**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 20, 2021**

**Sheila T. Reiff**
**Clerk of Court of Appeals**



**Appeal No. 2020AP404-CR** **Cir. Ct. No. 2018CF2151**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SKYLARD R. GRANT,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Brash, P.J., Dugan and White, JJ.

¶1 BRASH, P.J. Skylard R. Grant appeals his judgment of conviction, entered after he pled guilty to second-degree reckless homicide, as a party to a crime, and possession of THC with intent to deliver. He also appeals the order denying his

postconviction motion. Grant alleges that his trial counsel was ineffective for a number of reasons, and he is therefore entitled to withdraw his pleas.

¶2 The trial court rejected Grant's claims, and denied his motion without a hearing. Upon review, we affirm.

## BACKGROUND

¶3 The charges against Grant stem from the death of Antwone Berry. Berry was reported missing by his girlfriend, T.S., on December 28, 2017. T.S. told police that she had not heard from Berry since December 24. T.S. further informed them that Berry hung out with a man called "Nip" who worked at an Advanced Auto Parts store located at Teutonia Avenue and Hampton Avenue, and provided the police with Nip's cell phone number. T.S. also stated that Berry and Nip were selling marijuana together.

¶4 During their investigation of Berry's disappearance, officers spoke with an assistant manager at the auto parts store. The manager recognized Berry and informed the officers that the employee he hung out with was Grant. The manager noted that Grant drove a maroon Ford Expedition, and provided the same cell number for Grant that T.S. had given police.

¶5 Police questioned Grant, who said that he had spoken to Berry on December 24 but did not see him on that date, and that he had not seen or spoken to Berry since then. Police interviews with other friends of Berry's revealed that the last place Berry had been seen was at a gathering at a residence on North 39th Street on the night of December 24.

¶6 On January 7, 2018, a body was discovered in a ditch on West Fond du Lac Avenue. The cause of death was multiple gunshot wounds, to the stomach and the left temple. The victim was identified as Berry.

¶7 The police interviewed J.R., who lived at the residence where the December 24 gathering was held. J.R. stated that Grant, Berry, and various other people were at his residence in the early morning hours of December 25, 2017. He said that Grant was drunk and arguing with Berry because Berry had "not put[] money on [Grant's] books" while Grant was in jail, and because Berry was "hang[ing] out" at J.R.'s residence with Grant's "people."

¶8 J.R. further stated that Grant told Berry that "he was going to take him home and then shoot him." J.R. said that Berry then asked Grant if he was going to shoot him with Berry's "own gun," to which Grant responded "absolutely." J.R. then saw Grant drive away with Berry in Grant's maroon Ford. J.R. stated that Grant later returned to the residence in the maroon Ford and used a vacuum to clean the vehicle, and then used bleach to clean the vacuum.

¶9 J.R. also told police that Grant had taken a tree branch out of his Ford and thrown it onto J.R.'s lawn. Police recovered the branch, and found that it did not appear to match any of the vegetation in J.R.'s yard. However, the branch was consistent with vegetation located at the scene where Berry's body was found.

¶10 Police questioned Grant's girlfriend, L.G., who was with Grant on the night that Berry went missing. L.G. stated that she also witnessed the argument between Grant and Berry at J.R.'s house. She said that Grant had then driven her home, telling her he had to park his truck, which she presumed meant he was parking about a block away from her home. However, she told police that Grant was gone for between one and one-half to two hours before he returned to her house.

¶11 Police also took a statement from A.B., who stated that Grant had attempted to sell him a 9mm handgun on December 26, 2017. A.B. knew the gun belonged to Berry, and asked Grant if he knew where Berry was, to which Grant responded "you ain't gonna be seeing him no more, I had to take care of him."

¶12 A search warrant was executed at Grant's residence, where police discovered a backpack with four clear plastic bags filled with marijuana, consistent with being intended for distribution. Officers also recovered a digital scale and a 9mm handgun.

¶13 Additionally, the police analyzed Grant's cell phone records. They showed that between December 12 and December 25, 2017, Grant and Berry had been in contact multiple times each day, but all contact ended on December 25, with no calls made from Grant to Berry after that date. Police also reviewed cell tower records, which show that Grant made a call to J.R.'s phone at 2:28 a.m. on December 25 that utilized a tower on West Fond du Lac Avenue, approximately two blocks from where Berry's body was found. Surveillance video from another location on West Fond du Lac Avenue showed a maroon Ford passing by at 2:41 a.m. on December 25.

¶14 Grant was arrested and charged with first-degree reckless homicide with use of a dangerous weapon, as a party to a crime; possession of THC with the intent to deliver; and two counts of possession of a firearm by a felon. The matter proceeded to a jury trial in March 2019.

