SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff - Respondent,

v. Case No. 2012AP000046-CR

JIMOTHY A. JENKINS,

Defendant – Appellant - Petitioner

BRIEF AND APPENDIX OF THE DEFENDANT – APPELLANT - PETITIONER, JIMOTHY A. JENKINS

AN APPEAL FROM A JUDGMENT AND ORDERS OF THE CIRCUIT COURT FOR MIILWAUKEE COUNTY, THE HONORABLE CARL ASHLEY AND REBECCA DALLET, PRESIDING.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The Defendant-Appellant, JIMOTHY A. JENKINS ("JENKINS"), submits that the issues for appeal are:

ISSUE #1: Was Jenkins denied his Constitutional Rights to Counsel when his attorney failed to investigate and call to testify a witness who was: A) A neutral eyewitness who would have testified that Jenkins was not the shooter and that she saw him minutes after the shooting; and B) a witness who would have testified that another person confessed to committing the homicide for which Jenkins was convicted?

ANSWERED BY CIRCUIT COURT and COURT OF APPEALS: No.

ISSUE #2: Was the real controversy fully tried in this matter despite the lack of testimony from Cera Jones, an eyewitness, who would have testified that Jenkins was not the shooter and that she saw him shortly after the shooting, and from Corey Moore, who would have testified that Christopher Blunt confessed to this shooting?

ANSWERED BY CIRCUIT COURT and COURT OF APPEALS: Yes.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is appropriate in this case under sec. 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under 809.22(2)(a).

STATEMENT REGARDING PUBLICATION

Publication is proper under § 809.23(1)(b) Wis. Stats., as Jenkins brings an issue of first impression on the standard the court must use in determining if a defendant has satisfied prong two of the Strickland test when the deficient performance of trial counsel involves the failure to investigate and call an eyewitness.

STATEMENT OF THE CASE

This is an appeal from an August 17, 2009 judgment of conviction[1] (R.33;P-Ap.p.111-112) and a December 30, 2011 order denying postconviction relief (R.58:8;P-Ap.p.116;R. 80:27;P-Ap.p.141), all in the Circuit Court for Milwaukee County, the Honorable Carl Ashley and Rebecca Dallett presiding.[2] A jury found Jenkins guilty of one count of first degree intentional homicide with use of a dangerous weapon as a party to a crime in violation of §940.01(1)(a), §939.63 & §939.05 Wis. Stats. (2009-2010); first degree reckless injury in violation of §940.23(1)(a), §939.63 & §939.05 Wis. Stats. (2009-2010); and possession of a firearm by a felon in violation of §941.29(2) Wis.Stats (2009-2010). (R.33;P-Ap.p.111-112). Jenkins received a life in prison sentence, with eligibility for extended supervision after 40 years, plus 14 consecutive years of prison for the reckless injury conviction. (Id.). The circuit court also denied Jenkins' postconviction motion for a new trial. (R.58:8;P-Ap.p. 116;R.80:27;P-Ap.p.141). The Court of Appeals affirmed. (P-Ap.p.101-110).

Statement of the facts

In the early morning of March 23, 2007, Anthony Weaver (Weaver) and Toy Kimber (Kimber) were driving a car that ran out of gas at 2100 North 38th Street in Milwaukee, seven blocks from where Kimber lived on 45th Street. (R.72:7-9). The location is significant because those who live on 38th Street don't like those who live on 45th Street hanging around, and vice versa. (R.72:29; R.73:102-104).

Weaver and Kimber got out of the car on 38th Street and began talking to two girls. (R.72:9-10). One of these girls was Cera Jones. (R.45:18-19;P-Ap.198-199). A car drove past, suddenly did a U-turn at the end of the block, and returned to the location where Weaver, Timber, and the girls were

[1] The judgment of conviction was corrected on September 1, 2009. (R.34;P-Ap.p.113-115).

[2] Judge Ashley presided over the trial. Judge Dallett presided over the postconviction motions.

standing. (R.72:11-12). A man then stepped from the back seat of the car, pointed a gun with a red laser beam at them, and discharged four or five shots. (R.72:12-14 & 15). Weaver was killed and Kimber was shot in the leg.

The police spoke to Cera Jones minutes after the shooting. (R.45:18-19;P-Ap.198-199). She told the police that she saw a brown, four-door, older model Cutlass drive the wrong way down the one way street. (Id.). She stated that a black male got out of the rear passenger side of the car and yelled "yea nigga I told you I was gonna get yall" and then started shooting a rifle with a banana clip that had a laser sight. (Id.). She stated she did not previously know Kimber or Weaver. (Id.). The police report indicated that Jones did not see the shooter because it was dark and he was wearing a hoodie. (R.45:18-19;P-Ap.p.198-199).

The police also spoke to Kimber minutes after the shooting, and according to the police, Kimber did not know the identity of the person who shot him. (R.71:23). Kimber said that the shooter was wearing a black hoodie and stepped out of a tan Cutlass. (R.71:24-25). He claimed a woman was driving and two black males were also in the car. (Id.).

The next morning, Detective Wesley presented a photo array to Kimber. (R.72:50). Despite the fact Kimber was unable to identify the shooter immediately after it happened, Kimber was now able to identify Jenkins as the shooter. (R.72:56). Kimber knew Jenkins for about three years prior to this incident as his cousin dated Jenkins' sister. (R.72:14). In fact, on the night of the shooting, Kimber was hanging out at the same "trap house"[3] where Jenkins was hanging out. (R.72:15).

Despite the identification by Kimber, the police continued their investigation a week later (April 1, 2007) by re-interviewing Cera Jones. (R.45:20-22;P-Ap.200-202). She described the shooter as: "a black male, 20-21 yoa, 5'08", medium build, medium complexion, clean shaven-baby face, and that he was wearing a black hooded sweatshirt." (R.45:21; P-Ap.p.201). She noted that she had never seen the shooter before, but thought she could identify him. (R.45:22;P-

[3]A trap house is a place for friends to hang out and drink. (R.73:27).

Ap.p.202). Jones however was familiar with Jenkins as she knew him from the neighborhood. (R.45:25-26;P-Ap.p.205-206).

On April 3, 2007 Jones was shown a photo lineup of suspects, including Jenkins. (R.45:23-24;P-Ap.p.203-204). She told the police none of the photos she observed were of the shooter. (Id.). The police also showed her a photo of Jenkins' sister's burgundy Buick LeSabre. (Id.). Jones told the officers that this definitely was not the car that the shooter was riding in. (Id.). While the police report does not reflect it, Jones told the police that she recognized Jenkins' photo, but he was definitely not the shooter. (R.45:25;P-Ap.p.205). Further, Jones swore that she saw Jenkins minutes after the shooting on a porch across the street from the shooting. (Id.).

Jenkins was eventually arrested and charged for this shooting. While waiting for trial, Jenkins was housed in the same jail pod (3C) as Corey Moore and Christopher Blunt. (R.45:32;P-Ap.p. 212). While in jail, Blunt approached Jenkins and stated: "I know you. Where you from? I know you from a porch party." (R.45:10;P-Ap.p.207; R.46). Blunt remembered Jenkins because of Jenkins' heavy acne scars. (Id.). Blunt then asked Jenkins: "do you fuck with those niggers in the 4's?" Jenkins explained that he knew people in the 40's streets. (Id.). Blunt then confided to Jenkins: "I'm from the 3's and I'm going to keep it real with you. Do you know Toy and Anthony? I'm the dude that shot Toy and killed Anthony." (Id.). Blunt explained that these individuals had previously beat up his brother, giving him a black eye. (Id.). Blunt further clarified that he was riding around in a stolen car around 38th or 39th Street, saw Kimber and Weaver, told his brother to make a U-turn, then shot Weaver and Kimber with a rifle type 9. (R.45:11;P-Ap.p.208). Moore overheard this entire conversation. (R.45:27-28;P-Ap.p.207-208).

