STATE OF WISCONSIN

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

DISTRICT II

Case No. 2023AP1464-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KORDELL L. GRADY,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A POSTCONVICTION MOTION, ENTERED IN WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE PAUL BUGENHAGEN, JR., PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

Kordell L. Grady pleaded to and was convicted of three counts: fleeing an officer, first-degree recklessly endangering safety, and operating a vehicle without consent. By counsel, Grady stipulated to the amount of the City of Muskego's insurance company's restitution request related to damages to a police squad car caused by his criminal conduct. At a restitution hearing solely on Grady's ability to pay, the court ordered $19,071.28 in restitution to the insurance company: $18,071.28 for the "auto damages paid" and $1,000.00 for the City's insurance deductible. Postconviction, Grady filed a motion alleging multiple claims, two of which are relevant to this appeal. First, Grady sought reversal of the restitution order, alleging that during the restitution hearing, when he asked to speak to his counsel and the court went off the record, the prosecutor and the court heard his remarks to counsel, which violated his due process rights by disclosing privileged, attorney-client communications. Second, he sought a hearing on his claim that his counsel was ineffective for stipulating to restitution to the insurance company that included the City's $1,000 deductible. The court denied relief on both grounds.

1. Did the circuit court properly deny Grady's due process and attorney-client privilege claim seeking reversal of the restitution order and a new restitution hearing?

The circuit court answered: Yes.

This Court should affirm.

2. Did the circuit court properly deny Grady's ineffective assistance of counsel claim without a hearing because he failed to sufficiently allege that his counsel was ineffective for stipulating to restitution to the insurance company that included the City's deductible?

The circuit court answered: Yes.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State agrees with Grady that oral argument is unnecessary, but disagrees that publication is warranted. The issues are fact-specific and this Court can decide them based on well-settled law, the record, and the parties' briefs.

INTRODUCTION

After a high-speed pursuit that resulted in extensive damage to a City of Muskego squad car, the State charged Grady with multiple counts. He pled no-contest to fleeing an officer, first-degree recklessly endangering safety, and operating a vehicle without consent. His counsel stipulated to the restitution requested by the insurance company for the damage to the squad car. At the restitution hearing on his ability to pay, Grady appeared remotely and, when he spoke to his counsel, the court went off the record and warned him that his voice was audible to everyone in the courtroom on the Zoom recording. The court found that Grady had a future ability to pay and ordered the full amount of restitution as part of his sentence. Grady seeks a new restitution hearing, alleging that his due process and attorney-client privilege rights were violated when his communications with counsel were overheard by the prosecutor and the court. The circuit court correctly rejected that claim because, under these circumstances, Grady's off-the-record conversation with his counsel was not intended to be confidential. Grady also seeks a hearing on his claim that his counsel was ineffective for stipulating to restitution to the insurance company that included the City's $1,000 deductible. The court properly denied this claim without an evidentiary hearing. Grady's counsel did not perform deficiently because she stipulated to restitution that was the correct amount of the loss resulting from Grady's criminal conduct, and Grady was not prejudiced

by the restitution amount that included the City's deductible. This Court should affirm.

STATEMENT OF THE CASE

Criminal charges. In September of 2021, police conducted a high-speed pursuit of a stolen Milwaukee Police Department parking enforcement Jeep, involving officers from both New Berlin and Muskego. (R. 5:4.) After multiple, unsuccessful attempts to stop the vehicle, a Muskego police officer, identified in the complaint as Victim A, responded as back-up and located the Jeep parked in a gas station lot in the City of Muskego. (R. 5:4–5.) While waiting for other officers to arrive, the officer saw a man, later identified as Grady, come out the gas station and get into the Jeep. (R. 5:5.) Attempting to prevent Grady from again fleeing, the officer activated his emergency lights and placed his squad car in a position to block the Jeep. (R. 5:5.) Grady accelerated, hitting the front of the squad car. (R. 5:5.) Grady left the gas station parking lot, continued to flee, and subsequently hit another vehicle, a Subaru occupied by Victim B and Victim C. (R. 5:5.) The officer pursued Grady as he fled and used a maneuver to force him to stop, which caused the Jeep to again hit the squad car. (R. 5:5–6.) Grady eventually stopped, complied with the officer's commands, and was taken into custody. (R. 5:6.) At the time of this incident, Grady did not have a valid license and was out on bail. (R. 5:6.) The squad car and the Subaru were both extensively damaged and had to be towed. (R. 5:6.)

