STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2012AP46-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.

JIMOTHY A. JENKINS,
Defendant-Appellant.

APPEAL FROM 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

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The parties' briefs will fully develop the issues presented, which can be resolved by applying well-established legal principles.

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. Relevant information will be included where appropriate in the State's argument.

ARGUMENT

Defendant-Appellant Jimothy A. Jenkins appeals a judgment of conviction for one count each of first-degree intentional homicide and first-degree reckless injury, both as a party to the crime and while armed with 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 by a jury 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 also appeals an order denying his motion for postconviction relief, in which he alleged that his trial counsel, Michael Backes, was ineffective for not investigating and presenting Cera Jones as a witness at trial. Jenkins alleged that Jones, who saw the shooting, would have testified that Jenkins was not the shooter and she saw him exit a nearby house shortly after the shooting (45:9-11; 58:8). Jenkins further argued that Backes should have presented evidence that Christopher Blunt confessed that he was the shooter to Jenkins and another man while they were all in jail (45:12-14). Jenkins also sought a new trial in the interest of justice based on these omissions (45:14). The circuit court denied

Jenkins' motion after a hearing (58:8; 77; 80). *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

On appeal, Jenkins reasserts the claims from his postconviction motion. This court should affirm. Contrary to Jenkins' assertions, the record reveals that Backes investigated Jones, and also shows that he acted reasonably in not calling her as a witness because she would have been impeached by her inconsistent statements to the police about the shooting. Backes also reasonably decided not to introduce the evidence of Blunt's alleged confession because he concluded the jury would find the evidence implausible. For largely the same reasons, Jenkins was not prejudiced by Backes' failure to present any of this evidence. Finally, because Jenkins is not entitled to relief on his ineffective assistance claims, his related interest of justice claim should also fail.

I. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INVESTIGATE OR CALL CERA JONES AS A WITNESS OR TO PRESENT EVIDENCE THAT CHRISTOPHER BLUNT CONFESSED TO THE SHOOTING.

A. Applicable law and standard of review and a note on Jenkins' proposed prejudice standard.

To prevail on a claim of ineffective assistance of trial counsel, a defendant must establish both that trial counsel's performance

was deficient and that this performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). 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.*

Jenkins asserts that in assessing prejudice for counsel's failure to call a witness at trial, a court should not determine whether that witness's testimony would have been credible and believed by the jury (Jenkins' brief at 13-16). Instead, he argues "the inquiry is assuming the jury believed the witness, would there be a reasonable probability that the outcome would have been different" (Jenkins' brief at 16). Allowing a circuit court to find that a witness was not believable, Jenkins claims, robs the jury of its role as the arbiter of witness credibility (Jenkins' brief at 15).

This court should not accept Jenkins' proposed standard. Initially, the federal cases on which he relies for this proposition do not support it. Instead, they hold that, in the context of a federal habeas corpus proceeding challenging a state criminal conviction, a state court's determination that an uncalled witness was not credible is a legal conclusion under *Strickland's* prejudice prong rather than a factual finding. *See Ramonez v. Berghuis*, 490 F.3d 482, 490 (6th Cir. 2007); *Vasquez v. Bradshaw*, 522 F. Supp. 2d 900, 926-27 (N.D. Ohio 2007) (applying *Ramonez*). In federal habeas cases, state court factual findings carry a presumption of correctness but state court legal conclusions do not. *Compare* 28 U.S.C. § 2254(d)(1) and 28 U.S.C. § 2254(e)(1). The cases do not establish that a court reviewing an ineffective assistance claim must assume that a jury would have believed an uncalled witness.

Further, while Jenkins argues that allowing a court to determine that the jury would not have believed an uncalled witness usurps the jury's role in determining witness credibility, Jenkins' proposed standard does the same. Requiring a court to assume that the jury would have believed the witness leaves no room for the jury's prerogative to determine whether a witness is credible.

