STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP971-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSHUA BERRIOS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, THE HONORABLE CHARLES F. KAHN, JR., PRESIDING, AND AN ORDER DENYING POSTCONVICTION MOTION FOR RELIEF, THE HONORABLE J. D. WATTS, PRESIDING, BOTH ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is warranted. The briefs of the parties adequately develop the law and facts necessary for the disposition of the appeal, and this case can be decided by applying well-established legal principles to the facts.

ISSUE PRESENTED

Is Berrios entitled to a *Machner*[1] hearing?

The circuit court denied Berrios' ineffective-assistance claims without a hearing, and found that the real controversy was fully tried.

SUMMARY OF ARGUMENT

This court must analyze counsel's alleged errors and omissions as ineffective assistance of counsel claims, not as interests of justice claims; but a defendant must show prejudice to receive an evidentiary hearing on ineffective-assistance claims.

Here, Berrios was not prejudiced by counsel's failure to object to Trevino's unexpected in-court identification testimony, or by counsel's failure to introduce countervailing evidence or request a curative instruction, because two other witnesses besides Trevino identified Berrios as the shooter, and another witness placed the gun in Berrios' hands at the time of the shooting. Berrios was also not prejudiced by counsel's failure to object to the court's response to the jury's question about Trevino's hospital statement, because the court's response simply repeated the substance of Detective Glidewell's unobjectionable testimony.

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

ARGUMENT

I. DISCRETIONARY REVERSAL IN THE INTEREST OF JUSTICE IS NOT ONLY IMPROPER BUT ALSO UNWARRANTED.

A. Relevant legal principles.

1. Discretionary reversal is a formidable power and should be exercised sparingly.

Under Wis. Stat. § 752.35, this court may order a new trial in the interest of justice on either of two grounds: "'that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried.'" *See State v. Cleveland*, 2000 WI App 142, ¶ 21, 237 Wis. 2d 558, 614 N.W.2d 543. To establish that the real controversy has not been fully tried, a defendant must demonstrate "'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.'" *Id.* (quoted sources omitted).

An appellate court will exercise its discretion to grant a new trial in the interest of justice only in exceptional cases. *Id.* (citation omitted); *Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). *See also State v. Avery*, 2013 WI 13, ¶¶ 38," \s "WSFTA_d100e3be526b42aab7276f8ba73b22ac" \c 3 *State v. Avery*, 2013 WI 13, ¶¶ 38, 57, 345 Wis. 2d 407, 826 N.W.2d 60 (reversing court of appeals' grant of new trial in interest of justice; that the jury did not hear exculpatory scientific evidence did not make case "a truly exceptional one").

In other words, discretionary reversal is a "formidable power" that should be exercised "sparingly"

and with "great caution." *State v. Tainter*, 2002 WI App 296, ¶ 23, 259 Wis. 2d 387, 655 N.W.2d 538. This caution is warranted because the "real controversy" standard does not require that the outcome be different on retrial. *Vollmer*, 156 Wis. 2d at 19.

2. Discretionary reversal should not be used to supplant ineffective-assistance claims.

Importantly, where defense counsel fails to object to errors at trial, the only context within which the defendant's claims can be considered in this court is an ineffective-assistance claim. *State v. Ndina*, 2007 WI App 268, ¶ 12, 306 Wis. 2d 706, 743 N.W.2d 722 (unobjected-to error must be analyzed under ineffective-assistance standards); *State v. Flynn*, 190 Wis. 2d 31, 48-49 n.5, 527 N.W.2d 343 (Ct. App. 1994) (Wis. Stat. § 752.35 not intended to supplant ineffective-assistance claims).

While the Wisconsin Supreme Court clearly has authority to review unobjected-to errors under Wis. Stat. § 751.06 to decide whether those errors go to the integrity of the fact-finding process, this court does not possess such authority under Wis. Stat. § 752.35. *State v. Schumacher*, 144 Wis. 2d 388, 409-10, 424 N.W.2d 672 (1988) (for court of appeals to review unobjected-to errors is incompatible with error-correcting function).