The State charged Grady with 10 counts: two counts of attempting to flee an officer; two counts of hit and run of an attended vehicle; misdemeanor bail jumping; obstructing an officer, three counts of first-degree recklessly endangering safety; and operating a motor vehicle without the owner's consent. (R. 5:1–3; 34.)

Plea and sentencing. On March 10, 2022, Grady agreed to enter no contest pleas to three counts—fleeing an officer,

first-degree recklessly endangering safety, and operating a vehicle without consent—in exchange for the State's agreement to move to dismiss and read in the remaining seven counts. (R. 41.) At the plea hearing, where Grady appeared in person with his counsel, the State recited the agreement, which Grady agreed he understood: Grady would plead to the three counts, the State would dismiss and read in the remaining counts, "as well as the misdemeanor file," and recommend a sentence of three years of initial confinement and three years of extended supervision, "with standard conditions to include payment of all restitution requested." (R. 50:2–3.) As part of the plea agreement, the State recited two restitution requests: $19,071.28 by the City of Muskego's insurance company, Statewide Services, Incorporated, outlined in an affidavit that was filed and given to defense counsel (R. 36)[1], and a $500 restitution request by Victim B. (R. 50:15–16.) Grady's counsel had no objection to the dollar amount of these requests and asked for a restitution hearing "just to discuss ability to pay." (R. 50:16–17.) The court set a date for the restitution hearing and confirmed that the defense was not objecting to the dollar amounts, but only to Grady's "ability to pay." (R. 50:17.)

The court accepted Grady's pleas, found that the criminal complaint provided a factual basis, found Grady guilty of the three counts, and dismissed and read in the remaining seven counts. (R. 50:17–18.) The court sentenced

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[1] The affidavit for restitution filed by the insurer, Statewide Services Inc., is sealed in the appellate record. (R. 36.) The circuit court's order sealing restitution information explicitly provided that "[p]arties to the case are permitted access." (R. 38:2.) In his brief, Grady cites to the affidavit to support his claim that the amount of restitution to the insurance company was erroneous. (Grady's Br. 6–7, 17.) The State, as the plaintiff/respondent in this case, also cites to the sealed affidavit because as a party, it is permitted access by the circuit court order.

Grady to a total of three years of initial confinement and three years of extended supervision on the three counts and imposed conditions of extended supervision, including payment of restitution. (R. 50:30–31.)

Restitution hearing. At the restitution hearing on May 5, 2022, Grady appeared remotely, represented by Attorney Jessica Klein. (R. 65:2.) The State recited the stipulated restitution request amounts: "$500 on behalf of Victim B, personally. And then Stateside Services, Incorporated, is seeking $19,071.28." (R. 65:2.) Attorney Klein agreed that these amounts were "uncontested." (R. 65:2–3.)

In her argument regarding Grady's ability to pay, Klein described Grady's six-year sentence, which included a "substantial amount of custody credit," and argued that he "was eligible for public defender representation," he had "a six-month-old child, who he will ultimately be responsible for helping to financially support," and he "did not have any assets or an income at the time" of the incident in this case. (R. 65:3.) Klein did not object to the restitution amount, but contended that Grady was "not in a position financially to make restitution" and did "not have the ability to pay such a large amount." (R. 65:3–4.) She further argued that he would not "have the ability to pay while he's on extended supervision" because "he will have a lot of financial responsibilities, so to kind of saddle him with this stuff that may seem insurmountable, may actually be a detriment to his success" of being able to live on his own. (R. 65:4–6.)

