STATE OF WISCONSIN
IN SUPREME COURT

No. 2012AP46-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JIMOTHY A. JENKINS,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE CARL ASHLEY AND REBECCA F. DALLET, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

AARON R. O'NEIL
Assistant Attorney General
State Bar #1041818

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 266-9594 (Fax)
oneilar@doj.state.wi.us

TABLE OF CONTENTS

Page

CASES CITED

Page

Page

Page

Page

STATUTES CITED

STATE OF WISCONSIN

IN SUPREME COURT

No. 2012AP46-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JIMOTHY A. JENKINS,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE CARL ASHLEY AND REBECCA F. DALLET, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did Defendant-Appellant-Petitioner Jimothy A. Jenkins receive ineffective assistance of trial counsel when his attorney did not

investigate and present the testimony of Cera Jones, a witness to the crimes of which Jenkins was convicted, and evidence that another person named Christopher Blunt confessed to the crimes?

The circuit court answered no.

The court of appeals answered no.

2. Is Jenkins entitled to a new trial in the interest of justice because counsel's failure to present Jones's testimony and evidence that Blunt confessed prevented the real controversy from being fully tried?

The circuit court answered no.

The court of appeals answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This court has already set this case for oral argument. As with any case this court has accepted for review, publication is warranted.

STATEMENT OF THE CASE AND FACTS

As Respondent, the State exercises its option not to include separate statements of the case and facts. *See* Wis. Stat. (Rule) § 809.19(3)(a)2. Any necessary information will be included where appropriate in the State's argument.

SUMMARY OF ARGUMENT

Jenkins challenges his judgment of conviction, entered on a jury's verdict, for one count each of first-degree intentional homicide and first-degree reckless injury, both as a party to the crime and by use of a dangerous weapon, and one count of possession of a firearm by a felon (33; 34). *See* Wis. Stat. §§ 940.01(1)(a); 940.23(1)(a); 939.05; 939.63; 941.29(2). Jenkins was convicted of these crimes for shooting two men, Anthony Weaver and Toy Kimber. Weaver died. Kimber did not and at trial was the only witness to identify Jenkins as the shooter (72:17).

Jenkins argues that his trial counsel, Michael Backes, was ineffective for not investigating and calling to testify at trial a witness to the shooting named Cera Jones (Jenkins' brief at 17-26). Jenkins contends that Jones would have testified that a person not matching his description was the shooter and also would have supported his alibi that he was inside a nearby house during the crimes (Jenkins' brief at 17-26).

Backes was not ineffective for failing to investigate and call Jones as a witness. Backes investigated Jones and decided not to have her testify. The record demonstrates that this was a reasonable strategic decision because Jones's testimony in support of Jenkins would have been undercut by her inconsistent prior statements to police. Additionally, Jones's testimony also would not have contributed much to Jenkins' alibi, and Backes could reasonably decide not to call her for

this purpose. For the same reasons, Jenkins was not prejudiced by Backes' decision not to call Jones.

Jenkins also argues that Backes should have presented testimony that Christopher Blunt confessed he was the shooter to him and Cory Moore while the three of them were housed together in jail (Jenkins' brief at 27-31). The record not only shows that Backes made a reasonable strategic decision not to present this evidence, but also, as the court of appeals held, that he likely would not have been able to introduce it. As such, Backes was not ineffective on this issue.

Finally, Jenkins argues he is entitled to a new trial in the interest of justice because the jury did not hear Jones's testimony and the evidence of Blunt's confession, preventing the real controversy from being fully tried (Jenkins' brief at 31-33). This court should hold that Jenkins may not seek relief in the interest of justice based on Backes' decision not to introduce evidence, and instead, Jenkins' only remedy is an ineffective assistance of counsel claim. Further, even if relief in the interest of justice is available, Jenkins has failed to show that Backes' actions kept the real controversy from being fully tried.

ARGUMENT

I. JENKINS HAS FAILED TO SHOW THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

A. Applicable law and standard of review.

Wisconsin has adopted the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984), for claims of ineffective assistance of counsel. *See State v. Franklin*, 2001 WI 104, ¶ 11, 245 Wis. 2d 582, 629 N.W.2d 289. To prevail under *Strickland*, a defendant must establish both that trial counsel's performance was deficient and that this performance prejudiced his defense. *See Strickland*, 466 U.S. at 687.

To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. In proving that counsel was deficient, the defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. *State v. Swinson*, 2003 WI App 45, ¶ 58, 261 Wis. 2d 633, 660 N.W.2d 12 (citation omitted). The defendant must demonstrate that his attorney made serious mistakes which could not be justified in the exercise of objectively reasonable professional judgment, deferentially considering all the circumstances from counsel's contemporary perspective to eliminate the distortion of hindsight. *See Strickland*, 466 U.S. at 689-91.