Analyzing claims under the ineffective-assistance framework, rather than the interests of justice framework, is in accordance with the long-established general rule that an appellate court does not review an error unless it has been properly preserved. *State v. Bannister*, 2007 WI 86, ¶ 42, 302 Wis. 2d 158, 734 N.W.2d 892. The general rule gives attorneys an incentive to diligently try the case at trial because of the threat of waiver. *Id.* It also emphasizes the need for objections, which brings an issue to the court's attention and allows it to correct errors,

thereby reducing the need for appeals. *Id.* The general rule also preserves for the court of appeals the role of corrector of errors actually made by circuit courts, rather than addressing issues not even raised in the circuit court. *Id.*

B. Procedurally, discretionary reversal in the interests of justice is improper, because Berrios' claims are premised on his counsel's failures and actions, and must be analyzed as ineffective-assistance claims.

Berrios gives short shrift to his arguments about his counsel's alleged ineffectiveness (Berrios' brief at 28-31), yet argues at length that he should receive a new trial in the interests of justice because the real controversy has not been fully tried (*id.* at 17-28). In particular, Berrios argues that the jury should not have heard: 1) Trevino's identification testimony (*id.* at 18, 23-24); and 2) the court's response to the jury's questions about Trevino's hospital statement (*id.* at 20-22, 24-28).

Berrios also argues that the jury did not hear crucial evidence in the form of: 1) countervailing evidence as to why Trevino's identification was unreliable (*id.* at 19, 25); and 2) curative instructions addressing Trevino's identification testimony (*id.* at 19-20, 23-24).

As Berrios concedes, however (*id.* at 29), Berrios' interests-of-justice claims are the same as his ineffective-assistance claims. Accordingly, this court should reject Berrios' attempt to frame his arguments within the interests-of-justice framework, and instead should apply the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), because Berrios' claims of error have been waived due to omissions of defense counsel.

Ndina, 306 Wis. 2d 706, ¶ 12; *Bannister*, 302 Wis. 2d 158, ¶ 42.[2]

Unlike the Wisconsin Supreme Court's discretionary reversal powers under its inherent authority as well as under Wis. Stat. § 751.06, this court does not possess the same powers under Wis. Stat. § 752.35. The language "this court" in the case law refers to the Wisconsin Supreme Court and its discretionary reversal powers under Wis. Stat. § 751.06, not this court and its powers under Wis. Stat. § 752.35. *See, e.g., State v. Romero*, 147 Wis. 2d 264, 276-77, 432 N.W.2d 899 (1988); *State v. Penigar*, 139 Wis. 2d 569, 572-73, 408 N.W.2d 28 (1987); *State v. Hicks*, 202 Wis. 2d 150, 158-60, 549 N.W.2d 435 (1996).

Such a distinction is meaningful—and dispositive here—because this court may not use its powers of discretionary reversal under Wis. Stat. § 752.35 to conclude that the real controversy was not tried, when there was no objection by counsel at trial to the allegedly objectionable testimony. *Ndina*, 306 Wis. 2d 706, ¶ 12; *Flynn*, 190 Wis. 2d at 48-49 n.5. Rather, this court must assess Berrios' claims within the framework of *Strickland's* mandates. *Id.*

In short, Berrios cannot make an end-run around his burdens of proof set forth in *Strickland* simply because he has framed his arguments as interests-of-justice claims. To supplant *Strickland's* prejudice standards in favor of the lesser "real controversy" standard in Wis. Stat. § 752.35 would render *Strickland* a nullity in cases where, as here, counsel's alleged errors and omissions are at issue. Moreover, this court should not use the "formidable power" of discretionary reversal authority where other remedies may lie under *Strickland*. *Tainter*, 259 Wis. 2d 387, ¶ 23 (discretionary reversal power should be exercised "sparingly" and with "great caution").

[2]The State will discuss Berrios' ineffective-assistance claims in Part II.

C. On the merits, discretionary reversal in the interests of justice is unwarranted in this unexceptional case.

The only possible claim that can be analyzed under the interests-of-justice standard is Berrios' claim that Trevino's identification testimony was improper, because Berrios' counsel did object to the prosecutor's question (50:12) as a violation of the court's pre-trial order (48:28)—an objection that was implicitly sustained after a sidebar (50:64-67).