During Klein's argument on Grady's ability to pay, Grady interrupted Klein, saying "Wait, what–"? (R. 65:4.) Klein told the court, "I believe Mr. Grady is trying to talk." (R. 65:4.) The court asked Grady if he needed to speak to Klein, Grady said, "Yes," and the court went off the record. (R. 65:4.)

Back on the record, the State noted that "it sounds like there's some ability to pay," that Grady had "work opportunities within the prison system," and, although prison jobs paid "an extremely small wage," a portion could "be allocated to restitution. So there are means to collect restitution here. To his credit, it sounds like Mr. Grady is saying that he can work while out on extended supervision." (R. 65:4–5.) The State asked the court to "certainly order the $500 to the citizen victim, who is identified as Victim B." (R. 65:5.) With respect to the claim of Statewide Services, Inc., which as the City of Muskego's insurer had the ability to go "through subrogation" and "try and get all of it back," the State requested that if the court did not order the entire amount, it order "some amount of it," and noted that, if the prosecutor had heard Grady "correctly," he had "paid over $3,000 in tickets in his past." (R. 65:5.) Therefore, the State asked the Court to "order it all, as he's acknowledged that he's responsible for these amounts," but at a minimum, to order "the $500 to Victim B and some percentage of the insurance's claim." (R. 65:5.)

The court clarified that the State's argument referenced Grady's statements that were "not going to show up in the transcript" because the court "had gone off the record when [Grady] was speaking with his attorney." The court stated that when it went off the record, the court "warned" and "told" Grady "that everybody could hear him obviously" while he spoke to his attorney in open court. (R. 65:5.)

The court found that the amount of restitution was "not disputed" and that Grady's "financial resources" were "essentially nothing right now." (R. 65:6.) The court considered both Grady's "present and future earning ability," his sentence of a "period of incarceration" followed by three years of extended supervision, and that the total amount of restitution requested was "just over $19,000." The court found that this requested restitution was "a good amount of money,

but breaking it down into smaller chunks at least over three years" was "by no means an insurmountable amount" of "damages that are part of his case." (R. 65:6.) The court recognized "the circumstances" of this case and what "Grady was going through" at the time of this incident, but found that he had "substantial family support" and that he could "take care of this [restitution amount] without too much difficulty." (R. 65:6–7.) Based on its factual findings, the court ordered that Grady had the ability to pay the full amount of restitution requested by both Victim B and Statewide Services, Inc., "payable as part of his sentence and over the course of the extended supervision period." (R. 65:7.)

The amended judgment of conviction, dated May 9, 2022, reflected the restitution ordered of "$500 for Victim B, and for Statewide Services, Inc. in the amount of $19,071.28," which was "[t]o be paid from prison wages and as a Condition of Extended Supervision." (R. 57:2.)

Postconviction motion and appeal. Grady filed a Wis. Stat. § (Rule) 809.30 motion seeking sentence modification, and requested a hearing on his motion and a new restitution hearing. (R. 74.) As relevant to this appeal, Grady contended that Attorney Klein was ineffective for stipulating to the restitution to Statewide Services that included both the $18,071.28 for repairs to the police squad car and $1,000 for the City of Muskego's insurance deductible. (R. 74:6–7.) He argued the restitution amount "was clearly erroneous" because it "award[ed] an excess of $1,000 to the insurance company," and that Klein was ineffective for stipulating to the amount. (R. 74:7.) Second, Grady contended he was entitled to a new restitution hearing, alleging that the court did not "honor" his attorney-client privilege under Wis. Stat. § 905.03 after Grady "expressed his desire to speak with his lawyer regarding his ability to pay," the court went "off the record" so Grady could talk to Attorney Klein, and the court did not "ensure" that Grady "had a meaningful opportunity to

exercise the [attorney-client] privilege, as the Court and the prosecutor could both overhear the conversation." (R. 74:9.) Grady contended that although it was not on the record, the State used the "attorney-client conversation to argue against Mr. Grady's ability to pay" and that the court "appears to have implicitly credited whatever was referenced while 'off the record' in then determining that Mr. Grady had an ability to pay." (R. 74:9.) Grady argued that his due process rights were violated because the restitution hearing "was rendered fundamentally unfair" when he was "deprived . . . of his ability to meaningfully consult with counsel" and his conversation with his counsel was "used against him." (R. 74:10.) He contended that the court's reliance on this allegedly privileged conversation required reversal of its restitution order. (R. 74:10.)