Put another way, in order to overcome the presumption that counsel acted within professional norms, the defendant must show that counsel's actions were not a "'sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). A trial court's determination that counsel had a reasonable trial strategy is "virtually unassailable in an ineffective assistance of counsel analysis." *State v. Maloney*, 2004 WI App 141, ¶ 23, 275 Wis. 2d 557, 685 N.W.2d 620. "Judicial scrutiny of an attorney's performance is highly deferential." *State v. Maloney*, 2005 WI 74, ¶ 25, 281 Wis. 2d 595, 698 N.W.2d 583 (citing *Strickland*, 466 U.S. at 689).

To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. *Strickland*, 466 U.S. at 687; *see also State v. Johnson,* 133 Wis. 2d 207, 222, 395 N.W.2d 176 (1986). A defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The critical focus is not on the outcome of the trial but on "'the reliability of the proceedings.'" *State v. Thiel*, 2003 WI 111, ¶ 20, 264 Wis. 2d 571, 665 N.W.2d 305 (quoted source omitted).

An ineffective assistance of counsel claim presents this court with a mixed question of fact and law. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Under this standard of review, the trial court's findings of fact will not be disturbed unless they are clearly erroneous. *Id.*

"However, the ultimate determination of whether the attorney's performance falls below the constitutional minimum is a question of law which this court reviews independently[.]" *Id.*

B. Backes was not ineffective for failing to investigate Jones or call her to testify at trial.

1. Deficient performance.

Jenkins first argues that Backes was ineffective for not conducting a meaningful investigation into Jones, and asserts that had he done so, he would have called her to testify at trial (Jenkins' brief at 17-20). He claims that it is "crystal clear" that Jones was a "crucial witness," and describes her as "neutral" and "disinterested" (Jenkins' brief at 17, 19). In particular, he notes that Jones was standing near the victims when they were shot, described the shooter to police as having a "clean shaven-baby face," a description not matching Jenkins, and told police he was not the shooter (Jenkins' brief at 17, 19). Jenkins also claims that Jones would have been able to testify that she failed to identify Jenkins as the shooter in a photo array containing his picture, though she thought police were pressuring her to pick him (Jenkins' brief at 17-19). Finally, Jenkins contends that Jones would have testified that she saw him exit a house near the scene of the shooting shortly after it happened (Jenkins' brief at 19).

Backes did not perform deficiently. Initially, the record refutes Jenkins' claim that Backes did not investigate Jones. Backes said at the

Machner[1] hearing that he read Jones's statements to the police and believed he had discussed her identification of the shooter with her, although he was unsure (77:15-17, 20-21). The circuit court accepted this testimony and his uncertainty likely resulted from Backes losing his file notes in a flood (77:24; 80:5-7). Jones herself testified that she spoke with Backes twice on the telephone and twice in person about her potential testimony, although in her statement prepared for the postconviction proceedings, she said she never talked to him (45:27; 77:59-60). Backes investigated Jones, and as the court of appeals noted, it "would be hard-pressed to find deficient performance" given this evidence. *Jenkins*, Case No. 2012AP46-CR, ¶ 14.

The record also shows that Backes' decision not to have Jones testify was reasonable. While Jenkins notes that Backes could not specifically recall why he did not call her as a witness, because review of an attorney's performance is objective, this court may rely on reasoning that counsel overlooked or disavowed in assessing whether counsel was deficient (Jenkins' brief at 19; 77:18, 25). *See State v. Kimbrough*, 2001 WI App 138, ¶¶ 24, 28-31, 246 Wis. 2d 648, 630 N.W.2d 752).

Backes testified at the *Machner* hearing that his trial strategy was two-fold, challenging Kimber's identification of Jenkins and establishing an alibi that Jenkins was asleep in a nearby house at the time of the shooting (77:37, 42-43). As noted, Jenkins maintains that Jones's

---

[1] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

testimony would have bolstered both parts of the defense (Jenkins' brief at 17-19).

Although Backes could not remember why he did not call Jones to testify at trial, he indicated that he had difficulties with several potential witnesses because of their inconsistent stories (77:16-19, 25-27). Jones was undoubtedly one of them, as her proposed testimony conflicts with what she told police throughout their investigation, and Backes would have had an adequate reason not to call her at trial. *See Whitmore v. State*, 56 Wis. 2d 706, 714-15, 203 N.W.2d 56 (1973) (counsel acted reasonably in not calling witness who would have been impeached by inconsistent statements).

For example, in her postconviction statement and at the *Machner* hearing, Jones described the shooter as having a "clean shaved baby face, smooth skin, no acne," a description that does not describe Jenkins, who has acne scars (45:26, 32; 77:59, 65). This conflicts with three previous statements she gave police.

- In the first, given on March 23, 2007, the day of the shooting, Jones said she did not see the shooter's face because he was wearing a hood and it was dark (45:20).

- In a later statement, made on April 1, 2007, Jones described the shooter as having a "medium complexion, clean[-]shaven-baby face" (45:22). Yet, with one exception about whether she was dealing drugs the night of the shooting, Jones told police in her second statement that her first statement was the truth (45:23).