And Berrios can only make this claim in one of two ways: 1) by showing that justice was miscarried because of Trevino's identification testimony; or 2) by showing that the real controversy was not fully tried because Trevino's identification testimony clouded an important issue—namely, identification of the shooter. *Cleveland*, 237 Wis. 2d 558, ¶ 21.[3] Berrios has not shown either one.

1. Justice was not miscarried, because Trevino's in-court identification did not deprive Berrios of due process.

Berrios argues that the improper introduction of Trevino's testimony identifying Berrios as the shooter warrants discretionary reversal, because Trevino's in-court identification—allegedly "tainted by undue

[3]Berrios implicitly argues that the real controversy was not fully tried because the jury was precluded from considering important testimony that bore on the identification issue—namely, that Trevino failed to identify Berrios in the photo array (Berrios' brief at 19, 25, 27, 30). *Cleveland*, 237 Wis. 2d 558, ¶ 21. But those arguments are based on counsel's failure to introduce that evidence, and therefore must be considered in the context of an ineffective-assistance claim. *Ndina*, 306 Wis. 2d 706, ¶ 12; *Flynn*, 190 Wis. 2d at 48-49 n.5.

suggestiveness" (Berrios' brief at 18)—had already been ruled inadmissible, thereby denying Berrios due process.

But Berrios does not identify why or how Trevino's in-court identification testimony was tainted by any undue suggestiveness of the out-of-court pretrial photo array. Indeed, Trevino never even identified Berrios in the out-of-court police photo array (48:24-25 [A-Ap. 111-112]). Rather, the first time Trevino identified Berrios as the shooter was in court, at trial, when defense counsel—not the prosecutor—was asking Trevino questions on cross-examination (50:20-22).[4]

When the prosecutor asked Trevino whether the shooter was present in the courtroom, defense counsel asked for a sidebar, and Trevino never had the opportunity to give a response (50:12), as Berrios concedes (Berrios' brief at 5-6). After the sidebar, the prosecutor began a different line of questioning unrelated to the shooter's identity (50:12). Thereafter, during defense counsel's cross-examination, Trevino *sua sponte*, unexpectedly, identified Berrios as the shooter (50:20-22).[5]

But unlike out-of-court procedures, in-court identifications—by definition—are based on actual contact with the defendant, and will therefore have an independent basis and be deemed reliable. *State v. Myren*, 133 Wis. 2d 430, 443, 395 N.W.2d 818 (Ct. App. 1986). *See also State v. Dubose*, 2005 WI 126, ¶ 38, 285 Wis. 2d 143, 699 N.W.2d 582 (witness who participates in unconstitutional pretrial identification procedure may still identify defendant in court if in-court identification is based upon independent source); *State v. McMorris*, 213 Wis. 2d 156, 160, 167, 178, 570 N.W.2d 384 (1997)

[4]Again, this is why Berrios' claims are more appropriately analyzed as ineffective-assistance claims, rather than interest-of-justice claims.

[5]The State will further discuss defense counsel's cross-examination of Trevino when it analyzes Berrios' ineffective-assistance claims in Part II.

(if in-court identification has independent source, in-court identification is admissible).

Of course, the in-court identification may be questioned as to weight and credibility, but the in-court identification itself will still be admissible. *State v. Garner*, 207 Wis. 2d 520, 536, 558 N.W.2d 916 (Ct. App. 1996) (witness's "minimal description" of defendant may reduce weight that jury gives to identification but does not render identification inadmissible); *State v. Streich*, 87 Wis. 2d 209, 216-17, 274 N.W.2d 635 (1979) (inconsistencies in witness's identification testimony are material only to weight and credibility of testimony, not admissibility).

Reliability—not suggestiveness—is the linchpin in determining the admissibility of identification testimony. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). The primary evil to be avoided is a very substantial likelihood of irreparable misidentification, because it is the likelihood of misidentification that violates a defendant's right to due process. *Powell v. State*, 86 Wis. 2d 51, 64, 271 N.W.2d 610 (1978). *Cf. McMillian v. State*, 83 Wis. 2d 239, 250, 265 N.W.2d 553 (1978) (inability of witness to make in-court identification did not render out-of-court identification unreliable as a matter of law, but was issue for jury to decide).