In an oral ruling, the court denied Grady's postconviction claims. (R. 111:18–27.) First, the court concluded that Grady was not entitled to a new restitution hearing based on the alleged violation of his right to attorney-client privilege, finding that the communication between Klein and Grady was not "intended to be confidential" and thus, the information that the prosecutor heard was "something he [could] address with the Court." (R. 111:20–21.) Second, the court denied Grady's request for an evidentiary hearing on his ineffective assistance claim, making factual findings and concluding that Grady failed to show that Klein performed deficiently when she stipulated to the restitution amount to the insurance company or that Grady was prejudiced, because the stipulated amount was the "correct dollar amount of the loss." (R. 111:27.)

On August 3, 2023, the court entered a written order denying Grady's postconviction motion. (R. 96.) Grady appeals from the judgment of conviction and the order denying postconviction relief. (R. 97.)

STANDARDS OF REVIEW

This Court reviews a circuit court's restitution order for an erroneous exercise of discretion. *State v. Canady*, 2000 WI App 87, ¶ 6, 234 Wis. 2d 261, 610 N.W.2d 147. Thus, a restitution request, "including the calculation as to the appropriate amount of restitution, is addressed to the circuit court's discretion and its decision will only be disturbed when there has been an erroneous exercise of that discretion." *State v. Gibson*, 2012 WI App 103, ¶ 8, 344 Wis. 2d 220, 822 N.W.2d 500. The interpretation of the restitution statute and its application to a given set of facts presents a question of law that this Court reviews de novo. *State v. Fernandez*, 2009 WI 29, ¶ 20, 316 Wis. 2d 598, 764 N.W.2d 509.

Whether the defendant has the ability to pay a requested amount of restitution and whether justice requires reimbursement to an insurance company is left to the circuit court's discretion. *State v. Queever*, 2016 WI App 87, ¶ 12, 372 Wis. 2d 388, 887 N.W.2d 912; *Fernandez*, 316 Wis. 2d 598, ¶¶ 61–62. A circuit court's fact-findings at a restitution hearing will not be overturned unless clearly erroneous. *Queever*, 372 Wis. 2d 388, ¶ 13. This Court will not reverse a restitution order unless "the trial court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts." *State v. Behnke*, 203 Wis. 2d 43, 58, 553 N.W.2d 265 (Ct. App. 1996), *overruled on other grounds by State v. Johnson*, 2023 WI 39, 407 Wis. 2d 195, 990 N.W.2d 174.

Whether the circuit court violated the defendant's right to due process presents a question of law that this Court decides de novo. *State v. Counihan*, 2020 WI 12, ¶ 23, 390 Wis. 2d 172, 938 N.W.2d 530.

This Court reviews ineffective assistance of counsel claims under a mixed standard of review. *State v. Breitzman*, 2017 WI 100, ¶ 37, 378 Wis. 2d 431, 904 N.W.2d 93. The

"factual circumstances of the case and trial counsel's conduct and strategy are findings of fact, which will not be overturned unless clearly erroneous[.]" *Id.* Whether trial counsel performed deficiently and whether any deficient performance prejudiced the defendant are both questions of law reviewed de novo. *Id.* ¶¶ 38–39.