¶15 On the first day of trial, the State made its opening statement, but trial counsel for Grant deferred making an opening statement. The day concluded with the State introducing and questioning its first witness, T.S.

¶16 The trial did not continue the following morning, however, as the parties had reached a plea agreement. Pursuant to that agreement, Grant pled guilty to second-degree reckless homicide, as a party to a crime, without the weapon enhancer, and to possession of THC with the intent to deliver; the two counts of felon in possession of a firearm were dismissed. The trial court imposed concurrent sentences that totaled fourteen years of initial confinement and nine years of extended supervision.

¶17 Grant filed a postconviction motion in September 2019. He sought to withdraw his pleas on the ground that that he had received ineffective assistance from his trial counsel in several ways: that counsel should have filed a ***Denny***[1] motion seeking to admit evidence that J.R. had killed Berry; that counsel failed to file a notice of alibi; that counsel failed to provide a witness list prior to trial; that counsel failed to make an opening statement at trial; and that counsel failed to sufficiently review the case materials to adequately prepare for the trial.

¶18 The trial court rejected Grant's claims, finding that the allegations were speculative and conclusory. The court further noted that Grant had not provided any evidence regarding J.R. as the shooter that would demonstrate that a ***Denny*** motion would have been successful. Moreover, the court stated that even assuming that trial counsel was deficient for failing to file a ***Denny*** motion, Grant had not demonstrated that he was prejudiced by this failure, based on the extensive evidence against him. Additionally, with regard to Grant's allegations relating to counsel's lack of trial preparation, the court observed that Grant had waived his right to a trial by pleading guilty.

[1] *See* ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

¶19 Therefore, the trial court denied Grant's postconviction motion without a hearing. This appeal follows.

## DISCUSSION

¶20 On appeal, Grant maintains that plea withdrawal is warranted based on the ineffective assistance of his trial counsel. A defendant seeking to withdraw his or her plea after sentencing "must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted). Manifest injustice as it relates to plea withdrawal may be demonstrated by proving ineffective assistance of counsel. ***State v. Taylor***, 2013 WI 34, ¶49, 347 Wis. 2d 30, 829 N.W.2d 482.

¶21 The State asserts that Grant waived his claim of ineffective assistance of counsel under the guilty plea waiver rule. This rule refers to the "black letter law" that "[a] valid guilty or no contest plea waives all non[-]jurisdictional defenses to a conviction, including constitutional violations." ***State v. Villegas***, 2018 WI App 9, ¶45, 380 Wis. 2d 246, 908 N.W.2d 198 (citation omitted; brackets in ***Villegas***). Generally, however, a claim of ineffective assistance of counsel has been viewed as an exception to this rule. ***State v. Milanes***, 2006 WI App 259, ¶13, 297 Wis. 2d 684, 727 N.W.2d 94.

¶22 Still, the State argues that this court in ***Villegas*** adopted a very narrow interpretation of that exception. In ***Villegas***, we determined that "the 'exception' to the guilty plea waiver rule does not provide an independent ground to challenge the effectiveness of counsel during pre[-]plea proceedings outside of an attack on the defendant's plea." ***Id.***, 380 Wis. 2d 246, ¶47. Based on that determination, the State asserts that claims of ineffective assistance for plea withdrawals are limited to

allegations relating strictly to counsel's performance of his or her obligations to ensure a defendant's understanding of the plea proceedings and consequences, including the constitutional rights the defendant waives by pleading guilty. We believe, however, that the State's argument overstates the limitations of the ineffective assistance exception as set forth in ***Villegas***.

¶23 In ***Villegas***, the defendant was a juvenile at the time he committed the crime, and had been waived into adult court. ***Id.***, ¶¶4, 6. He then resolved the charges by way of a plea agreement. ***Id.***, ¶7. He subsequently sought to withdraw his pleas for various reasons, including his counsel's alleged ineffective assistance regarding counsel's performance in opposing the State's waiver petition. ***Id.***, ¶9. This court rejected that claim by applying the guilty plea waiver rule. We recognized that "a valid guilty plea 'represents a break in the chain of events which has preceded it in the criminal process,'" and thus "[a]fter admitting guilt in open court, a defendant 'may not thereafter raise independent claims relating to the deprivation of constitutional rights' outside of an attack on the plea itself." *See* ***id.***, ¶47 (citation omitted).