Jenkins suggests that this court apply standards governing other legal issues to determine whether he was prejudiced, but this court should not do so (Jenkins' brief at 15-16). The law this court should apply is the well-established *Strickland* prejudice standard, which asks whether there is a reasonable probability of a different result had counsel performed as the defendant claims he should have. In making this

determination, courts are not required to assume that the jury would believe an uncalled witness. Instead, the court must assess whether it is reasonably probable that the result of the trial would have been different had the witness been called. This includes assessing whether the witness's testimony would have been subject to impeachment by inconsistent testimony. *See State v. Vennemann*, 180 Wis. 2d 81, 97, 508 N.W.2d 404 (1993). This court should not assume that the jury would have believed the uncalled witnesses.

B. Counsel was not ineffective for failing to investigate Jones or have her testify at trial.

1. Deficient performance.

Jenkins first claims that Backes should have investigated, subpoenaed, and called Cera Jones to testify at his trial (Jenkins' brief at 16-26). Jones witnessed the shooting, and Jenkins maintains that she would have testified that he was not the shooter (Jenkins' brief at 18-19). Additionally, Jenkins argues that Jones would have testified that she did not identify Jenkins as the shooter in a police photo array in which he was included and told police he was not the shooter, although they pressured her to implicate him (Jenkins' brief at 18-19). Jenkins also asserts that Jones would have testified, as she told police, that the shooter had a "clean shaven baby face," a description not matching Jenkins (Jenkins' brief at 19). Finally, Jenkins claims that Jones would have said that she saw him exit a house near the crime scene shortly after the shooting (Jenkins'

brief at 19). Jones testified consistently with these assertions at the *Machner* hearing (77:53-59).

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). Jenkins maintains that Jones's testimony would have bolstered both prongs (Jenkins' brief at 18-20).

Backes could not remember why he did not call Jones to testify at trial, but he indicated that he had difficulties with several potential witnesses because of their inconsistent stories (77:18; 25).[1] 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

[1]While Jenkins claims that Backes was ineffective for not investigating Jones and subpoenaing her for trial, the record does not support his claims. Backes said he read Jones's statements to the police and believed he had discussed her identification of the shooter with her, although he was unsure (77:16-17, 20-21). Jones 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; 77:60). The circuit court accepted Backes' testimony (80:6-7). Further, there does not appear to have been any reason for Backes to subpoena Jones, if as she said at the *Machner* hearing, she was willing to testify and had appeared at several earlier trial dates (77:54-55). Jones also indicated in her postconviction statement that she received a subpoena for trial (45:27).

been impeached by inconsistent statements); *State v. Koller*, 2001 WI App 253, ¶ 8, 248 Wis. 2d 259, 635 N.W.2d 838 (reviewing court may find counsel not deficient based on reasons that counsel overlooked).

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). In her first statement to police, 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, taken on April 2, 2007, Jones described the shooter as having a "medium complexion, clean[-]shaven-baby face" (45:22). With one exception about whether she was dealing drugs, Jones told police in her second statement that her first statement was the truth (45:23). In a third statement given after viewing a 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 inconsistencies. Jones's initial inability to describe the shooter would have undercut her trial description. Further, her testimony that the shooter had no acne would have been suspicious because she never told police this when she described the shooter in her second and third statements and a lack of acne is an unusual way to describe someone. In light of Jenkins' pronounced acne, such a description becomes even more questionable and suggestive of

fabrication. Finally, Jones' description 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. She told police 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 at the *Machner* hearing, said 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.

Backes could also reasonably decide not to present Jones's testimony that she saw Jenkins exit a house near the crime scene a few minutes after the shooting because he 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 and 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 the shooting (77:58). As the circuit court noted, this did not necessarily exclude Jenkins from being the shooter (80:8-9).

Jenkins maintains that Backes should have called Jones because, unlike McFadden, who was Jenkins' friend, she was an unbiased neutral party (Jenkins' brief at 19-20). But it would have been

extraordinarily difficult for Backes to present Jones as neutral in light of her inconsistent statements. If Jones was truly unbiased, there would have been no reason for her story to the police, particularly her description of the shooter, to evolve as it did. If anything, Jones's changing description would let a jury conclude that her testimony was improperly influenced to support Jenkins. Backes did not act unreasonably in failing to present Jones's testimony at trial.