- In her third statement, which she gave after viewing the photo array, Jones described the shooter as having a lighter complexion, but admitted that she was more focused on the gun's laser scope than the shooter's face (45:25).

It would have been reasonable for Backes not to call Jones in light of these other statements. Jones's initial inability to describe the shooter would have undercut what she would have said at trial. Further, her testimony that the shooter had no acne would have been suspicious because she never told police this in her second and third statements and a lack of acne is a very unusual way to describe someone. In light of Jenkins' pronounced acne, such a description becomes even more questionable and suggestive of fabrication. Finally, Jones's testimony would have been subject to challenge by her admission that she was more focused on the scope's beam than the shooter.

Jones's testimony would also have been undercut by her inconsistencies about her drug dealing on the night of the shooting. In her second statement, Jones said that Weaver and Kimber approached her on the street and asked to buy marijuana from her (45:22). Jones told police she went into her house to obtain the marijuana and gave one of the men $10 worth (45:22). Jones did not mention that she was selling marijuana in her first statement (45:20). She told police in her second statement that she omitted this information because she was afraid of getting in trouble (45:23). Jones did not mention selling marijuana in her postconviction statement either, but testified at the *Machner* hearing that her

cousin, not she, had obtained the marijuana and sold it (77:57, 62). Backes could reasonably decide not to call Jones based on these inconsistencies.

Further, Jones's testimony about the photo array would have been impeached by the police report generated from it. At the *Machner* hearing, Jones said she was shown six photographs at once, and two were of Jenkins, whom she knew from the neighborhood (77:63-65). Jones testified that she told police she did not recognize the shooter, but identified Jenkins in both photographs (77:63-64).

In contrast, the report states that police showed Jones six photographs in eight folders "in the sequential folder method" (45:24). This involves allowing the witness to open the folders one at a time and view each photo individually (72:52-53). The witness does not look at the photos at the same time (72:52-56). Jenkins' photo was number three in the sequence (45:24). According to the police report, Jones "was unable to make any identification, and stated that she did not recognize anybody in the array, or, notice any individual which looked similar to the shooter" (45:25). This evidence would have directly undercut Jones's description of the array.[2]

---

[2] Jenkins contends that Backes needed to investigate the report's omission that Jones told police Jenkins was not the shooter and that she thought they were pressuring her into identifying him (Jenkins' brief at 19). Apart from not explaining why Jones's subjective beliefs about the police would be in the reports, Jenkins has completely failed to explain what any further investigation would have uncovered. *Thiel*, 264 Wis. 2d 571, ¶ 44 ("'a defendant who alleges a failure to investigate on the part of his or her (footnote continued)

Backes could also reasonably decide not to present Jones in support of Jenkins' alibi. Jones testified at the *Machner* hearing that she saw Jenkins exit a house near the crime scene a few minutes after the shooting (77:58). Backes presented the same evidence through another witness, Daniel McFadden (73:19-65). McFadden testified that he was in the house with a sleeping Jenkins during the shooting and that the two of them went outside after it was over (73:20-22). Backes testified that he thought McFadden was a good witness, and chose to present him alone as the alibi rather than several other potential witnesses who had different stories about Jenkins' activities at the time (77:43). It would have been reasonable for Backes to choose a witness he thought the jury would believe over one like Jones with her inconsistent statements.

Further, McFadden was a better alibi witness than Jones because he could account for Jenkins' whereabouts during the shooting, while Jones could only testify she saw him leave the house three to five minutes after it happened (77:58). As the circuit court and the court of appeals noted, this did not necessarily exclude Jenkins from being the shooter (80:8-9). *Jenkins*, No. 2012AP46-CR, ¶ 18. Backes was not deficient for failing to call Jones to testify.

---

counsel must allege with specificity what the investigation would have revealed'" (quoted source omitted).

2. Prejudice.

For many of the same reasons, Jenkins was not prejudiced by Backes' failure to have Jones testify. Jones's assistance to the defense would have been minimal at best and potentially harmful at worst because of her numerous inconsistencies. As the circuit court and the court of appeals held, in light of these inconsistencies, there is no reasonable probability that the outcome of Jenkins' trial would have been different had Jones testified (80:10-20). *Jenkins*, No. 2012AP46-CR, ¶¶ 15-19. *See also State v. Vennemann*, 180 Wis. 2d 81, 97, 508 N.W.2d 404 (1993) (defendant not prejudiced by counsel's failure to present witness whose testimony would have been easily impeached by other inconsistent testimony).

As noted, Backes' defense strategy was to challenge Kimber's identification of Jenkins as the shooter and establish an alibi. While Jones's testimony would have arguably supported both parts of this defense, it is unlikely that her testimony would have persuaded the jury. Her description of the shooter would have been questionable based on her initial report to the police that she did not see the shooter's face and her later statement that she paid more attention to the beam coming from the gun's scope (45:20, 25). Further, the jury would likely not have believed her specific description of the shooter as lacking acne, a feature that would seem unusual to mention and one that could seem tailored to support Jenkins (45:26; 77:64-65).