Jenkins told his attorney about Blunt's statement. (R.46). Shortly after Blunt's statement, Jenkins' counsel wrote a letter to the ADA about Blunt and Moore. (R.45:33;P-Ap.p.213). To Jenkins' knowledge, no follow up was done until nearly a year later when counsel again asked the ADA to talk to Moore. (R.45:34;P-Ap.p.214). Counsel noted: "I find Moore to be credible and willing to cooperate, this even though

there is nothing in it for him and, it could be argued, some risk given his status." (Id.). Jenkins wanted to call Moore and Blunt as witnesses at his trial. (R.77:75).

TRIAL

A trial was conducted accusing Jenkins of first degree intentional homicide, first degree reckless injury, and felon in possession of a firearm. While many witnesses were called[4], the case boiled down to a credibility contest between Kimber - who alleged that Jenkins was the shooter, and Jenkins - who denied he was the shooter, insisting he was at the trap house when the shooting occurred.

At trial, Kimber's story now changed. He testified he immediately told the responding police officer that Jenkins was the shooter. (R.72:34&46). This was directly contrary to the testimony of the responding officer (Officer Kraker), who testified that at the shooting scene, Kimber stated that he did not know who shot him. (R.71:23).

Jenkins testified that he was in the trap house on 38th Street when the shooting occurred. (R.73:70). He testified that he was there with several people, including Daniel McFadden. (R.73:70-71). He testified that he did not shoot a gun, much less at either of the victims in this case. (R.73:72).

Jenkins' alibi Daniel McFadden (aka Lil' Frankie) testified that he was in the trap house when he heard the shooting. (R.73:21). He stated that he woke up Jenkins, who was with him in the house at the time of the shooting, and within two to five minutes after the shots they went outside.

[4] The State's other witnesses included responding officers Byers and Kraker (R.71:15 & 20); lead detective Chavez (R.71:27); assistant medical coroner Tlomak (R.71:39); firearm expert Simonson (R.71:51); Detective Wesley (conducted a photo lineup for Kimber) (R.72:48); Citizen Dewan Robinson, who allegedly told the police that Jenkins referred to the homicide as "it wasn't nothing" and Jenkins had previously handled a gun with a laser site (although Robinson denied this at trial) (R.72:78); and Det. Hutchinson who interviewed Robinson (R.72: 88). Other than Jenkins, the Defense called Det.Walton to show Kimber previously knew Jenkins (R.73:11) and the alibi witness McFadden (R.73:18). The State then called witnesses to rebut the alibi in Kristeena Coleman (R.74:8) and Det. Norman and Det. Kopcha (R.74:17 & 20). Det. Kopcha and Mueller also testified about Jenkins' statement. (R.74:20 & 28).

(R.73:21-22&24). Once outside, McFadden walked across the street and gave the injured Kimber a cell phone to use to call his mom. (R.73:36-37). McFadden testified that Kimber was at the "trap house" earlier in the day of the shooting. (R.73 at 26). McFadden admitted that at one point he told the police Jenkins was not in the trap house at the time of the shooting, but he did this only because he was scared from police threats. (R.73:25-26).

The parties also stipulated that Kimber had five adult convictions and four juvenile adjudications, Jenkins had two prior juvenile adjudications, and McFadden had one adult conviction and three juvenile adjudications. (R.74:34). Neither the State, nor Jenkins' trial counsel, called Cera Jones, Christopher Blunt or Cory Moore to testify. The State subpoenaed Jones for a previously scheduled trial, but sent her home, telling her she was not needed, and nobody called her for the new trial date. (R.45:25; P-Ap.p.205).

Jenkins was found guilty on all three counts and received a life in prison sentence, with eligibility for extended supervision after 40 years, plus an additional 14 year prison sentence for the reckless injury conviction. (R.75; R.76:42).

POSTCONVICTON PROCEEDINGS

Appointed postconviction counsel hired an investigator to interview Christopher Blunt who denied any knowledge of the shooting and denied knowing Jenkins. (R.45:29;P-Ap.p.209). The investigator also took statements from Corey Moore and Cera Jones. (R.45:25-28;P-Ap.p.205-208). Jenkins then filed a motion for new trial based upon ineffective assistance of counsel and in the interest of justice. (R.45). Jenkins claimed that his counsel was ineffective for failing to investigate, subpoena[5], and call Cera Jones to testify. (Id.). Further, he claimed that his counsel provided ineffective assistance for failing to subpoena and call Moore and Blunt to testify. (Id.).

[5] Jenkins abandons his "failure to subpoena" allegation of his claim to utilize energy and space for his remaining, stronger arguments.

A Machner hearing was conducted. (R.77;P-Ap.p.143-195). First, the parties stipulated that if Blunt and Moore testified, they would have testified similar to the statements they gave to Jenkins' investigator. (R.77:8-9;R.77:69-71). Further, the parties stipulated that Moore, Jenkins, and Blunt were all in the same jail pod together, as demonstrated by the jail records. (R.77:69-71; R.45:27;P-Ap.p.212).

As required, trial counsel took the stand to explain his actions. (R.77:15-50; P-Ap.p.143-178). Counsel testified that the theory of the case was to attack Kimber's identification of Jenkins and to present an alibi as to Jenkins' whereabouts at the time of the shooting. (R.77:30-31:P-Ap.p.158-159).

Counsel was uncertain if he met with Jones, but thought he talked to her, although he could not specifically recall her. (R.77:16,26&41;P-Ap.p.149,144&169). Counsel testified he would have read the police reports where Jones gave a description of the shooter. (R.77:20;P-Ap.p.148). Counsel did not remember discussing the photo lineup with Jones. (R.77:22;P-Ap.p.150). Counsel could not recall where Jones fit into the theory of defense. (R.77:23:11;P-Ap.p.151). Counsel did not recall why he did not ask Detective Walton, who conducted the photo array for Jones, if Jones failed to identify Jenkins as the shooter. (R.77:25;P-Ap.p.153). Counsel admitted he placed Jones on the defense witness list, but was unsure if he spoke to her before doing so. (R.77:26:25;P-Ap.p.154). Finally, counsel admitted he could not recall why he decided not to call Jones as a witness. (R.77:18;P-Ap.p.146).

Counsel stated that when he became aware of Moore, he let the ADA know Moore had exculpatory information. (R.77:27;P-Ap.p.155). Counsel agreed that Moore would have been "credible." (R.77:32-33;P-Ap.p.160-161). Counsel admitted he never spoke to Blunt and did not really search for him, other than knowing he was at the jail. (R.77:31-32;P-Ap.p.159-160). Counsel hired an investigator but does not recall to whom this investigator spoke. (R.77:34-35;P-Ap.p.162-163).

Cera Jones also testified at the Machner hearing. (R.77: 53-67;P-Ap.p.181-195). She testified that she was familiar with Jenkins, but she and Jenkins were not family and not

romantically linked. (R.77:53-54;P-Ap.p.181-182). Jones stated she spoke to Jenkins' trial counsel, gave her phone number and address to him, and was told that counsel would get back to her. (R.77:54;P-Ap.p.182). Jones testified that when she viewed the photo array, she knew Jenkins' picture was in it, and told the officer Jenkins wasn't the shooter. (R.77:56;P-Ap.p.184). Jones testified that the officers had tried to convince her that Jenkins' was the shooter and that the burgundy car was the shooter's car. (R.77:56&58;P-Ap.p.184&186). She testified that she remembered Jenkins coming out of the trap house across the street three to five minutes after the shooting. (R.77:58;P-Ap.p.186). She also remembers telling the officer that the shooter had a smooth baby face, a feature which Jenkins does not possess. (R.77:59;P-Ap.p.187). Jones also testified that Jenkins was not the shooter and she had wanted to tell that to the jury. (Id.). Jones testified that she told officers the night of the incident that she saw the shooter's face before he put the hood up, and the officer is mistaken if his report reflects otherwise. (R.77:61;P-Ap.p.189).