¶24 Specifically, this court in ***Villegas*** pointed out that the defendant had not asserted that his trial counsel's "alleged ineffectiveness during the [juvenile court] waiver proceedings had anything to do with his later decision to plead guilty." ***Id.***, ¶48. In fact, we noted that the defendant had not sought plea withdrawal on that ground, but instead had requested that this court overturn the juvenile court's waiver decision. ***Id.***

¶25 In other words, this court distinguished the ineffective assistance claim relating to his waiver hearing because it was not raised as "a plea withdrawal claim under [***State v.***] ***Bentley***[, 201 Wis. 2d 303, 315-16, 548 N.W.2d 50 (1996)]—

i.e., that his counsel's ineffective assistance entitles him to withdraw his plea because, but for counsel's errors, he would not have pled guilty[.]" ***Villegas***, 380 Wis. 2d 246, ¶48. As a result, we determined that his challenge was "subject to the guilty plea waiver rule just like any other non[-]jurisdictional claim" and, ultimately, held that this claim was waived pursuant to that rule. ***Id.***, ¶¶47-48. Thus, this court determined that the guilty plea waiver rule should be applied to that ineffective assistance claim because it was not brought within the confines of ***Bentley***'s standard for plea withdrawal, and, as a result, the exception that is generally applicable to such claims pled under the ***Bentley*** rubric was not applicable. *See* ***Villegas***, 380 Wis. 2d 246, ¶¶47-48.

¶26 Therefore, we disagree with the State's assertion that in the context of a request for plea withdrawal, ineffective assistance claims are limited to allegations relating strictly to counsel's performance during the plea proceedings. However, we nevertheless conclude that Grant's claims fail based on the manner in which he presents his allegations.

¶27 We acknowledge that Grant's ground for plea withdrawal—the ineffective assistance of his trial counsel—cites to ***Bentley*** as the legal basis for his argument, as required under ***Villegas***. *See* ***id.***, 380 Wis. 2d 246, ¶¶47-48. Grant then lists several ways in which trial counsel failed to prepare: failing to file a ***Denny*** motion; failing to file a notice of alibi; failing to provide a witness list prior to trial; failing to make an opening statement at trial; and generally failing to sufficiently review the case materials to adequately prepare for trial.

¶28 However, Grant fails to specifically connect these alleged failures of counsel to his decision to enter a plea. Rather, he states that but for counsel's ineffective assistance, there would have been a different outcome—that is, J.R.

would have been proven guilty—and that because of counsel's deficiencies, he "would have accepted any [plea] deal." Therefore, while we conclude that the guilty plea waiver rule can arguably be applied in this case, *see* ***Villegas***, 380 Wis. 2d 246, ¶48, we also conclude that Grant's claims nevertheless fail, either due to insufficiencies in pleading his allegations or on the merits.

¶29 Grant's arguments in support of his claims consist largely of conclusory statements that better preparation by trial counsel would have led to a successful outcome at a trial. If the trial court determines that a postconviction motion "does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," it may, in its discretion, either grant or deny a hearing. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We review this decision under the deferential erroneous exercise of discretion standard. ***Id.***

¶30 In contrast, a trial court is required to hold an evidentiary hearing only if the defendant has alleged "sufficient material facts that, if true, would entitle the defendant to relief." ***Id.***, ¶14. Whether a defendant's motion "on its face" alleges sufficient material facts to entitle that defendant to relief is a question of law that we review *de novo*. ***Id.***, ¶9.

¶31 First, with regard to his argument regarding the ***Denny*** motion, Grant alleges the following facts about the night that Berry went missing: that J.R.'s motive to kill Berry was that Berry owed J.R. money for drug debts; that J.R. had the opportunity to kill Berry as one of the last people to see Berry alive at the gathering at J.R.'s residence, as it was J.R.—not Grant—who gave Berry a ride that night; and that the branch from the ditch where Berry's body was found that was

discovered in J.R.'s yard is a direct connection between J.R. and the crime scene. These facts align with the three prongs of the ***Denny*** test: that a defendant must provide evidence that the third-party had (1) motive; (2) opportunity to commit the crime charged; and (3) a direct connection to the crime that is not remote in time, place, or circumstance. *See* ***State v. Denny***, 120 Wis. 2d 614, 624, 357 N.W.2d 12 (Ct. App. 1984). All three factors must be present for a ***Denny*** motion to succeed. *See* ***State v. Wilson***, 2015 WI 48, ¶¶51-52, 362 Wis. 2d 193, 864 N.W.2d 52.