Jones's testimony also would have added little, if anything, to Jenkins' alibi. Jones said she saw Jenkins exit a nearby house three to five minutes after the shooting. This testimony would not have accounted for Jenkins' whereabouts during the crime itself and placed him at the crime scene shortly after the shooting. As the court of appeals held, this is not really even alibi testimony. *Jenkins*, No. 2012AP46-CR, ¶ 18 (""[A]n alibi is a defense that at the time of the crime the defendant was so distant from the scene that his participation in the crime was impossible. . . . [A] purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all."") (quoting *State v. Harp*, 2005 WI App 250, ¶ 16, 288 Wis. 2d 441, 707 N.W.2d 304).

Jenkins contends that the circuit court erred in finding he was not prejudiced because it found Jones not credible based on her inconsistencies (Jenkins' brief at 20; 80:10, 18). Specifically, he claims that the court improperly invaded the jury's province by assessing Jones's credibility, and argues that in resolving a claim like his, it is inappropriate for a court to determine whether the jury would have believed a witness in light of her inconsistent statements (Jenkins' brief at 14-15, 20).

Instead, Jenkins asserts, the proper standard for prejudice is whether there is a reasonable probability of a different result had the witness testified (Jenkins' brief at 14-15, 21). The State agrees, but like the court of appeals, fails to see how the circuit court did not apply this standard to Jenkins' claim. *Jenkins*, No. 2012AP46-CR, ¶ 15 n.3. The court made its comment about Jones's credibility as part of its

overall finding that Jenkins was not prejudiced. It stated:

> 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.

(80:18). The court later reiterated this holding (80:20).

Jenkins has not proven any reversible error. Even if the circuit court erred by saying it found Jones not credible, its overall conclusion that it was not probable that the result of the trial would have been different had Jones testified reflects an application of the correct legal standard.

Oddly, Jenkins hardly acknowledges the problems with Jones's proposed testimony, only admitting they exist and would have provided "fodder for cross examination" (Jenkins' brief at 21, 26). But by not addressing their substance, he ignores the basis on which both circuit court and the court of appeals rejected his claim, and has failed to show that either court erred.[3]

---

[3] The State is confused whether Jenkins even thinks the inconsistencies matter to resolving his claim. He appears to have abandoned his court of appeals position that the circuit court was required to assume the jury would have believed Jones's supportive testimony in determining if he was prejudiced, which presumably would also have required the reviewing court to ignore the (footnote continued)

Further, Jenkins overstates the value of Jones's testimony. He argues that he was prejudiced by the absence of Jones because Kimber's identification of him was "less than iron clad" (Jenkins' brief at 21). While it is true that police testified that Kimber initially said he did not know who the shooter was, he disputed this at trial (71:26; 72:34). Kimber also identified Jenkins as the shooter in a photo array (72:56-58). Jones also was unable to initially give a description of the shooter, but later provided one to police. Her testimony would not have undercut Kimber's testimony any more than Backes was able to on cross-examination (72:30-38). Likewise, while Jenkins points to Kimber's numerous prior convictions making him a less believable witness, Jones's credibility would also have been easily undermined, and the jury would not have given much weight to her description of the shooter (Jenkins' brief at 22).

Jenkins contends the jury would likely have believed Jones because she was a "neutral" witness (Jenkins' brief at 24-25). It would have been extraordinarily difficult for Backes to present Jones as neutral in light of her inconsistent statements. Jones knew Jenkins (77:65). Further, if Jones was truly unbiased, there would have

---

inconsistencies (Jenkins' court of appeals' brief-in-chief at 16). His reluctance to acknowledge them in this court suggests that he believes they are, at best, minimally relevant to his claim. Given the foregoing arguments, it is sufficient to say the State believes they are not only very important to determining whether Backes was ineffective for not calling Jones, but essentially determinative of this claim.

been no reason for her description of the events, particularly her description of the shooter, to evolve as it did. If anything, Jones's changing stories and her eventual description of the shooter as someone without Jenkins' distinctive facial features would let a jury conclude that her testimony was improperly influenced to support him.

Finally, Jenkins focuses on the purported weakness of the State's case in arguing he was prejudiced by the absence of Jones's testimony (Jenkins' brief at 21, 26). But whatever the shortcomings in the State's case, they must be balanced against the numerous problems with Jones's testimony. As noted, Jenkins barely acknowledges them in his brief, and Jones did not provide any satisfactory explanation for them at the *Machner* hearing. Jenkins has not established he was prejudiced.