Jenkins testified that he mentioned Cera Jones to his trial counsel, but does not know if his counsel ever looked into it, only telling him it was a "dead end." (R.77:74-75). He also testified that counsel told him Moore was credible as a witness. (R.77:75).

The post conviction court denied Jenkins' motion for a new trial. (R.80:27; R.58:8;P-Ap.p.141&116). As to Jones, the court noted trial counsel did not have "real strong recollections of a specific. So it was difficult to assess." (R.80:5;P-Ap.p.119). As a result, the court was unable to determine if trial counsel's performance was deficient, so it made its decision based upon the prejudice prong instead. (R.80:9;P-Ap.p.123). The court ruled that Jenkins did not meet his burden to show prejudice to the defense because of inconsistencies in Jones' statements. The court started by denying the motion:

> And the reason that I think that the defense can't meet that burden is because I think that there are just way too many inconsistencies with Miss Jones' statements and I think all of

> what she testified to is frankly she just did not come across as a credible witness. I'm going to go through those specifics that show that I don't believe that she was credible and I think that the jury would have had difficulty with some of these statements as well.

(R.80:10;P-Ap.p.124). The court listed the inconsistencies and Jones' involvement with a petty marijuana sale just prior to the shooting, concluding:

> So I just think that given the contradictions in her testimony, I don't find her credible. I think she would have been impeached on the stand with all these statements and her descriptions kept changing. And I think that based on that, even if she had testified, there is not a reasonable probability that the result of the proceeding would have been different.

(R.80:18;P-Ap.p.132).

The court also denied the motion in regards to the failure to call Blunt and Moore as witnesses. (R.80:20-27;P-Ap.p.134-141). The court found it was not deficient performance to fail to call Blunt because Blunt would have just denied doing the shooting. (R.80:22-23). The court found that it was not deficient to call Moore, because he may not have been available and his statement would be inadmissible hearsay, either because the court felt it wasn't an inconsistent statement, or there was not sufficient corroboration to admit it as a statement against penal interest. (R.80:23-27;P-Ap.p.137-141). The court also denied the motion for a new trial in the interest of justice. (R.80:27;P-Ap.p.141).

Jenkins then filed a notice of appeal. (R.58). The Court of Appeals affirmed the conviction in a non-published decision. (P-Ap.p.101-110). The Court of Appeals agreed with the Circuit Court that Jones had too many contradictions to say that there is a reasonable probability the result would have been different if she would have testified. (P-Ap.p.107; ¶15-¶19). The court mentioned Jenkins' argument that the postconviction court invaded the providence of the jury in deciding the prejudice prong of the motion, but refused to

address it further. (P-Ap.p.107;¶15,n.3). The court also concluded that the failure to call Blunt or Moore was not prejudicial and such testimony "was inconsistent with the alibi defense and theory that Kimber's identification was faulty, [thus] failing to call Blunt was not deficient." (P-Ap.p.109-110;¶22). Lastly, the court concluded that this matter should not be reversed in the interest of justice since this case was about ineffective assistance of counsel and not about an erroneous trial court ruling. (P-Ap.p.110;¶24).

ARGUMENTS

I. JENKINS WAS DENIED HIS CONSTITUTIONAL RIGHTS TO COUNSEL WHEN HIS TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT IN FAILINGTO : A) INVESTIGATE AND CALL CERA JONES TO TESTIFY; AND B) TO SUBPOENA AND CALL CORY MOORE AND CHRISTOPHER BLUNT TO TESTIFY, AND SUCH PERFORMANCE PREJUDICED JENKINS' DEFENSE.

A. The Standard Of Review For An Ineffective Assistance Of Counsel Claim Is A Mixed Standard.

Ineffective assistance of counsel claims present mixed questions of fact and law. State v. Pitsch, 124 Wis.2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. State v. Harvey, 139 Wis.2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which an appellate court reviews *de novo*. Pitsch, 124 Wis.2d at 634, 639 N.W.2d 711.

B. A Defendant Has Constitutional Rights To Counsel, And Counsel Must Be Effective To Satisfy Those Constitutional Rights.

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

U.S. CONST. Amend. VI (applicable to the States by U.S.CONST. Amend. XIV; see State v. Doe, 78 Wis. 2d 161, 254 N.W.2d 210 (1977)); See Strickland v. Washington, 466 U.S. 668 (1984); WIS. CONST. Art. I, Sec. 7. Assistance of counsel must be "effective" to satisfy the Sixth Amendment. State v. Felton, 110 Wis. 2d 485, 499, 329 N.W.2d 161, 167 (1983). State ex.rel. Seibert v. Macht, 244 Wis.2d 378, 389, 627 N.W.2d 881, 886 (2001).

C. To Prove A Denial Of Constitutional Rights To Counsel, A Defendant Must Show That Counsel's Performance Was Deficient And Such Performance Prejudiced The Defense.

To establish a claim for ineffective assistance of counsel in violation of the United States and Wisconsin Constitutions, a defendant must show: 1) that counsel's performance was deficient; and 2) the deficient performance prejudiced the defense. State v. Smith, 207 Wis. 2d 258, 274, 558 N.W.2d 379, 386 (1997); Pitsch, 124 Wis. 2d at 633, 369 N.W.2d at 714; Seibert, 244 Wis.2d at 391-92, 627 N.W.2d at 887.

1. Prong one of an ineffective assistance of counsel claim: deficient performance.

"To prove deficient performance [prong one] a defendant must establish that counsel 'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the Defendant by the Sixth Amendment.'" Smith, 207 Wis. 2d at 274, 558 N.W.2d at 386 (citation omitted). The standard for deficient performance is if the "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688; State v. Ambuehl, 145 Wis. 2d 343, 351, 425 N.W.2d 649, 652 (Ct.App.1988). In assessing the reasonableness of counsel's conduct, the court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690.

Failure to conduct a reasonable investigation can constitute deficient performance. State v. Delgado, 194

Wis.2d 737, 751-54, 535 N.W.2d 450, 456 (Ct.App.1995); State v. Hubert, 181 Wis.2d 333, 343-44, 510 N.W.2d 799, 803 (Ct.App.1993). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Wiggins v. Smith, 539 U.S. 510, 522 (2003) (quoting Strickland at 690-691). "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case…." Pitsch, 124 Wis.2d at 638, 369 N.W.2d at 717 (quoting *ABA Standards for Criminal Justice*, The Defense Function, sec. 4-4.1 (2nd edition)). Incomplete investigations, which are the result of inattention or oversight, do not constitute a reasoned strategic judgment to satisfy the Constitution. Wiggins, at 534.

Failure to call a witness to testify can constitute deficient performance, if it is outside the realm of professional judgment to do so. Whitmore v. State, 56 Wis.2d 706, 715, 203 N.W.2d 56, 61 (1973). It is within an attorney's discretion to call or not call a particular witness, if the circumstances of the case reasonably support such a decision. Id.; *see also* State v. Wright, 2003 WI App 252, ¶¶ 34-35, 268 Wis.2d 694, 673 N.W.2d 386.

There are three Wisconsin cases which demonstrate prejudicial, deficient performance, when counsel fails to investigate and call a witness. These cases are Washington v. Smith, 219 F.3d 620 (7th Cir. 2000); State v. White, 2004 WI App 78, 271 Wis.2d 742, 680 N.W.2d 362; and Goodman v. Bertrand, 467 F.3d 1022 (7th Cir.2006).