"Whether a defendant's postconviction motion allege[d] sufficient facts to entitle" him to an evidentiary hearing on an ineffective assistance claim presents a mixed question of law and fact. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. This Court reviews a circuit court's discretionary decision to deny a hearing for an erroneous exercise. *Id.* This Court independently "determine[s] whether the motion . . . alleges sufficient material facts that, if true, would entitle the defendant to relief." *Id.*

ARGUMENT

I. The circuit court properly exercised its discretion to order Grady to pay restitution to the insurer and Grady is not entitled to reversal and a new hearing based on his claim of a violation of his due process and attorney-client privilege rights.

A. In its discretion, the court may order restitution that justice requires to an insurance company to reimburse for the victim's losses resulting from the defendant's crime.

Restitution in criminal cases is governed by Wis. Stat. § 973.20, which has the primary purpose of compensating the victim and thus is interpreted broadly, making restitution "the rule and not the exception." *State v. Wiskerchen*, 2019 WI 1, ¶ 22, 385 Wis. 2d 120, 921 N.W.2d 730 (citation omitted); *Queever*, 372 Wis. 2d 388, ¶ 20. Restitution also serves to punish and rehabilitate the defendant as part of his criminal

sentence. *State v. Sweat*, 208 Wis. 2d 409, 428–29, 561 N.W.2d 695 (1997). "A restitution hearing in a criminal proceeding is part of the criminal sentencing process, and serves the goals of the criminal justice system." *Id.* at 422.

At a restitution hearing, the victim has the burden to prove the loss sustained from the crime by a preponderance of the evidence. Wis. Stat. § 973.20(14)(a). A court setting restitution must consider the defendant's ability to pay. *See* Wis. Stat. § 973.20(13)(a). The defendant has the burden to demonstrate by a preponderance of the evidence the defendant's "financial resources," his or her "present and future earning ability," and any dependents' "needs and earning ability." Wis. Stat. § 973.20(14)(b).

A circuit court has discretionary authority to reimburse insurance companies that have provided funds that have the effect of compensating a victim as part of the restitution order. Wis. Stat. § 973.20(5)(d). A "restitution order may require that the defendant do one or more of the following . . . (d) If justice so requires, reimburse any insurer, surety or other person who has compensated a victim for a loss otherwise compensable under this section." Wis. Stat. § 973.20(5)(d); *Fernandez*, 316 Wis. 2d 598, ¶¶ 61–62 (it is within the circuit court's discretion to determine whether justice requires reimbursement to insurance companies); *Gibson*, 344 Wis. 2d 220, ¶ 16 (circuit court reasonably determined that insurer was entitled to compensation for losses incurred in fulfilling obligation to insured in manner consistent with its business practice). The court's finding that justice requires restitution to an insurer may be implicit in the court's order of restitution to an insurance company. *Fernandez*, 316 Wis. 2d 598, ¶ 62 & n.32; *Gibson*, 344 Wis. 2d 220, ¶ 15.

B. At a restitution hearing, the Due Process requirement of providing the defendant a meaningful opportunity to be heard is satisfied through a more informal process.

"The Fourteenth Amendment to the United States Constitution and art. I, § 1 of the Wisconsin Constitution prohibit government actions that deprive any person of life, liberty, or property without due process of law." *Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶ 80, 237 Wis. 2d 99, 613 N.W.2d 849. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). Due process "is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (citation omitted).

The restitution statute affords "[a]ll parties interested" the "opportunity to be heard, personally or through counsel, to present evidence and to cross-examine witnesses called by other parties." Wis. Stat. § 973.20(14)(d). The text of the statute itself says that the circuit court "shall conduct the proceeding so as to do substantial justice between the parties according to the rules of substantive law and may waive the rules of practice, procedure, pleading or evidence," except in situations that do not apply here. Wis. Stat. § 973.20(14)(d). Thus, restitution is an informal process, requiring notice of the hearing and an opportunity to confront witnesses and present evidence, comparable to probation hearings and presentence investigations. *See State v. Pope*, 107 Wis. 2d 726, 729–30, 321 N.W.2d 359 (Ct. App. 1982).

C. To prove that a right to attorney-client privilege was violated, the defendant must show that it was intended to be confidential.