C. Backes was not ineffective for failing to present evidence of Blunt's confession.

1. Deficient performance.

Next, Jenkins contends Backes should have subpoenaed and presented Blunt and Moore as witnesses at trial to testify about Blunt's jailhouse confession to the crimes (Jenkins' brief at 27-31). Blunt denied confessing to Jenkins' postconviction investigator (45:30). Jenkins maintains that if Blunt did the same at trial, or invoked his privilege against self-incrimination, Moore could have testified about the confession, which would

have been admissible as a statement against interest or a prior inconsistent statement (Jenkins' brief at 28-30). *See* Wis. Stat. §§ 908.045(1); 908.01(4)(a)1.

Backes did not perform deficiently. He learned about Blunt's alleged confession from Jenkins and took steps to obtain permission from Moore's attorney to speak to Moore about it (77:27-35). Backes also wrote several letters to the prosecutor asking him to have law enforcement interview Moore (45:34-35, 37; 77:29-30, 49). Backes testified that Moore's attorney prevented detectives from doing so (77:30, 33). The prosecutor confirmed this, saying that Moore's counsel would not approve the meeting because Moore was in the postconviction stage of his homicide conviction (56:4; 77:11-12).

Backes also testified that although he was aware that Blunt had supposedly confessed and Jenkins thought it was "the holy grail, so to speak," he had strong reservations about presenting the evidence (77:28-30, 46-47). Backes indicated that he wanted to follow through with the evidence, but "didn't want to . . . put a bunch of stuff into evidence that's gonna blow up in our face or make the jury think we're trying to blow smoke at them" (77:28-29). He said it would be "extremely dangerous" to present evidence that Jenkins just happened to be in jail with the real shooter who confessed to him in front of a witness (77:46-47). Backes said that he thought the jury would view the evidence unfavorably and that it was not key to the defense (77:30). He also testified that he was "hoping against hope" that something would come out of the State's interview

with Moore, but that his attorney prevented it from happening (77:30).

Backes' actions were reasonable. He investigated Blunt's alleged confession, and was able to speak with Moore about it. Backes then concluded that the evidence did not contribute directly to the chosen defense. He also determined that there was a significant risk that the jury would believe the testimony was implausible and find the rest of the defense less credible. Backes investigated this evidence, considered presenting it, and decided it was not worth it. This is exactly the kind of reasoned trial strategy to which appellate courts are required to defer. *See State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted) (court does not second-guess trial counsel's selection of tactics in face of alternatives that counsel has weighed).

Jenkins argues that Backes was deficient because he testified that he found Moore "credible" (Jenkins' brief at 27; 45:35-36; 77:32-33). But simply because Backes might have, as he said, thought Moore would be "a good witness possibly," does not mean he was obligated to call him (77:32-33). Counsel is not required to raise every nonfrivolous defense. *See Knowles v. Mirzayance,* 556 U.S. 111, 127 (2009). And counsel cannot be judged on a "'nothing to lose'" standard for failing to present evidence. *Id*. at 122. Backes did not perform deficiently by not introducing evidence of Blunt's confession.

2. Prejudice.

Jenkins also was not prejudiced by Backes' actions.

Initially, there was no prejudice because, as both the circuit court and the court of appeals held, Backes would not have been able to introduce any evidence of Blunt's supposed confession (80:23-24, 26-27). *Jenkins*, No. 2012AP346-CR, ¶¶ 21-22.

The parties agreed at the *Machner* hearing that Blunt would have denied confessing if he was called to testify (77:8-9). This would have left it to Moore to testify about Blunt's confession, but Moore's attorney likely would not have let him do so. As noted, Backes testified that while he was initially allowed to meet with Moore, his attorney eventually put a stop to any further investigation (77:30). The circuit court found that Moore's counsel "was advising Mr. Moore not to say anything," "wouldn't have him interviewed," and "didn't want him to be available" (80:23-24). Moore's statement submitted with Jenkins' postconviction motion does not indicate that he was willing to appear at trial (45:28-29). If there was no one to testify that Blunt confessed, Jenkins could not be prejudiced.

Jenkins barely acknowledges the circuit court's reasoning in his brief and completely ignores the court of appeals' decision on this issue (Jenkins' brief at 8-9, 27-31). He also does nothing to try to show why the courts were wrong (Jenkins' brief at 27-31). Jenkins has waived any challenge to the courts' decisions by not trying to prove they were in error. *See State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, ¶ 27 n.9, 682 N.W.2d 433.

Instead, Jenkins devotes most of his argument to trying to show that Moore's testimony would be admissible as a prior inconsistent statement or a statement against interest (Jenkins' brief at 28-31). The State assumes for the purposes of resolving this issue that had Backes wanted and been able to introduce Moore's testimony, it would have been admissible under the rules of evidence.

Further, even if Backes had presented this evidence, it is not reasonably probable that the result of Jenkins' trial would have been different. The jury would have rejected Blunt's supposed confession as implausible.