In Washington, three men entered the Jolly Skot Tavern, robbing the owner and two patrons. Id. at 623. One of the robbers had a shotgun. Id. When Washington was stopped in a car two hours later, he was brought back to the bar, where the owner did not identify him, but the two patrons did. Id. At trial, the bar owner did not identify Washington, but both patrons testified that Washington was present at the robbery. Id. at 624. An officer testified that when Washington was arrested, he was in a car with a bag containing shotguns. Id.

A large part of the Washington case focused on alibi witnesses, but for Jenkins' case, the issue involving the witness Lobley is much more relevant. A hand written police report contained statements Lobley made to a detective after his arrest, stating the shotguns found in the car did not belong to Washington, but had been placed there earlier in the day by "Shorty G." and Washington knew nothing about the guns. Id. at 625-626. Trial counsel never reviewed the police report because he could not read the Detective's writing. Id. at 626. Thus trial counsel did not speak to Lobley prior or during the trial, nor call him as a witness. Id. at 626.

The Seventh Circuit found not only was counsel's performance deficient in failing to read the police report (Id. at 629), but that such failure (and thus a failure to call Lobley as a witness) was prejudicial. The court stated: "[H]is testimony also would have distanced Washington from the shotguns by explaining that Shorty G. put the guns in the car and that Washington knew nothing about them….At trial, only Washington testified that the shotguns were not his, so Lobley's testimony to the same effect could have helped a great deal." Id. at 634.

In White, the defendant was convicted of an armed robbery of a convenience store. White at ¶2. One of the clerks of the store, Ehlers, claimed that White demanded money after showing a gun, and thus Ehlers gave him $22.00. Id. Ehlers testified that he had never seen White before. Id. White's theory of defense was that Ehlers was selling pot out of the store, had shorted him some marijuana from a previous deal, and thus the $22.00 was Ehlers' way of making good on the shortage. Id. at ¶3-4. In his postconviction motion, White argued that his counsel's performance was deficient in failing to present two witnesses: Dragan (the other store clerk) and Sonny (the person who drove White to the store). Id. at ¶5. Dragan's affidavit stated that she knew the other clerk (Ehlers) was stealing from the store, and that Ehlers had demanded to personally wait on White despite the fact it was Dragan's job to wait on the customers. Id. at ¶6-7. Sonny would have testified that he had previously purchased marijuana from Ehlers at the store three to four times and that Sonny introduced White to Ehlers to purchase marijuana. Id. at ¶ 6.

The court of appeals found that White's trial counsel's performance was deficient and prejudicial. The witnesses would have been relevant to undermine Ehlers' explanation of why he gave the money to White, and the description of White's demeanor would support the theory that White went to the store for something other than robbing Ehlers. Id. at ¶15-18. Additionally, Sonny's testimony would have gone to Ehlers' intent and opportunity to use the store to sell drugs and to impeach Ehlers contention that he did not know White. Id. at ¶20-21.

In Goodman, the defendant was accused of an armed robbery of a Kohl's food store. Id. at 1023-1024. Kollath, the store manager, initially identified someone else as the robber, but later identified Goodman as the robber. Id. at 1024. Retzlaff, the store cashier, did not identify Goodman from a lineup, but rather identified someone else. Id. Goodman's first trial resulted in a mistrial because of a hung jury. Id. At the second trial, "the store's cashier, Retzlaff, did not testify because she was on vacation and Goodman's lawyer failed to subpoena her." Id. Thus Retzlaff was not "unavailable" and her prior testimony could not be used at the new trial. Id. The court held counsel's performance was prejudicial:

> Here too, the testimony of a disinterested eyewitness was a crucial aspect of Goodman's defense. Retzlaff, who chose another individual as the robber, was undoubtedly important to creating reasonable doubt in the state's case against Goodman. Yet, the jury did not have the benefit of Retzlaff's testimony because Goodman's lawyer made no efforts to secure her presence at trial.

Id. at 1030.

2. Prong two of an ineffective assistance of counsel claim: prejudice to the defense.

The second prong under Strickland requires counsel's performance to be prejudicial. "The defendant is not required [under Strickland] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" State v. Moffet, 147 Wis.2d 343, 354, 433 N.W.2d 572, 576 (1989) (quoting Strickland, 466 U.S. at 693). Instead, a defendant only needs to demonstrate that if not for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; Smith, 207 Wis. 2d at 276, 558 N.W.2d at 387. All that is required is that "there is a reasonable probability that at least one juror would have struck a different balance." Wiggins, 539 U.S. at 537. "'Even if the odds that the defendant would have been acquitted had he received effective representation appear to be less than fifty percent, prejudice has been established so long as the chances of acquittal are better than negligible.'" U.S. v. Leibach, 347 F.3d 219, 246 (7th Cir.2003) (quoting Miller v. Anderson, 255 F.3d 455, 459 (7th Cir.2001)). This court should not make an inquiry into the "reliability" or "fundamental fairness" of the proceedings. See Goodman v. Bertrand 467 F.3d 1022, 1028-29 (7th Cir. 2006); Washington v. Smith, 219 F.3d 620, 632-633 (7th Cir. 2000).

Ineffectiveness of counsel must be assessed under the totality of the circumstances, thus the cumulative effect of counsel's errors is what is controlling. Alvarez v. Boyd, 225 F.3d 820, 824 (7th Cir. 2000); Smith, 219 F.3d at 634-35; State v. Thiel, 2003 WI 111,¶¶ 59-60,264 Wis.2d 571, 665 N.W.2d 305 (addressing cumulative effect of deficient performance of counsel). See also State v. Zimmerman, 2003 WI App 196, ¶34, 266 Wis.2d 1003, 669 N.W.2d 762. Thus, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming support." Strickland, 466 U.S. at 696.

In assessing prejudice under a Strickland claim, the court should not determine whether a jury would believe a witness who did not testify as a result of counsel's

professional error. It is not up to the court to determine whether the missing or forgotten witness would have been believed by the jury; Rather the court must determine only whether there is a reasonable probability that the outcome would have been altered if the jury had heard this evidence. See Ramonez v. Berghuis, 490 F.3d 482, 490 (6th Cir. 2007); Vasquez v. Bradshaw, 522 F.Supp.900, 926-927 (N.D.Ohio 2007). Thus while missing or forgotten witnesses may be vulnerable to cross examination, the credibility determination of that witness is constitutionally required to be left to the jury. Ramonez, 490 at 490.

While not directly addressed in Wisconsin in the Strickland arena, Wisconsin has addressed the standard for "reasonable probability of different outcome" in a case involving recantations[6] which may provide some guidance. The seminal recantation case from the Wisconsin Supreme Court has set forth the following standard to determine "reasonable probability of a different outcome":

> The correct legal standard when applying the 'reasonable probability of a different outcome" criteria is whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt.
>
> …A reasonable jury finding the recantation less credible than the original accusation could nonetheless, have a reasonable doubt as to a defendant's guilt or innocence. It does not necessarily follow that a finding of "less credible" must lead to a conclusion of "no reasonable probability of a different outcome." Less credible is far from incredible. A finding that the

[6] While the standard in the recantation cases may be helpful, recantation cases should be viewed with a stricter eye than Strickland cases involving eyewitnesses who were not called to testify because of professional error. As the McCallum court points out, recantations are inherently unreliable because "[t]he recanting witness is admitting that he or she has lied under oath." McCallum at ¶21. A defendant who alleges a denial of Constitutional Rights to Counsel because of the omission of a neutral eyewitness' testimony does not present the same inherently unreliable scenario.

> recantation is incredible necessarily leads to the conclusion that the recantation would not lead to a reasonable doubt in the minds of the jury….Therefore, in sum, in determining whether there is a reasonable probability of a different outcome, the circuit court must determine whether there is a reasonable probability that a jury, looking at both the accusations and the recantation, would have a reasonable doubt as to the defendant's guilt.