¶32 The "evidence" against J.R. alleged by Grant was simply Grant's version of the events that occurred that night. Therefore, in order to present this evidence, Grant would have had to testify, subjecting himself to cross-examination by the State. As noted by the trial court, this can be a "risky proposition" for a defendant. Furthermore, the State asserts that the branch from the crime scene in J.R.'s yard does not necessarily directly connect J.R. with the crime scene, as Grant has not provided any evidence demonstrating that J.R. brought it there from the crime scene. In contrast, there was evidence that Grant's cell phone was in the area where Berry's body was found on the night he disappeared, as well as surveillance video that also showed Grant's vehicle in that area.

¶33 Moreover, even if we were to conclude that the facts alleged by Grant are sufficient to support his claim that a ***Denny*** motion should have been filed, we note that even without a ***Denny*** motion, Grant's trial counsel could have questioned J.R. about Grant's allegations. Therefore, Grant has failed to demonstrate that he was prejudiced by any potential error of counsel relating to filing a ***Denny*** motion. *See* ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62 ("To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance and that the deficiency caused him prejudice." (citation omitted)).

¶34 Next, in his claim that counsel should have filed a notice of alibi, Grant states that his girlfriend, L.G., *could* have testified regarding Grant's alleged alibi—that there is a cell phone video showing that he was opening Christmas gifts at 3:47 a.m. on the night that Berry was killed. However, Grant does not provide any information as to how this potential testimony would be reconciled with L.G.'s statement to police that Grant was gone for one and one-half to two hours that night while supposedly parking his vehicle. Additionally, this "alibi" does not take into account the time that Grant's vehicle and cell phone were traced to the crime scene, which was approximately an hour before the video of him opening presents was allegedly taken. In short, Grant has not demonstrated how this alibi evidence is material to the issue of whether he shot Berry. *See* ***Allen***, 274 Wis. 2d 568, ¶¶22-24.

¶35 There are problems with Grant's other alleged examples of ineffective assistance by his trial counsel as well. For example, Grant's claim that trial counsel should have filed a witness list does not include the names of any witnesses that he believes should have been called. Also, Grant's claim regarding trial counsel's failure to make an opening statement at trial is similarly insufficient and conclusory. Counsel chose to defer the opening statement—which was her prerogative—and because Grant entered his plea after the State's first witness, the opportunity never arose for counsel to present an opening statement. Grant fails to set forth any specific allegations as to why counsel's exercise of her option to defer the opening statement constituted ineffective assistance.

¶36 Grant's general claim that trial counsel failed to prepare for trial likewise contains no specific allegations. Rather, he asserts that counsel failed to file pretrial motions or make any objections during the direct examination of the State's first witness, without stating what motions or objections should have been

made. Additionally, Grant's contention that counsel did not review the case materials is pure speculation.

¶37 As noted above, in order for Grant's ineffective assistance of counsel claims to succeed, he must show that his trial counsel's performance was deficient and that the deficiency prejudiced his defense, in accordance with the test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***Love***, 284 Wis. 2d 111, ¶30. "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***Id.*** "To prove constitutional 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.'" ***Id.*** (citations and one set of quotation marks omitted). The defendant "must prevail on both parts of the test to be afforded relief." ***Allen***, 274 Wis. 2d 568, ¶26.

¶38 Furthermore, in the context of a motion for plea withdrawal based on ineffective assistance of counsel, in order to satisfy the prejudice prong of the ***Strickland*** test, the defendant "must allege facts to show 'that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" ***Bentley***, 201 Wis. 2d at 312 (citation omitted).

¶39 Not only does Grant fail to specifically allege that but for the alleged errors of his trial counsel, he would have insisted on going to trial—as we noted above, relative to the guilty plea waiver rule—but his allegations are mostly conclusory and insufficient to demonstrate that he is entitled to relief, or otherwise fail on the merits. Therefore, the trial court did not err in denying his postconviction

motion without a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Accordingly, we affirm that order, as well as his judgment of conviction.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.

¶40 DUGAN, J. (*concurring*). I concur with the Majority's analysis of the guilty plea waiver rule as it applies to this case. Majority, ¶¶21-27. I also agree with the Majority's conclusion that Grant fails to specifically connect his alleged failures of trial counsel to his decision to enter his pleas. Majority, ¶28. In other words, Grant has not sufficiently alleged how his trial counsel's alleged ineffectiveness in preparing for trial resulted in his decision to plead guilty. *See* ***Villegas***, 380 Wis. 2d 246, ¶48. However, I disagree with the Majority's statement that "the guilty plea waiver rule can arguably be applied in this case" and their decision to then address the merits of Grant's ineffective assistance of counsel claim. Majority, ¶28. I conclude that the guilty plea waiver rule does apply to this case and, therefore, Grant waived his claim of alleged ineffective assistance of counsel when he pled guilty to the charges. Therefore, I do not join in the Majority's analysis and decision related to the merits of Grant's claim.