According to Moore's postconviction statement, Blunt approached both Moore and Jenkins while they were sitting at a table in the jail (45:28; 46:1). Blunt said he recognized Jenkins because of his face and acne scars (45:28; 46:1). He then asked Jenkins where he was from (45:28; 46:1). Blunt next asked him "Do you fuck with those niggers in the 4's?" meaning gangs in the streets numbered in the forties (45:28). Jenkins replied "I know them but I don't fuck with them" (45:28). Blunt then said "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. They beat up my little brother. Gave him a black eye" (45:28). Jenkins then asked what Blunt was doing when he shot the men, and Blunt replied that he was riding with his brother in a stolen car when he saw Weaver and Kimber (45:29). He had his brother make a u-turn, and he then got out of the car and shot them with a 9-millimeter rifle (45:29). Blunt

said Weaver went down right away, and Kimber ran between the houses, "but I got him" (45:29).[4]

Jenkins' postconviction investigator met with Blunt (45:30). He denied knowing Weaver, Kimber, or Jenkins and did not recognize Jenkins from a photo (45:30). Blunt also denied knowing anything about the shooting (45:30).

Jenkins cannot show that the outcome of his trial would likely have been different had the jury heard this evidence. Blunt's alleged confession is unreliable. The jury would have learned that Blunt, Moore, and Jenkins were in jail together, and that Blunt, supposedly recognizing Jenkins because of his distinctive acne as someone he met at a party, confessed that he killed one man and injured another for no other reason than he wanted to "keep it real." The implausibility of the statement would have led the jury to ignore it.

Jenkins argues that the confession was reliable because Moore said Blunt gave details

---

[4] Jenkins' affidavit about the conversation recounts Blunt's confession differently than Moore's statement (46). Specifically, Jenkins said he answered Blunt's question about where he was from by saying he "hung out near 38th Street near Garfield and Lloyd" (46:1). Blunt then asked Jenkins if he knew Kimber and Weaver and messed with them, and he said he knew them but did not mess with them because they were "'up in the fours'" (46:1). Jenkins also said that Blunt asked if he messed with anyone in this area, and Jenkins said he did not (46:1). Blunt's last question to Jenkins was if he had heard what happened to Kimber and Weaver (46:1). Jenkins said he did, and Blunt said "'I'm gonna keep it real with you, I shot them'" (46:1-2).

about the crimes, including the location, the car taking a u-turn, the type of gun, and that Kimber ran (Jenkins' brief at 30; 45:28-29). But the jury could have easily concluded that Jenkins provided Moore with all of this information.

Jenkins also claims the confession is reliable because it gives Blunt a motive for the shooting, specifically, Weaver and Kimber beating up Blunt's little brother (Jenkins' brief at 30). Jenkins has produced nothing that would verify this happened (Jenkins' brief at 30). His postconviction investigator noted that Blunt had three brothers, but did not apparently follow up with any of them about whether they knew the victims or had been attacked by them (45:30).

Finally, the jury would likely not have believed Moore's testimony because at the time he reported Blunt's confession, he was in jail facing a homicide charge (77:11). While Jenkins claims that Moore's postconviction statement is reliable because his conviction is now final and can gain nothing from testifying, the same would not be true had he testified at trial (Jenkins' brief at 30). Had Backes called Moore to testify, the State could have argued he fabricated Blunt's confession to seek consideration on his own homicide charge.

As noted, most of Jenkins' prejudice argument is dedicated to proving that Moore's testimony would have been admissible under the hearsay rules (Jenkins' brief at 28-30). Jenkins only briefly addresses whether there is a reasonable probability that the evidence would have changed the trial's outcome (Jenkins' brief at 31). He argues Blunt's confession would necessarily have affected the outcome in light of

the deficiencies in the State's case, but he does not fully develop this argument (Jenkins' brief at 31). This court should decline to address it. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Jenkins has not proven he was prejudiced.

II. JENKINS IS NOT ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE.

A. Applicable law.

Jenkins next asks this court to grant him a new trial in the interest of justice based on the jury not having heard Jones's testimony or evidence of Blunt's confession (Jenkins' brief at 31-33).

This court has discretionary power to reverse a criminal conviction in the interest of justice. *See State v. Burns*, 2011 WI 22, ¶ 24, 332 Wis. 2d 730, 798 N.W.2d 166. This power arises from both statute and common law. *Id.* ¶ 24 n.17. *See* Wis. Stat. § 751.06.

Reversal in the interest of justice is permitted in two situations: (1) when the real controversy has not been fully tried; and (2) when it is probable that justice has miscarried. *Burns*, 332 Wis. 2d 730, ¶ 24 (citation omitted).

The first situation occurs when the jury is erroneously not given an opportunity to hear important testimony that bore on an important issue in the case or when the jury had before it improperly admitted evidence that so clouded a crucial issue that it cannot be said the real

controversy was fully tried. *State v. Doss*, 2008 WI 93, ¶ 86, 312 Wis. 2d 570, 754 N.W.2d 150; *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). The court can grant this relief in this situation without finding a probability of a different result on retrial. *Hicks*, 202 Wis. 2d at 160.