State v. McCallum, 208 Wis.2d 463, ¶18-¶19, 561 N.W.2d 707 (1997). The McCallum concurrence gave more guidance on the standard, holding the court first should determine:

> …whether the recantation is credible, that is, worthy of belief…. The circuit court merely determines whether the recanting witness is worthy of belief, whether he or she is within the realm of believability, whether the recantation has any indicia of credibility persuasive to a reasonable juror if presented at a new trial.
>
> A circuit court's finding that a recanting witness is incredible as a matter of law is sufficient to support its conclusion that no reasonable probability exists of a different result at a new trial.

McCallum, ¶48-¶49 (concurrence, Abrahamson). If a defendant meets this standard, the concurrence held that the court should examine whether "'there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.' Reasonable probability for purposes of prejudicial error is not strictly outcome determinative. Reasonable probability does not mean that it is more likely than not that a new trial would produce a different result. The circuit court does not determine which of the two statements is more credible; the circuit court is not to act as a thirteenth juror." McCallum, at ¶59 (concurrence, Abrahamson)(quoted cites omitted). The concurrence, in a footnote, quoted the McCallum court of appeals decision for the premise that: "'It is the jury's role to determine which of the two contradictory statements it believes.'" McCallum, ¶59 n.12.

D. Jenkins Was Denied His Constitutional Rights To Counsel When His Trial Counsel's Performance Was Deficient and Prejudicial to Jenkins' Defense For Failing To Investigate And Call Cera Jones As A Witness.

Counsel was deficient in failing to investigate Cera Jones and call her to testify as a witness. Such deficient performance by counsel prejudiced Jenkins' defense. Thus Jenkins' Constitutional Rights to Counsel were violated and he must be awarded a new trial.

1. Jenkins' trial counsel's performance was deficient in failing to investigate Jones and in failing to call Jones to testify as a witness.

The court did not make a determination as to whether Jenkins' trial counsel's performance was deficient as to Jones. However, the court noted that counsel's testimony was less than clear. (R.80:5; P-Ap.p.119). Eventually the court gave up trying to determine if counsel had a strategy when investigating and deciding not to call Jones to testify; Rather, the court decided the motion solely on the prejudice prong. (R.80:9;P-Ap.p.123). However, this court decides the issue *de novo*, and the record clearly supports the premise that Jenkins' trial counsel was deficient in failing to investigate and call Cera Jones to testify as a witness.

For this proceeding, one thing is crystal clear – the police reports demonstrate that Cera Jones was a crucial witness to the case. (R.45:18-24;P-Ap.p.198-204). The police reports convey three things about Cera Jones: 1) She was standing near the victims when they were shot; 2) Within a week she described the shooter as having a "clean shaven-baby face," something that Jenkins does not have; and 3) Most importantly, Jones viewed a photo lineup, which included Jenkins, and Jones did not identify Jenkins as the shooter. (Id.). These facts alone required reasonable competent counsel to **begin** an investigation into the suitability of Jones as witness for trial.

Jones was a neutral eyewitness, with no association to Jenkins or Kimber. She was standing next to Kimber and Weaver when the shooting started, thus was in the best

position of any person in this trial to identify the shooter. She gave statements to the police on the night of the shooting (3/23/07), a week later (4/1/07), and two days after that (4/3/07). From the very beginning counsel should have realized that this person was critical to the case.

We know counsel was aware of Jones, as he read the police report and placed her on his March 2, 2009 witness list. (R.77:20 & 26;P-Ap.p.148&154). Counsel was unsure if he had spoken to Jones prior to placing her on this witness list. (R.77:26; A-Ap.p.144). He did not remember discussing the photo lineup with her. (R.77:22;P-Ap.p.150).

Cera Jones testified that she met with trial counsel and gave her phone number and address to him. (R.77:54; P-Ap.p.182). She testified that she was available to come to trial, and did in fact come to court on a couple of occasions. (R.77:54-55;P-Ap.p.182-183). She was told by the police officers and possibly trial counsel that Jenkins' previously scheduled trial had been adjourned. (R.77:55;P-Ap.p.183). Despite this, it appears counsel did not make any meaningful investigation into what Jones knew of this case.

Counsel's investigation into Jones was simply inadequate given the importance of this witness. Counsel did not give a strategic reason why he did not fully investigate Jones. Any failure to completely investigate then was a result of inattention or oversight, and not a deliberate strategic choice. Thus counsel's actions were deficient in failing to conduct an investigation into what Cera Jones knew, and if she would have been a good witness for the defense.

Aside from failing to investigate Jones, counsel's performance fell below an objective standard when he failed to call Jones as a witness. Jenkins' trial counsel agreed that the theory of the case was two fold, involving attacking the identification of Jenkins and bringing forth an alibi. (R.77:30-31;P-Ap.p.158-159). With this theory, Cera Jones' testimony was essential to the defense and the failure to call her as a witness at trial was deficient.

As a witness, Cera Jones provided the following: 1) She was the only person, other than Kimber, who saw the shooter and was near him when the shooting started; 2) She

did not identify a shooter from a police photo lineup - an array which included Jenkins; 3) She specifically told the Detectives that Jenkins was not the shooter (investigation needed to be done to determine this – the police report was incorrect); 4) She believed the Detectives were pressuring her to pick Jenkins as the shooter (again, not in the police report); 5) She described the shooter as having a "clean shaven-baby face," which does not describe Jenkins; and 6) she saw Jenkins outside the trap house a few minutes after the shooting. Given the vast amount of positive information from a disinterested eyewitness, any sound trial strategy needed Cera Jones to testify.

And trial counsel was unable to give a strategic reason for not calling Jones to testify. He was uncertain if he met or talked to her. (R.77:16;P-Ap.p.144). He could not recall if she was uncooperative. (R.77:25;P-Ap.p.153). He had intentions to call her as shown by the witness list. (R.77:25-26;P-Ap.p.153-154). But he could not recall why he did not call her. (R.77:18-A-Ap.p.146). Thus failing to call Jones was not a strategic trial decision, but a result of inattention, oversight, or a misjudgment by counsel. In this case, the error is amplified since Jones was the only eyewitness other than Kimber to have seen the shooter.[7]

Aside from the misidentification angle of the theory of defense, Jenkins' trial counsel also testified that he believed McFadden was the key witness for the alibi defense. (R.77:26-27;A-Ap.p.154-155). Jones offered something more than cumulative evidence to this facet of the defense. She offered a neutral party's observation a few minutes after the shooting. Unlike McFadden, she was not good friends with Jenkins, and thus does not have a bias. Jones would have corroborated Jenkins' alibi and reinforced the misidentification theory of defense. Failure to call this type of witness has been held to be deficient performance. See

[7] Trial counsel also missed the opportunity to bring in the fact that Jones did not identify a shooter from the photo lineup (which included Jenkins) through the lineup administrator Detective Mark Walton. At the Machner hearing, trial counsel could not remember calling Detective Walton to the stand, and thus could not give a reason why he failed to introduce the lineup results through the Detective. (R.77:23;P-Ap.p.151).

State v. Cooks, 2006 WI App 262, ¶50, 297 Wis.2d 633, 726 N.W.2d 322. Very much like the Washington and Cooks cases, failure to call a neutral witness to corroborate an alibi fell below reasonable standards of representation.

Because failing to call Jones was not a strategic trial decision, but rather one of misjudgment, inattention, or a consequence of inadequate investigation, counsel's performance fell below the reasonable standards of criminal defense representation, and thus his performance was deficient in regards to prong one of the Strickland standard.

2. Counsel's deficient performance in failing to investigate and call Cera Jones as a witness was prejudicial to Jenkins' defense.