2. Prejudice.

For many of the same reasons, Jenkins was not prejudiced by his 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 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). *See Vennemann*, 180 Wis. 2d at 97 (defendant not prejudiced by counsel's failure to present witness whose testimony would have been impeached).

As noted, Backes' defense 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).

Jenkins argues that he was prejudiced by the absence of Jones because Kimber's identification of Jenkins was "less than iron clad" (Jenkins' brief at 21-22, 24-25). While it is true that Kimber initially told police he did not know who the shooter was (71:23), he subsequently identified Jenkins as the shooter in a photo array (72:56-58). Presenting someone who also initially said she was unable give a description of the shooter but later was able to do so would not have undercut Kimber's testimony any more than Backes already was able to on cross-examination. 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. It is unlikely that the jury would have given much weight to Jones's description of the shooter.

Further, Jones's testimony 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. Jones's testimony would not have accounted for Jenkins' whereabouts during the crime itself and placed him at the crime scene shortly after the shooting. It is questionable whether her testimony would even be considered evidence of an alibi. *See State v. Harp*, 2005 WI App 250, ¶ 16, 288 Wis. 2d 441, 707 N.W.2d 304 (alibi's "'only design is to prove that the defendant, being at another place at the time, could not have committed the offense charged.'" "'Since an alibi derives its potency as a defense from the fact that it involves the physical

impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all'" (quoted source and parentheses omitted).

Jenkins argues that his alibi suffered from Jones's absence (Jenkins' brief at 25-26). He notes that McFadden gave an inconsistent statement to the police and had prior convictions, and claims that Jones's status as a "neutral" witness would have let the jury overlook these problems and accept his alibi (Jenkins' brief at 25-26). But, as already argued, the jury would have viewed Jones as anything but a neutral witness in light of her inconsistencies, and her evolving description of the shooter could give rise to the belief that she was lying to protect Jenkins. Jenkins was not prejudiced by Backes' failure to attempt to use Jones to bolster McFadden's testimony.

Finally, whatever Jones might have been able to contribute to either prong of Jenkins' defense would have been undermined by her inconsistent statements about whether she sold marijuana on the night of the shooting. If Jones had testified at trial like she did at the *Machner* hearing, her assertion that her cousin sold the marijuana would have been impeached by her earlier admission that she sold it (77:62). The jury would likely have viewed Jones's testimony with suspicion in light of these conflicting statements. Jenkins was not prejudiced by Jones's absence from his trial.

C. Counsel was not ineffective for failing to introduce evidence that Blunt confessed to the shooting.

1. Deficient performance.

Next, Jenkins contends Backes should have presented evidence that Christopher Blunt confessed to him and Cory Moore while the three of them were housed together in jail (Jenkins' brief at 27-31). Blunt denied confessing to Jenkins' postconviction investigator (45:30). Jenkins maintains that if Blunt denied confessing or invoked his privilege against self-incrimination at trial, Moore could have testified about his confession, which would have been admissible as a statement against interest or a prior inconsistent statement (Jenkins' brief at 27-29). *See* Wis. Stat. §§ 908.045(1); 908.01(4)(a)1.

Backes was aware of Blunt's purported confession (77:27-35). Specifically, Jenkins had informed him about Moore, and Backes took steps to obtain permission from Moore's attorney to speak to him (77:27-28). Backes also wrote several letters to the prosecutor asking him to arrange an interview of Moore (45:34-35, 37; 77:29-30, 49). Backes testified that Moore's attorney prevented the detectives from speaking to his client (77:30, 33). The prosecutor confirmed this, as did Moore's counsel (56:4; 77:11-12).

Backes also testified that although he was aware of the purported confession 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 another 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 not believe the testimony as implausible and lead it to 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 this court is required to defer. *See State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted) (this 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 indicated that he found Moore "credible" (Jenkins' brief at 27; 45:35-36; 77:32-33). But simply because Backes might have, as he

testified, thought Moore would be "a good witness possibly," does not mean he was obligated to call him (77:32-33). Counsel is not obligated to raise every nonfrivolous defense. *See Knowles v. Mizrayance,* 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 for failing to have Blunt and Moore testify.