In contrast, for this court to grant relief in the second situation, when justice has miscarried, it must conclude there would be a substantial probability of a different result on retrial. *Burns*, 332 Wis. 2d 730, ¶ 24 (citation omitted).

This court's power to reverse in the interest of justice is limited to "'exceptional cases.'" *Id.* ¶ 25 (quoted sources omitted). The court should exercise this power "'sparingly and with great caution.'" *Id.* In determining whether to grant a new trial in the interest of justice, this court examines the totality of the circumstances to determine if such extraordinary relief is warranted. *Id.* (citation omitted).

B. New trials in the interest of justice should not be available when the basis for the claim is trial counsel's decision about the admission of evidence.

In denying Jenkins' request for a new trial in the interest of justice based on the jury not hearing Jones's testimony and evidence of Blunt's confession, the court of appeals held:

> [D]iscretionary reversal "based on a determination that the jury was denied the

> opportunity to hear important evidence" refers to a legal, evidentiary error by the circuit court. *See State v. Burns*, 2011 WI 22, ¶45, 332 Wis. 2d 730, 798 N.W.2d 166. The error in this case is not premised on an incorrect evidentiary ruling but, rather, on trial counsel's purported ineffectiveness. Thus, there is no basis for a new trial in the interest of justice based on the fact that the jury did not hear testimony from Jones, Blunt or Moore. The circuit court properly denied the motion.

Jenkins, Case No. 2012AP46-CR, ¶ 24.[5]

This court should reach the same conclusion and hold that a defendant may not seek a new trial in the interest of justice based on the real controversy not being fully tried because the jury did or did not hear evidence when trial counsel made a strategic decision regarding the introduction of that evidence. An ineffective assistance claim should be the defendant's only remedy in these situations and if that claim fails, there should be no other basis to allow an appellate court to grant a new trial.

---

[5] Jenkins sought review in this court on the grounds that the language from *Burns* relied upon by the court of appeals conflicted with its decision in *State v. Davis*, 2011 WI App 147, 337 Wis. 2d 688, 808 N.W.2d 130 (Jenkins' petition for review at 23-24). Jenkins does not address *Burns* in his brief, and does not discuss the conflict raised in his petition beyond citing *Davis* and *Logan v. State*, 43 Wis. 2d 128, 168 N.W.2d 171 (1969), for the proposition that reversals in the interest of justice can be granted "despite no evidentiary misruling by the court" (Jenkins' brief at 32).

The State acknowledges that in *State v. Williams*, 2006 WI App 212, 296 Wis. 2d 834, 723 N.W.2d 719, the court of appeals held that a claim that could be framed as ineffective assistance of counsel can also provide the basis for a claim that the real controversy was not fully tried. *See id.* ¶ 17. Among the errors alleged in that case was that counsel should have presented existing evidence to the jury. *Id.* ¶¶ 23-32. Under *Williams*, Jenkins' request for a new trial in the interest of justice would appear to be appropriate. *See also State v. Jeffrey A.W.*, 2010 WI App 29, ¶¶ 13-22, 323 Wis. 2d 541, 780 N.W.2d 231 (granting a new trial based on the real controversy not being fully tried because evidence was not presented at trial, even though trial counsel did not perform deficiently in not discovering the evidence).

Nonetheless, two decisions of this court call *Williams* into question. The first is *Burns*. There, this court said that when discretionary reversal is sought on the grounds that the jury was erroneously denied the opportunity to hear important evidence, "erroneous denial" refers to a legal evidentiary error by the circuit court. *Burns*, 332 Wis. 2d 730, ¶ 45 (internal quotation marks omitted). This language suggests that a claim that counsel made an ineffective decision regarding the admission of evidence cannot also serve as the basis for a claim that the real controversy was not fully tried.

The second case is *State v. Mayo*, 2007 WI 78, 301 Wis. 2d 642, 734 N.W.2d 115. There, the defendant argued his trial counsel was ineffective, for among other things, deciding not to present evidence corroborating the defendant's testimony.

Id. ¶ 57. He also argued he was entitled to a new trial in the interest of justice based on counsel's failures. *Id.* ¶ 60. This court declined to address the defendant's claim that the real controversy was not fully tried because of counsel's actions, stating "the *Strickland* test is the proper test to apply in the context of an ineffective assistance of counsel claim." *Id.* Like *Burns*, *Mayo* suggests that it is inappropriate for a defendant to seek relief in the interest of justice based on counsel's alleged improper decision to admit or exclude evidence.