Jenkins' asserts that the postconviction court applied the wrong standard in deciding prong two of the Strickland test in relation to Cera Jones. The court made a credibility determination based upon whether the jury would have believed Jones. It focused on the inconsistencies in Jones' multiple statements, finding that there were: "just way too many inconsistencies with Miss Jones' statements";"I don't believe that she was credible and I think that the jury would have had difficulty with some of these statements as well";"I just think that given the contradictions in her testimony, I don't find her credible;" and "I think she would have been impeached on the stand with all these statements." (R.80:10&18;P-Ap.p124&132). Its important to note that the court never found Jones "incredible." Rather, the court made a determination that Jones was not credible, and the jury would not have believed her, because of her inconsistent statements. Assessing whether a jury would believe a witness who was not called because of counsel's deficient performance invades the province of the jury. The postconviction court should not have acted as the 13th juror in this case. While a court that conducts a Machner hearing should assess the credibility of the defendant and the trial counsel in regards to deficient performance, it should not assess whether a witness would be believed by the jury because of that witness's inconsistent statements.

Jones is worthy of belief, within the realm of believability, and her testimony had more than some indicia of credibility that would be persuasive to a reasonable juror if presented at a new trial. There is a reasonable probability that a jury, looking at both Jones' testimony and Kimber's testimony, would have reasonable doubt about Jenkins as the shooter. Yes there are inconsistencies in Jones' statements, and she was involved as a "middleman" in petty marijuana sale prior to the shooting, but the fact remains that she was standing near the two people who were shot, when they were shot, and yet she did not identify Jenkins as the shooter from a photo lineup conducted a week after the shooting. Jones' testimony would not have been a third-hand hearsay account. And she was not across the street or watching from a window, unbeknownst to anyone else. She was at ground zero of this shooting, and this was known to all minutes after the shooting.

Once the proper standard is used, it becomes apparent that counsel's failure to investigate and call Jones as a witness was prejudicial to Jenkins defense. The sole issue in this case was the identification of the shooter – who was the person who jumped out of the car and shot Kimber and Weaver. Thus the theory of the case for Jenkins, as stated by trial counsel, was twofold, with the folds interwoven: 1) Jenkins was misidentified; and 2) Jenkins's alibi demonstrates that he was misidentified. (R.77:30-31).

When determining the prejudice prong, this court must take into consideration that the State's case was less than iron clad as to the identification of Jenkins as the shooter. There was no physical evidence linking Jenkins to the shooting (i.e. DNA, blood, fingerprints, etc.). There was but one witness who identified Jenkins as the shooter: Kimber. And Kimber's identification was inconsistent and his general credibility was questionable.

As far as the identification of the shooter itself, Kimber testified at trial that Jenkins was the person who shot him. (R.72:17). Kimber also testified that he told the responding Officer, as he lay injured on the ground, that Jenkins shot him. (R.72:34). However the responding Officer testified **exactly the opposite** of Kimber: That

Kimber had **no idea who shot him**. The responding Officer's testimony was as follows:

> Q. Now, officer, when you went in to the gangway and came into contact with Mr. Kimber, did you ask Mr. Kimber what happened?
>
> A. Yes, I did.
>
> Q. What did he tell you about what happened to him?
>
> A. I believe – Well, I know he didn't know who did it. He mentioned something about a vehicle; and that **he didn't have any idea who the shooter was**.

(R.71:23:7-13) (emphasis added).

McFadden testified that immediately after the shooting, Kimber seemed like he was in the right state of mind, despite being shot, and was able to dial his mother on the phone without any problems. (R.73:23). Further, even when Kimber did make an identification of Jenkins from a photo lineup the next day, it was still less than clear cut. Kimber picked out Jenkins from a set of photos. However, he also stated, after seeing a second set of pictures, when he came to a picture of Isaiah Guy: "This is your guy." (R.72: 58). The Detective asked him to clarify, Kimber stated: "No, that's not the guy. That's not the guy who shot me." (Id.).

Aside from the conflicting statement regarding an on-scene identification of Jenkins, Kimber's general credibility itself was weak. Kimber had nine previous criminal convictions/juvenile adjudications. (R.74:34). Kimber and his cousin were the shooting victims, thus Kimber had an interest in a conviction. Lastly, there is an informal turf war between those who live in the 3000s and those who live in the 4000s. (R.72:29; R.73:102-104). Kimber lives in the 4000s and Jenkins the 3000s. Thus Kimber had a personal bias.

Not only was Kimber's trial testimony of identification in conflict with his statement given to police the night of the shooting, the identification is even more questionable once his less than stellar credibility is considered. Thus this verdict, supported only by Kimber's testimony, is more likely

to have been affected by Jenkins' trial counsel's professional errors than a verdict with overwhelming support. It is with this background that the two areas of deficient performance should be examined for prejudice to Jenkins' case.

a. Jenkins' case was prejudiced by trial counsel's failure to investigate Cera Jones.

If counsel would have made a meaningful investigation as to Jones, he would have discovered four invaluable things that were not contained in the police reports. First, minutes after the shooting, Jones saw Jenkins coming out of the trap house across the street. (R.77:58;P-Ap.p.186). While this can not serve as a true alibi, this neutral eyewitness' testimony corroborates Jenkins and McFadden's testimony that Jenkins was in the house across the street when the shooting occurred. This type of evidence is crucial, as discussed in the Washington case. Jones' testimony makes it less probable that Jenkins could have been in the tan car, fired off the shots, speed away, then within minutes end up across the street from the shooting.

Second, much like the Goodman case, the neutral eyewitness did not pick Jenkins out of the photo lineup. However, if counsel would have investigated, he would have discovered that not only did Jones not identify a shooter from the photo lineup, she specifically told the officers that Jenkins, who she pointed out in the photos, was not the shooter. (R.77:55-56;P-Ap.p.183-184). While the police report shows that Jones did not identify the shooter, it also states that Jones did not recognize anyone in the lineup. (R.45:24;P-Ap.p.204). This is incorrect according to Jones. (R.77:55-56;P-Ap.p.183-184). Without the investigation, counsel was unaware of the existence of the evidence to present to the jury.

Further, an investigation would have revealed two more things: Jones did see the shooter's face, but this fact was misreported (R.77:61;P-Ap.p.189); and Jones believed the police were trying to push her to say that Jenkins was the shooter. (R.77:56;P-Ap.p.184). This was helpful to show the

police were only focusing on convicting Jenkins, something that McFadden implied as well. (R.73:25-26&59).

Because trial counsel did not investigate Jones, counsel was not able to ascertain facts that were outside of the police reports in determining who to call as witnesses. Given the importance of these facts to rebut the only other identification witness, counsel's actions prejudiced the defense.

b. Jenkins' case was prejudiced by trial counsel's failure to call Cera Jones to testify.

Counsel's failure to call Cera Jones as a witness was also prejudicial. Without Jones, the jury had only Kimber's testimony when assessing the only issue of the case: the identity of the shooter. The jury was left with the impression that while Kimber may or may not have identified the shooter immediately after being shot, he did the next day, and there was no contrary testimony. The jury never heard from a neutral eyewitness, standing near the State's witness, about the shooter's identification. The State relied on this fact in closing, emphasizing that Kimber "was there, that he was shot, and he identified who did the shooting." (R.74:55). The prosecutor relied on the fact that only Kimber's testimony was crucial, telling the jury: "if you believe Toy Kimber; then certainly what you have here, beyond any doubt is the fact Jimothy Jenkins is guilty of each and every one of these crimes." (R.74:56).

Counsel failed to call a witness who would have convincingly stated that she saw a "clean shaven- baby faced" shooter, something which does not match Jenkins' description. (compare R.45:21 with R.45:31). Counsel failed to call a witness who saw the shooter, at the same angle as Kimber, and could testify (as she told the police and testified at the Machner hearing) that the shooter was not Jenkins. Counsel failed to call a witness who would have supported the misidentification issue by disclosing that the police placed pressure on her to name Jenkins as the shooter. Counsel failed to call a witness who would have supported the

misidentification issue by adding information that was not placed in Detective Walton's report – that she specifically told Detective Walton that Jenkins was not the shooter, adding credence to the implication that the police were focused only on Jenkins and not looking for objective evidence to solve the crime.