Here, the State can show that Trevino's in-court identification was reliable, notwithstanding the alleged suggestiveness of any out-of-court procedures. *Powell*, 86 Wis. 2d at 64-65 (adopting *Neil v. Biggers*, 409 U.S. 188, 199 (1972)) (if defendant shows out-of-court identification was overly suggestive, burden shifts to State to demonstrate reliability of identification under totality of circumstances).

Under *Powell*'s totality of circumstances analysis, any factors tending to show that the defendant was correctly identified by the eyewitness should be included. *Powell*, 86 Wis. 2d at 65 (listing possible factors). Where

the State can show that the in-court identification rests on an "independent recollection of the witness's initial encounter with the suspect," rather than on the tainted out-of-court identification, the in-court identification will be admissible. *State v. Roberson*, 2006 WI 80, ¶¶ 34-35, 292 Wis. 2d 280, 717 N.W.2d 111.

Here, Trevino made his in-court identification of Berrios (50:20-22) without the State having proffered any testimony or evidence about the out-of-court photo array procedure, bolstering the conclusion that Trevino's in-court identification was not tainted. *Roberson*, 292 Wis. 2d 280, ¶ 36. Trevino also knew where Berrios lived (50:20), even though he did not know Berrios personally (50:21-22). Further, Trevino knew Berrios' nickname (50:22). Trevino then made the in-court identification, testifying that Berrios was coming down off of Berrios' porch when Berrios aimed the shotgun and shot him (50:21-22).

This testimony demonstrates that Trevino's in-court identification rested on Trevino's independent recollection of his initial encounter with Berrios, rather than on any tainted out-of-court procedures. *Roberson*, 292 Wis. 2d 280, ¶ 34. Accordingly, the identification was reliable and did not deprive Berrios of due process, regardless of whether the testimony violated the circuit court's pre-trial order ruling the testimony inadmissible, because there was no substantial likelihood of irreparable misidentification. *Powell*, 86 Wis. 2d at 64 (it is the likelihood of misidentification, not suggestiveness, that violates defendant's due process rights).[6]

Insofar as the circuit court found that the out-of-court procedures were overly suggestive (48:25-26 [A-Ap. 112-113]), the court based its *in limine* ruling on the fact that Trevino—after not being able to identify Berrios out of the photo array previously—might have seen

[6]As discussed below, two other witnesses also identified Berrios as the shooter, and another witness placed the gun in Berrios' hands at the time of the shooting.

Berrios being brought into the courtroom in chains, yet the court was "not totally sure about that" (*id.*). Regardless, Berrios was there wearing jail clothing, sitting next to his counsel, when the witnesses, including Trevino, first came into the courtroom (*id.*).

On appeal, however, Berrios does not renew this claim or argue this rationale as to why Trevino's in-court identification was allegedly tainted by undue suggestiveness. Rather, Berrios only argues that Trevino failed to identify him in the out-of-court photo array (Berrios' brief at 4, 8, 19, 25). Even so, Berrios does not develop an argument as to why or how the photo array procedures were overly suggestive.

This cursory argument is insufficient to show that the pretrial procedures were overly suggestive, and this court should not consider them further. *See, e.g., State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (appellate court need not address inadequately briefed arguments). *See also State v. Waites*, 158 Wis. 2d 376, 391, 462 N.W.2d 206 (1990) (if defendant fails to meet first initial burden in showing police procedure was impermissibly suggestive, second reliability prong need not be addressed).

Moreover, this court is not bound by the circuit court's finding that the previous out-of-court procedures tainted and barred Trevino's in-court identification, because whether an independent source exists for Trevino's in-court identification is a question of constitutional fact which this court determines independently of the circuit court. *McMorris*, 213 Wis. 2d at 166.

Here, this court should find that an independent source existed for Trevino's in-court identification, based upon Trevino's testimony that he knew where Berrios lived (50:20) and knew of him by his nickname (50:22), demonstrating that Trevino could identify Berrios by sight in the courtroom, notwithstanding Trevino's failure to

pick Berrios out of a photo array around the time of the crime.[7]

In short, discretionary reversal in this case is not warranted in this unexceptional case, because Berrios has failed to show how Trevino's in-court identification deprived him of due process, or how justice was miscarried in any way. *Tainter*, 259 Wis. 2d 387, ¶ 23 (discretionary reversal is "formidable power" that should be exercised "sparingly" and with "great caution").