Wisconsin Statute § 905.03(2) provides that, "[a] client has a privilege to refuse to disclose and to prevent any other

person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . ..” Importantly, section 905.03(1)(d) explains that a communication is only confidential if it was “not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”

A party alleging a violation of the attorney-client privilege bears the burden to establish that the privilege applies. The privilege must be strictly and narrowly interpreted, and a “mere showing that the communication was from a client to his attorney is insufficient to warrant a finding that the communication is privileged.” *State v. Meeks*, 2003 WI 104, ¶ 20, 263 Wis. 2d 794, 666 N.W.2d 859 (citations omitted). Moreover, “[w]hen determining whether a privilege exists, the trial court must inquire into the existence of the relationship upon which the privilege is based *and* the nature of the information sought.” *Id.* (citation omitted).

D. Grady’s due process and attorney-client privilege rights were not violated at the restitution hearing, because his conversation in open court with Klein was not intended to be confidential.

The crux of Grady’s claim that he is entitled to reversal of the restitution order is that his due process rights were violated because his “restitution hearing was fundamentally unfair” as a result of the circuit court’s alleged violation of his right to privileged communications with his counsel, Attorney Klein. (Grady’s Br. 9–10.) He faults the court’s procedure for not giving him a fair “choice” between speaking with his counsel in open court or “heed[ing] the court’s warning and to not discuss confidential legal matters with counsel,” and contends that the court “impeded” his “attorney-client relationship” with Klein by allowing their communications to

be "available to adversary counsel," and failing "to meaningfully facilitate a confidential conference." (Grady's Br. 10–11.) Grady seeks reversal of the restitution order and a new hearing because the State allegedly relied on what he claims were privileged communications to argue that Grady did not have the ability to pay restitution. (Grady's Br. 12–13.) Grady is not entitled to reversal and a new restitution hearing. His due process rights were not violated because his communication with Klein was not intended to be confidential and, even if it was, any claim of a violation of the attorney-client privilege was forfeited.

Here, after Grady interrupted Klein's argument about his ability to pay, said he wanted to speak to her, the court went off the record for their conversation and "warned" Grady and his counsel that the conversation could be heard in the courtroom. (R. 65:4–5.) Under these circumstances, the court concluded that Klein and Grady's conversation was not intended to be confidential. (R. 111:21.) By statute, the attorney-client privilege protects against disclosure of confidential communications with counsel. Wis. Stat. § 905.03(2). Here, the court made multiple findings of fact before concluding that Grady's conversation with Klein was not intended to be confidential: their conversation was not "a meeting in private"; Klein knew that there were steps that could have been taken to make the conversation private, such using a "break-out room[ ]" or a "whisper" or "low voice," which would indicate that the conversation was "not be shared with third parties"; Grady was aware that he was on Zoom and had no "control" over "lowering his voice when it was being broadcast into the courtroom"; and Grady and Klein both knew that the prosecutor and the judge were present in the "open courtroom." (R. 111:19–20.) Based on all these facts, the court concluded that Grady held the privilege, he did not invoke it, and his communication to Klein during his Zoom appearance was not intended to be "a confidential

communication." (R. 111:20.) Thus, their conversation was not protected by the attorney-client privilege under Wis. Stat. § 905.03 and the prosecutor properly addressed it with the court. (R. 111:20–21.) Grady failed to show either that the court's procedure or the prosecutor's reference to the communications between Grady and Klein in open court made his hearing unfair by violating his due process right to confidential attorney-client communications.