Further, Jones was useful to Jenkins' alibi defense. Much of the testimony of the trial focused on Jenkins' whereabouts during the shooting. Jenkins presented an alibi witness of McFadden. Trial counsel testified that he believed that McFadden was the key witness. (R.77:27;P-Ap.p.155). McFadden testified that Jenkins was in the house with him when the shots rang out, whereas McFadden woke Jenkins up and they went outside to let Kimber use a cell phone. (R.73:24). However, McFadden also gave the police an inconsistent statement, telling the police that he was not with Jenkins at the time of the shooting. (R.73:45-47). The State was quick to note this inconsistency at closing. (R.74:81). Further, McFadden had four prior criminal convictions/adjudications. (R.74:34). Thus the alibi defense had shortcomings, which would have been shored up with Jones' testimony.

However, the jury did not get to hear the testimony of Cera Jones, who saw Jenkins on the scene a few minutes after the shooting. (R.77:58;P-Ap.p.186). While not a true alibi, Jones, a neutral witness, substantially corroborates both Jenkins and McFadden's testimony. As a neutral witness, she provides valuable knowledge into Jenkins' location shortly after the shooting, and when assessed with the weak identification evidence presented by the State, it demonstrates a reasonable probability of a different outcome.

And while both Kimber and Jones had conflicting statements about the identification, Jones' credibility was not at issue. She was not shot. She was not related to Jenkins. She was not romantically involved with Jenkins. She did not have any criminal convictions. She was a neutral witness who wished to tell what she saw, but was not called upon by trial counsel to do so. The failure to call Jones was simply a break down of the adversarial process – there was no flip side to Kimber's side of the story presented to the jury.

Yes, there was fodder for cross examination of Jones given her inconsistent statements. But this is for the jury to assess, and given Kimber's inconsistencies, criminal convictions, and obvious biases, there is a reasonable probability a jury would have overlooked Jones' inconsistencies and returned a different result. Further, while Jones was involved with an exchange of marijuana for $10.00 immediately prior to the shooting, that exchange also involved Kimber[8], so any potential prejudice that such exchange may have had, it applied to both witnesses.

The omission of Jones in regards to the identification issue has to give this court reason to pause in assessing confidence of this verdict. Can it be said with confidence, after assessing the questionable identification by Kimber, his criminal convictions, and his biases, that the there is not a reasonable probability that the outcome would have been different with Jones' testimony? Are we comfortable with this verdict, without Jones testifying, that put a young man in prison for life?

Given the totality of the evidence that was introduced at trial, Jones' missing testimony undermines the confidence in the outcome of this case. The State's case against Jenkins was far from unassailable and the verdict is only weakly supported by the record. There is a reasonable probability that the jury would have reached a different verdict had Jones testified. Because of such, Jenkins was denied his Constitutional rights to counsel, and must be awarded a new trial.

[8] Kimber testified: "…we wanted some weed, and I bought the weed." (R.72:10).

E. Jenkins Was Denied His Constitutional Rights To Counsel When His Trial Counsel's Performance Was Deficient and Prejudicial to Jenkins' Defense For Failing To Subpoena And Call Blunt and Moore As Witnesses.

1. Jenkins' counsel's performance was deficient in failing to subpoena and call Blunt and Moore as witnesses.

Jenkins' trial counsel was deficient in failing to subpoena and call Blunt and Moore as witnesses. Blunt needed to be subpoenaed or produced for the mere fact that without his appearance, Moore's testimony, as it relates to Blunt's out of court statement, would be inadmissible. Moore needed to be subpoenaed to introduce Blunt's out of court statement to prove that someone other than Jenkins shot Kimber and Weaver.

Jenkins' counsel did speak to Moore, according to his letters, and he found him to be credible. (R.77:32-33;R.45:34-35; P-Ap.p.160-161). Trial counsel wanted the ADA and police to follow up with this, but in the end, no steps were taken. At the Machner hearing, trial counsel did express concern that putting a fellow inmate on the stand could "blow up in our faces." (R.77:29;P-Ap.p.157). However, if trial counsel found Moore credible, and this individual was able to provide exculpatory evidence regarding the shooter, it was an unreasonable strategy not to call this witness to testify at trial.

Blunt's statement, told through Moore, clearly exonerates Jenkins. There can be no reasonable strategy in failing to call these witnesses, given the importance of the statement and counsel's admission that he found Moore credible. Failure to subpoena and call these witnesses then fell below a reasonable level of criminal defense representation and thus was deficient.

2. Jenkins' Trial Counsel's Deficient Performance in Failing to Subpoena and Call Blunt and Moore Was Prejudicial To Jenkins' Defense.

The court ruled that Blunt's statement, as told through Moore, was inadmissible, thus failure to call Moore was not prejudicial. (R.80:26-27;P-Ap.p.140-141). However, the statement would have been admissible under one of two rules of hearsay, if the proper foundation of getting Blunt to court would have occurred.

Nobody expected Blunt to have a "Perry Mason" moment and blurt out "I did it" on the stand. However, Blunt's presence was needed to use his out of court statement that was overheard by Moore. If subpoenaed, Blunt would have either: 1) denied any involvement in this matter; or 2) invoked his Fifth Amendment rights to remain silent. Either scenario would have made Moore's testimony of what he overheard in Jail Pod 3C admissible. Under the first scenario, Moore's testimony is admissible under §908.01(4)(a)1. as an inconsistent statement to Blunt's testimony. Under the second scenario, Blunt would then be declared as an unavailable witness under §908.04(1)(a), and Moore's testimony about what he overheard would have been admissible under §908.045(1) Wis. Stats.

If Blunt denied making this statement, like he did to Jenkins' investigator, then Moore's testimony (which would have been Blunt's out of court statement) would have been admissible because it is inconsistent with that testimony. If a declarant testifies at trial, and is subject to cross examination concerning the statement, and there is an out of court statement that is inconsistent with the declarant's testimony, then that inconsistent out of court statement is admissible. See Sec. 908.01(4)(a)1 Wis. Stats. (2007-2008). This procedure was shown in State v. Nelis, 2007 WI 58, 300 Wis.2d 415, 733 N.W.2d at 619. In Nelis the witness Steve Stone testified that he didn't remember telling the officers that the victim was a bloody mess and crying, and denied that the defendant was on top of her. Id. at ¶10-11. The State then called the Chief of Police to testify that Steve Stone stated that he did see the defendant on top of the victim and

that she was bleeding. Id. at ¶16. The court held that because Steve Stone was available for cross examination and his testimony was inconsistent with the prior statement, the Chief's testimony of what Steve Stone told him was admissible under section 908.01(4)(a)1. Id. at ¶32-33.

On the other hand, if Blunt would have invoked his right to remain silent, Blunt would be considered unavailable as a witness. See State v. Marks, 194 Wis.2d 79, 533 N.W.2d 2d (1995). His out of court statement then is admissible as a statement against interest under §908.045(4). Statements made by persons who are unavailable as a witness may be admissible, despite being hearsay, if the statement "which was at the time of its making so far contrary to the declarant's pecuniary or propriety interest, or so far tended to subject the declarant to civil or criminal liability…." Sec. 908.045(4) Wis.Stats. (2007-2008). However, when the statement could subject the declarant to criminal liability, and is offered to exculpate the accused, it must be corroborated. Id.