2. The real controversy was fully tried, because Trevino's testimony did not cloud the identification issue.

Berrios also argues that the identification issue was clouded, or not fully tried, because the jury did not hear crucial evidence in the form of: 1) countervailing evidence as to why Trevino's identification was unreliable (Berrios' brief at 19, 25); and 2) curative instructions addressing Trevino's identification testimony (*id.* at 19-20, 23-24). As Berrios concedes, however (*id.* at 29), these claims are ineffective-assistance claims, not interests-of-justice claims.

The real controversy about the shooter's identity was fully tried for the same reason why counsel's alleged errors and omissions did not prejudice Berrios. As discussed below, the jury heard two other witnesses identify Berrios as the shooter, and heard another witness place the gun in Berrios' hands at the time of the shooting. Simply put, there is no way that the identification issue was clouded by Trevino's testimony.

[7]During the hearing on the motion *in limine*, the prosecutor suggested that Trevino's inability to identify Berrios shortly after the crime was most likely due to the photo array being presented to Trevino after his traumatic experience of getting shot in the face and in the arm (48:24-26).

In short, this court should not use its "formidable" discretionary reversal power when other remedies may lie under *Strickland*. *Tainter*, 259 Wis. 2d 387, ¶ 23 (discretionary reversal power should be exercised "sparingly" and with "great caution").

II. THE CIRCUIT COURT PROPERLY DENIED BERRIOS' POSTCONVICTION MOTION WITHOUT AN EVIDENTIARY HEARING, BECAUSE THE RECORD CONCLUSIVELY ESTABLISHES THAT BERRIOS' COUNSEL RENDERED EFFECTIVE ASSISTANCE OF COUNSEL.

Thus, in order to receive a new trial, Berrios must ultimately meet his burdens under *Strickland*, and cannot rely on the lesser burdens of proof under the interests-of-justice standard. *Ndina*, 306 Wis. 2d 706, ¶ 12; *Flynn*, 190 Wis. 2d at 48-49 n.5. But as the circuit court properly held (40 [A-Ap. 101-105]), the record here conclusively establishes that Berrios did not meet his required burdens to be entitled to an evidentiary hearing.

Accordingly, this court should reject Berrios' alternative claim that he is entitled to a *Machner* hearing (Berrios' brief at 28-31).

A. Relevant legal principles.

To establish ineffective assistance of counsel, a defendant must prove the familiar two-pronged test: both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See also State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305 (defendant who claims his attorney was ineffective has dual burden of proof).

A claim of ineffective assistance fails if the defendant fails to prove either one of these requirements. *State v. Williams*, 2006 WI App 212, ¶¶ 18-19, 296 Wis. 2d 834, 723 N.W.2d 719 (because defendant must prove both prongs, reviewing courts may avoid deficient performance analysis altogether if defendant has failed to show prejudice, and vice versa).

> 1. To establish deficient performance, a defendant must overcome the strong presumption that his counsel acted properly.

A strong presumption exists that counsel acted properly within professional norms, and the defendant must demonstrate that his attorney made serious mistakes that 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. *Strickland*, 466 U.S. at 689-91; *State v. Maloney*, 2005 WI 74, ¶ 25, 281 Wis. 2d 595, 698 N.W.2d 583.

> 2. To establish prejudice, a defendant must show that counsel's alleged errors actually had some adverse effect on the defense.

The defendant must also 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. Thus, *Strickland* squarely places the burden on the <u>defendant</u> to affirmatively prove prejudice. *State v. Roberson*, 2006 WI 80, ¶ 35, 292 Wis. 2d 280, 717 N.W.2d 111.

Showing prejudice means showing that counsel's alleged errors actually had some adverse effect on the defense. *State v. Koller*, 2001 WI App 253, ¶ 9, 248 Wis. 2d 259, 635 N.W.2d 838. The defendant cannot meet this burden by simply showing that an error had some conceivable effect on the outcome. *Id. See also State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999) (defendant must offer more than "rank speculation" to satisfy prejudice prong).