Further, as this court's decisions make clear, the real controversy is not fully tried when evidence is *erroneously* presented to or kept from the jury. *See State v. Avery*, 2013 WI 13, 345 Wis. 2d 407, ¶ 38 n.18, 826 N.W.2d 60; *Burns*, 332 Wis. 2d 730, ¶ 25; *Doss*, 312 Wis. 2d 570, ¶ 86; *Hicks*, 202 Wis. 2d at 160. Arguably, this language is referring to trial court error. Further, assuming that this language does include errors by trial counsel, a defendant who has shown such error has necessarily proven deficient performance under *Strickland*. If it were otherwise, counsel's legitimate, strategic decisions would improperly be labeled "erroneous."

A much larger problem arises when comparing *Strickland* and "real controversy" claims in terms of prejudice. To obtain a new trial based on the real controversy not being fully tried, the reviewing court does not have to conclude that there is a probability of a different result at a new trial. *Hicks*, 202 Wis. 2d at 160. In contrast, to show prejudice under *Strickland*, the defendant must prove a reasonable probability of a different outcome at trial had counsel not

performed deficiently. *Strickland*, 466 U.S. at 694. *Strickland* is not intended to be an easy standard to meet. *See Harrington v. Richter*, __ U.S. __, 131 S. Ct. 770, 788 (2011) ("'[s]urmounting *Strickland's* high bar is never an easy task.'") (quoted source omitted). The likelihood of a different result must be substantial, not just conceivable. *Id*. at 792.

Because of this difference, the "real controversy" alternative of the interest-of-justice test cannot reasonably be construed as articulating any *lesser* standard of prejudice than *Strickland*. If it were so interpreted, it would render *Strickland* a nullity. The "real controversy" standard is not designed to supplant pure claims of ineffective assistance of defense counsel in criminal cases. To conclude otherwise would allow a defendant to obtain a new trial in the interest of justice even though his identical ineffective assistance claim failed. As this court has held, a defendant may not seek a new trial in the interest of justice based on a claim the appellate court has already rejected. *See Doss*, 312 Wis. 2d 570, ¶ 87, and *Allen*, 274 Wis. 2d 568, ¶ 35 (both citing *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976)). This court should hold relief in the interest of justice is not available to Jenkins.

C. Backes' failure to introduce Jones's testimony or evidence of Blunt's confession did not prevent the real controversy from being fully tried.

If this court considers the merits of Jenkins' request for a new trial in the interest of justice, it must deny him relief because the real controversy was fully tried.

The real controversy at trial was whether Kimber correctly identified Jenkins as the shooter and if Jenkins was sleeping during the shooting. These issues were fully explored. Kimber testified that he saw Jenkins, whom he knew from the neighborhood, shoot him and Weaver (72:17-18). Backes cross-examined Kimber and challenged his testimony that he immediately identified Jenkins as the shooter to police (72:30-38, 45-46). Backes also presented evidence from McFadden to support Jenkins' testimony that he was sleeping in a nearby house during the shooting (73:19-26, 70-73).

The absence of Jones's testimony and evidence of Blunt's confession did not prevent these issues from being fully tried. Jenkins argues that the jury must have wondered what Jones saw because Kimber testified that he bought marijuana from her right before the shooting (Jenkins' brief at 32). The jury would have heard from Jones such an inconsistent story about what she saw and did the night of the shootings that it would likely have discounted her testimony in its

entirety. Whatever the flaws in Kimber's identification of the shooter, Jones's testimony had far more. Likewise, Jones's inconsistencies would not have helped Jenkins' alibi, which again, her testimony did not even directly support.

Further, contrary to Jenkins' conclusory suggestion, the absence of evidence of Blunt's confession also does not warrant a new trial (Jenkins' brief at 33). There was no evidence of the confession that Backes could have introduced and the State fails to see how its omission from trial could somehow have harmed Jenkins. Further, even if Backes could have presented this evidence, as argued, it would have distracted the jury from the real issues in controversy and was not believable.

Put another way, there is no reason to believe that had Backes introduced the evidence at issue, the result of Jenkins' trial would have been any different. Admittedly, Jenkins does not have to show a probability of a different result to demonstrate that the real controversy was not fully tried. But this does not mean that it is irrelevant that the evidence he argues should have been introduced not only had serious flaws, but likely would have harmed the defense Backes chose to pursue. In resolving this claim, this court should not ignore that Jenkins most likely would have still been convicted had Backes presented Jones's testimony and evidence of Blunt's confession, and conclude that the real controversy was fully tried. *See Burns*, 332 Wis. 2d 730, ¶ 25 (court considers totality of circumstances in assessing a request for new trial in the interest of justice).

CONCLUSION

Upon the foregoing, the State respectfully requests that this court affirm the decision of the court of appeals.

Dated this 4th day of February, 2014.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

AARON R. O'NEIL
Assistant Attorney General
State Bar #1041818

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 266-9594 (Fax)
oneilar@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,435 words.

Dated this 4th day of February, 2014.

_____

AARON R. O'NEIL
Assistant Attorney General

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 4th day of February, 2014.

_____

AARON R. O'NEIL
Assistant Attorney General