There is no doubt that Blunt's statement, overheard by Moore, would subject Blunt to criminal liability and exculpate Jenkins. The only question is whether the statement is corroborated. A statement is corroborated by "evidence that is sufficient to enable a reasonable person to conclude, in light of all the facts and circumstances, that the statement could be true." State v. Guerard, 2004 WI 85,¶24, 273 Wis.2d 250, 682 N.W.2d 12 (citing State v. Anderson, 141 Wis.2d 653, 416 N.W.2d 276 (1987)). This is a less restrictive standard than the Federal Rules of Evidence, taking into consideration the judge and jury's roles with the defendant's constitutional right to present evidence. Guerard, at ¶25. There is not an independent source requirement for corroboration of the hearsay statement. Id. at ¶31. Thus a court should not conduct "an evaluation of the credibility or weight of the statement against penal interest itself." Id. at ¶32. "[C]orroboration sufficient to meet the Anderson test will usually be 'debatable,' at least to the extent that the term 'debatable' suggests a conflict between two distinct points of view, or, in this context, evidence that points in different directions." Id. at ¶33.

There is no requirement that the corroboration of Blunt's statement be from an independent source. As such, there is

plenty of corroboration of Blunt's out of court statement in this case:

- It is uncontested that Moore, Blunt, and Jenkins were in the same jail pod in March of 2008 for a period of three days. Moore did not know Jenkins or Blunt prior to being placed in the same jail pod as them (R.45:27;P-Ap.p.212);
- Moore's statement of what Blunt said is substantially similar to Jenkins' statement of what Blunt said (Compare R.46 with R.45:27-28;P-Ap.p.207-208);
- Moore has already been sentenced and his appeal period over, thus he can gain nothing from his testimony. (www.wcca.wicourts.gov – Milwaukee County Case 2007 CF 2036). This is quite different than the traditional jail house informant who is testifying in hopes of gaining a mitigating factor at sentencing;
- Moore immediately came forth with this information in March of 2008, as shown by Attorney Backes' March 25, 2008 letter to Attorney Shomin (R.45:28; P-Ap.p.213). This is consistent with how someone would act if they heard someone confess to a heinous crime that a third person is accused of committing – immediately reporting rather than reporting years later;
- Moore provides details about the offense that he could not have known about absent Blunt telling him. (R.45:27-28;P-Ap.p.207-208). These include:
    - Location of shooting;
    - The car took a U-turn;
    - The type of gun (9 mm rifle);
    - Kimber ran between houses;
    - The fact that there was a turf war going on between the 30s and 40s;
- Moore provides a motive for Blunt's actions – revenge for beating up his brother. (R.45:27-28;P-Ap.p.207-208). This was unknown prior to the statement.

An evaluation of the weight of Moore's statement itself, debating the credibility of the statement by questioning the source of Moore's information, should not be conducted. What

this court must do is assess whether a jury, under all the facts and circumstances, **could** find that Blunt's statement is true. See Guerard, at ¶32,¶35&¶42. A jury, given the circumstances of the confession, clearly could find that Blunt's confession is true.

Once admitted into evidence, the jury now has an answer to a question it was sure to have asked – if not Jenkins, then who did this crime? The jury now has the answer and it also has a motive – it was Blunt, and he did it as a revenge for a beating his brother suffered. Given the fact that another person admits that he committed this crime, there is a reasonable probability that the outcome would have been different, especially since, as shown in the previous section, the State's case against Jenkins was far from unassailable. Because of counsel's failure to subpoena and call Blunt and Moore, Jenkins was denied his Constitutional Rights to Counsel, and he must be awarded a new trial.

II. THIS MATTER SHOULD BE REVERSED IN THE INTEREST OF JUSTICE BECAUSE THE JURY DID NOT HEAR CERA JONES TESTIFY THAT JENKINS WAS NOT THE SHOOTER AND THAT SHE SAW HIM MINUTES AFTER THE SHOOTING AND CORY MOORE WOULD HAVE TESTIFIED THAT CHRISTOPHER BLUNT CONFESSED TO THE SHOOTING.

A. Standard of Review.

The Wisconsin Supreme Court, and the court of appeals, have the discretionary power to reverse a judgment in cases where the real controversy has not been fully tried. Sec. 751.06 Wis. Stats.(2009-2010) & Sec. 752.35 Wis. Stats. (2009-2010). No finding of a probability of a different result on retrial is needed if the real controversy has not been fully tried. State v. Henley, 2010 WI 97, ¶81, 328 Wis.2d 544, 787 N.W.2d 350; State. v. Davis, 2011 WI App 147, ¶16, 337 Wis.2d 688, 808 N.W.2d 130. "[T]he real controversy has not been tried if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case, even if this occurred because the evidence or testimony did not exist at the time of trial." Id. (citation omitted). This review is

done considering the totality of circumstances, to determine if a new trial is required to accomplish the ends of justice. Id. Further, Wisconsin courts have granted new trials despite no evidentiary misruling by the court. See Davis; See also Logan v. State, 43 Wis.2d 128,137, 168 N.W.2d 171, 175-176 (1969)[9].

B. Because The Jury Did Not Hear From Jones And Moore, The Real Controversy Was Not Fully Tried In This Matter, And A New Trial Must Be Ordered.

The only issue in this case was the identification of the shooter. Because the jury did not hear from Cera Jones, a neutral eyewitness in the same area as the State's only identification witness, and from Corey Moore, who heard another confess to the shooting, the real controversy in this matter has not been fully tried as to a significant issue.

As noted in the previous section, only two people directly witnessed the shooting: Kimber and Jones. They were standing in the same area when the shooting started. The jury heard from Kimber. They heard how Kimber claims he identified Jenkins as the shooter while bleeding in an alleyway. They heard the officer contradict this testimony. They heard how Kimber picked out Jenkins from a photo lineup the next day. But they did not hear from any other eyewitness as to the identity of the shooters.

The jury knew about Jones as Kimber testified about her presence. (R.72:9-10). The jury was sure to wonder why isn't this person present telling us what she saw? The jury did not have the opportunity to hear from Jones and weigh her testimony against Kimber's testimony. They did not hear that the person standing next to Kimber saw a "clean shaven-baby faced" shooter, something which does not match Jenkins' description. (compare R.45:21 with R.45:31). They did not hear Jones testify that she saw the shooter, at the same angle

[9] "We cannot conclude, however, that the trial judge committed error. The record clearly reveals that the judge did not exclude the proffered testimony. It was trial counsel who elected not to proceed and withdrew the witness….We are satisfied that counsel's confusion resulted in the omission of highly probative evidence, which, if believed, could have materially altered the result of the trial."

as Kimber, and that the shooter was not Jenkins. The jury did not hear that the person who was standing near Kimber did not pick Jenkins out of a police photo lineup. The jury did not get to hear the testimony of Jones, who saw Jenkins on the scene a few minutes after the shooting. (R.77:58;P-Ap.p.186). Without Jones' testimony, can we say that the controversy in this matter, as to the identity of the shooter, was fully tried?

Further, the jury did not hear from the testimony of Moore, explaining that he overheard Blunt confess to being the shooter in this matter. Moore provided the answer to the question the jury was sure to ask: If not Jenkins, then who did this? Without Moore's testimony, the real controversy has not fully been tried.

CONCLUSION

Because Jenkins was denied his Constitutional Rights to counsel, he must be granted a new trial. Further, since the real controversy has not been fully tried, Jenkins must be granted a new trial.

Dated this ___ day of January, 2014.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b)&(c) for a brief and appendix produced with proportional serif font. Brief length is 33 pages and 10,939 words.

Signed:_____
Joseph E. Redding

INDEX TO APPENDIX

Certification on Appendix

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with section 809.19.(2)(a) and that contains:

1. a table of contents;
2. relevant trial court record entries;
3. the findings or opinion of the trial court; and
4. portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 14th day of January, 2014.

By:_____

Joseph E. Redding
State Bar No. 1023263

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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.

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Joseph E. Redding
State Bar No. 1023263

CERTIFICATION OF COMPLAINCE WITH RULE 809.19(13)

I hereby certify that:

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