Moreover, there is no privilege when the privilege is forfeited by a disclosure that is not "inadvertent." Wis. Stat. § 905.03(5)(a)1. Here, even if Grady did intend that his conversation with Klein, in open court over Zoom, was a privileged communication, the privilege was forfeited by engaging in that conversation with knowledge that the conversation could be heard by others in the courtroom. (R. 65:4–5.) Grady contends that it was "irrelevant" that he was "warned" by the court that others could hear him and contends that the court should have "attempted to meaningfully facilitate a confidential conference, by clearing the courtroom or by placing Mr. Grady in a secure setting to speak with his attorney." (Grady's Br. 11.) Grady's argument is unsupported and was correctly rejected by the court. Under Wis. Stat. § 905.03(3), Grady holds the privilege and either Grady, or Klein on his behalf, could have asserted that their conversation was intended to be privileged, but neither one did. Any disclosures of confidential information during their conversation in open court were not "inadvertent" because they knowingly engaged in the conversation in open court and did not take any reasonable steps to prevent disclosure. Wis. Stat. § 905.03(5)(a). Thus, Grady's claim that his conversation with Klein in open court violated his right to attorney-client privilege was forfeited and cannot serve as the basis for reversal of the restitution order.

In sum, the attorney-client privilege does not apply to the communications between Grady and Klein that occurred

in open court that were not intended to be confidential. Thus, Grady's due process rights were not violated by an alleged violation of his right to the attorney-client privilege. And, even if he had an attorney-client privilege right under these circumstances, the privilege was forfeited. This Court should affirm the circuit court's order denying Grady's claim that was entitled to a new restitution hearing.

II. The circuit court properly exercised its discretion to deny without a hearing Grady's claim that Klein provided ineffective assistance by stipulating to the amount of restitution requested by the insurance company.

A. To receive a hearing on an ineffective assistance claim, the defendant must sufficiently allege both that counsel performed deficiently and that counsel's performance resulted in prejudice.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

To show deficient performance, a defendant must demonstrate that specific acts or omissions of counsel were "outside the wide range of professionally competent assistance." *Id. at* 690. The court "strongly presume[s]" that counsel has rendered adequate assistance. *Id*. Failure to pursue a meritless issue is not deficient performance. *See State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441.

To prove prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985) (quoting *Strickland*, 466 U.S. at 694).

Establishing prejudice under *Strickland* is difficult. "*Strickland* asks whether it is 'reasonably likely' the result would have been different. This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011) (citations omitted). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

A defendant is entitled to an evidentiary hearing on a claim of ineffective assistance if the postconviction motion alleges sufficient material facts that, if true, would entitle the defendant to relief. *Allen*, 274 Wis. 2d 568, ¶ 9. But if "the motion does not raise facts sufficient to entitle the [defendant] to relief, or presents only cursory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court" may deny the motion without a hearing within its discretion. *Id.*

B. Grady failed to sufficiently allege either that Klein performed deficiently by stipulating to restitution to the insurance company that included the $1,000 insurance deductible or that stipulating to this amount prejudiced him.

Grady alleges that Attorney Klein performed deficiently by stipulating to a "clearly erroneous" restitution request by Statewide Services of $19,071.28, including "both the amount that Stateside paid out to the City of Muskego for repairs" to the squad car, "as well as the City of Muskego's insurance

deductible" of $1,000. (Grady's Br. 16–17.) He makes the unsupported claim that "it would appear that the Insurance Company was 'out' $18,071.28 and the City lost $1,000 as a result of Mr. Grady's conduct" and that the insurance company "obviously did not 'lose' the money paid out by the City as an insurance deductible." (Grady's Br. 17.) Grady's claim that Klein performed deficiently by stipulating to restitution including the deductible is entirely conclusory and insufficient to warrant a hearing.

In Wisconsin, the restitution statute, Wis. Stat. § 973.20(1r), creates a default requiring a circuit court to order restitution where applicable. Moreover, "restitution is the rule and not the exception." *Wiskerchen*, 385 Wis. 2d 120, ¶ 22 (citation omitted.) Here, Grady contends that Klein was deficient for not objecting to the restitution amount because "awarding the insurance company an additional $1,000 to cover a loss sustain by [the City] is, in fact, unjust enrichment." (Grady's Br. 17.) But this conclusory statement fails to sufficiently challenge the circuit court's findings of fact that the amount of restitution requested by the insurance company was appropriate. Nor does he even attempt to "prove that enforcement of the restitution order would result in a double recovery for" the insurance company. *See Huml v. Vlazny*, 2006 WI 87, ¶¶ 37–39, 293 Wis. 2d 169, 716 N.W.2d 807 (civil settlement agreement does not preclude enforcement of a restitution unless defendant proves it would result in double recovery).