2. Prejudice.

Similarly, this court should hold that Jenkins was not prejudiced by the absence of Blunt and Moore from trial. It is not reasonably probable that the jury would have believed that Blunt confessed to being the shooter because it was implausible. As such, presenting this evidence would have had no impact on the jury's verdict.

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 replied "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).[2]

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).

It is not reasonably probable that this evidence would have affected the outcome of Jenkins' trial. Initially, it is unlikely that Backes would have been able to introduce the statement. Blunt would have denied confessing, as he did to Jenkins' investigator and as the parties agreed at the *Machner* hearing (77:9). 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. Moore's statement does not indicate that he was willing to testify for Jenkins (45:28-29). Jenkins could not have been prejudiced if the jury did not hear the evidence.

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

Further, even had Moore testified, Jenkins cannot show that it would have affected the outcome of his case. Blunt's purported 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.

In addition, the confession's contents show it is not reliable. Moore said that Blunt gave details about the crimes, including the location, the car taking a u-turn, the type of gun, and that Kimber ran (45:28-29). But Jenkins could have provided Moore with all of this information. While Jenkins notes that Moore's statement also contains a motive for the shooting, that Weaver and Kimber beat up Blunt's little brother, Jenkins has produced nothing that would verify whether 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 (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, that is not true regarding his statements about Blunt made before Jenkins' trial. These statements would have been at issue had Backes called Moore to testify, and the State

could have argued he fabricated them to seek consideration on his own homicide charge.

Most of Jenkins' prejudice argument is dedicated to proving that Moore's testimony would have been admissible under the hearsay rules, something the trial court doubted (Jenkins' brief at 28-30; 80:20-26). Jenkins only briefly addresses whether there is a reasonable probability that the evidence would have changed the trial's outcome (Jenkins' brief at 30). 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 30). 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.

Jenkins also argues that this court should give him a new trial in the interest of justice under Wis. Stat. § 752.35 because the absence of Jones, Blunt, and Moore from trial kept the real controversy from being fully tried (Jenkins' brief at 31-33). This court should reject this claim.

In order to establish that the real controversy has not been fully tried, the defendant must show "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." *State v. Darcy N.K.*, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting

State v. Hicks, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). The authority to grant a new trial when the real controversy has not been fully tried does not require a showing that a new trial would likely produce a different outcome. *See State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719.

As a matter of law, Jenkins is not entitled to a new trial in the interest of justice. Discretionary reversal on the grounds that the jury was denied the opportunity to hear evidence only applies when the circuit court errs in not admitting the evidence. *See State v. Burns*, 2011 WI 22, ¶ 45, 332 Wis. 2d 730, 798 N.W.2d 166. The jury did not hear Jones', Blunt's, and Moore's testimony because Backes did not present it. This court should limit its consideration of their missing testimony to the ineffective assistance of counsel context. *See State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115.

Further, the real controversy was fully tried. The issue at trial was whether Kimber correctly identified Jenkins as the shooter and if Jenkins was sleeping during the shooting. These issues were fully explored. While it is true that Kimber's identification had some flaws, Jones's description of the shooter had more. Further, her testimony did not directly support Jenkins' alibi, and again, was questionable given her inconsistencies. Finally, Blunt's alleged confession would have distracted the jury from the real issues in controversy, and in any event, was not believable. Jenkins is simply trying to aggregate his unsuccessful ineffective assistance claims into another ground for relief. This he cannot do.

"Zero plus zero equals zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

CONCLUSION

Upon the foregoing, the State respectfully requests that this court affirm the circuit court's judgment of conviction and order denying Jenkins' motion for postconviction relief.

Dated this 31st day of May, 2012.

Respectfully submitted,

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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 5,056 words.

Dated this 31st day of May, 2012.

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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.

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Dated this 31st day of May, 2012.

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