Grady insists that, although "the circuit court speculated that there was some kind of contractual relationship under which the insurance company was entitled to collect" the $1,000 deductible and pay it back to the City, the company's "paperwork" did "not clearly support that inference." (Grady's Br. 17–18.) In conclusory fashion, he argues that "the insurance company had no right to request it be repaid for losses it did not actually suffer" and that Klein

performed deficiently because she "should have spotted that error" and objected to the $1,000 restitution request for the insured's deductible, because the City did not claim the loss at the hearing. (Grady's Br. 17–18.) But Grady's claim of deficient performance fails to meaningfully challenge the circuit court's findings that Statewide Services was contractually bound to reimburse the City for any recovery of the $1,000 deductible paid by the City as a result of Grady's crimes.

The circuit court found that Statewide Services' affidavit described its request for restitution for the "thousand dollars that's going to be going to the city" for the deductible as well as the approximately "$18,000 . . . for the insurance company." (R. 111:25.) Thus, the circuit court found that the insurer's restitution request "contemplated" that the $1,000 deductible would go back to the City of Muskego, based on its contractual relationship with the City, as the insured. (R. 111:25.) Although the court did not know if Attorney Klein "looked into any subrogation law," the court found that because of this contractual relationship, the City would "be reimbursed their deductible, if the insurance company does collect it." (R. 111:25–26.) Based on the court's findings that the insurer's contractual relationship with the City required it to reimburse for any amounts it recovered for the City, Klein did not perform deficiently by stipulating the insurer's restitution request that included the insurance deductible. The circuit court's finding that the insurance company's contractual obligation to reimburse the City made the affidavit requesting reimbursement of the deductible appropriate and was not clearly erroneous. Thus, Grady has not sufficiently alleged that Klein performed deficiently by stipulating to the insurance company's restitution request that included the City's deductible.

Moreover, even if Klein was deficient for stipulating to the restitution amount, Grady failed to sufficiently allege that

he was prejudiced. In its decision denying Grady's ineffective assistance claim without an evidentiary hearing, the circuit court concluded that it did not need to determine whether Klein was deficient because Grady failed to show that he was prejudiced by her stipulating to the requested restitution that included the City's deductible. (R. 111:26.) The court found that the purpose of restitution is to make "the victims . . . whole" and here, there was "no question that $19,071.28 was the loss" suffered by the victims. (R. 111:26–27.) Because the insurance company "had the obligation to reimburse" the City for any deductible it paid, the restitution ordered of $19,071.28 "was the correct amount in the end," regardless of Klein's "basis for determining that it was simply best to stipulate that amount." (R. 111:27.) The court was correct and Grady fails to show otherwise.

Grady argues that the court merely "speculated" that he was not prejudiced because "there was actually $19,071.28 in losses." (Grady's Br. 18.) Again, Grady ignores the circuit court's findings of fact that as the insurer, Statewide Services had a contractual relationship with its insured, the City, and thus that the insured's restitution request including not only the damages the insurer paid for the squad car, but also the $1,000 deductible, was proper because it contemplated reimbursement to the City. (R. 111:26–27.) Based on its findings, the circuit court correctly concluded that Grady failed to sufficiently allege that he was prejudiced as a result of Klein stipulating to the restitution amount that was the "correct dollar amount of the loss." (R. 111:27.)

Accordingly, because Grady failed to sufficiently allege either that Klein performed deficiently or that he was prejudiced by the restitution order requiring him to pay the entire amount of the loss resulting from his criminal conduct, he is not entitled to a hearing on his ineffective assistance claim.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision denying Grady's postconviction motion without a hearing, the restitution order, and the judgment of conviction.

Dated this 4th day of January 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,866 words.

Dated this 4th day of January 2024.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 4th day of January 2024.

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