> 3. To be entitled to an evidentiary hearing on a postconviction motion alleging ineffective-assistance claims, a defendant must raise questions of fact and cannot rely on conclusory allegations.

A properly pleaded claim of ineffective assistance of trial counsel triggers an evidentiary hearing at which counsel testifies regarding his challenged conduct. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). But a defendant is not automatically entitled to an evidentiary hearing on a postconviction motion. *State v. Bentley*, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996). A hearing is required only if the motion alleges facts which, if proved true, would entitle the defendant to relief. *Id.* at 310.

If the defendant's motion on its face fails to allege sufficient facts to raise a question of fact, or if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the circuit court may summarily deny the motion. *Id.* at 309-10.

Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law

reviewed by an appellate court *de novo*. *Id.* at 310. If the motion is deficient, the circuit court's decision to deny it without a hearing, for any of the reasons listed above, is reviewed under the deferential erroneous exercise of discretion standard. *Id.* at 310-11.

Similarly, an ineffective assistance of counsel claim is a mixed question of law and fact, with factual findings reviewed under a clearly erroneous standard of review, and legal findings of deficiency and prejudice reviewed independently. *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115.

B. Berrios was not prejudiced by his counsel's failure to object to evidence that he claims was improperly admitted.

Berrios' ineffective-assistance claims fall into two categories: counsel's failures related to evidence that Berrios claims was improperly admitted, and counsel's omissions related to evidence that Berrios claims should have been admitted but was never introduced.

As to the former, Berrios argues that counsel was ineffective for failing to object to: 1) Trevino's identification testimony (Berrios' brief at 18, 23-24); and 2) the court's response to the jury's question about Trevino's hospital statement (*id.* at 19-22, 24-28).[8] But the record conclusively reveals that Berrios was not prejudiced by any of his counsel's alleged failures.

[8]The State will address the latter category of claims in Section C.

1. Berrios was not prejudiced by counsel's failure to object to Trevino's unexpected in-court identification, because two other witnesses identified Berrios as the shooter and another witness placed the gun in Berrios' hands.

It bears repeating that Berrios' counsel did object and ask for a sidebar when the prosecutor attempted to elicit Trevino's in-court identification, and Trevino never had the opportunity to give a response (50:12), as Berrios concedes (Berrios' brief at 5-6). Thereafter, during defense counsel's cross-examination, Trevino—*sua sponte* and unexpectedly—identified Berrios as the shooter, in response to counsel's unrelated questions about where the shooting occurred and about the other shooters in the alley (50:20-22).

But as soon as Trevino made his unexpected in-court identification, defense counsel began to impeach Trevino with details from Trevino's statement, including the fact that Trevino never told police that he saw anyone shooting him from the porch, and had instead told police that he was shot by the three individuals in the alley (50:21-22). When Trevino insisted it was Berrios who shot him, counsel immediately forced Trevino to admit that he did not know Berrios (50:22)—thereby suggesting to the jury that Trevino's ability to identify Berrios was flawed.

Defense counsel also explored Trevino's motives for the identification—namely, that Trevino was mad at Berrios for beating up one of Trevino's relatives (50:22-23)—thereby suggesting to the jury that Trevino might have been lying about the shooter's identity. Counsel

repeated these themes during his closing argument (52:33-34, 36-37).

Counsel's tactical decisions in the face of Trevino's unexpected in-court identification cannot be deemed deficient performance, but rather, constituted good lawyering. Indeed, as the circuit court recognized, counsel's decision not to object and draw attention to the issue, along with counsel's decision not to pursue a mistrial motion—thereby waiving the issue—were both "strategic decision[s]" made by a "wise and experienced criminal defense attorney … [with] decades on the job" (50:66).

Berrios argues that defense counsel prejudiced him by waiving the issue, because "neither he nor Mr. Berrios wanted to seek a mistrial" (Berrios' brief at 8-9, 29). But Berrios' characterization is somewhat misleading when, in fact, counsel told the court that the decision not to pursue a mistrial motion was Berrios' decision alone (50:109).

Although counsel agreed with Berrios that it was a rational decision and he was not inclined to pursue a mistrial anyway, counsel also made clear that it was Berrios who instructed him not to pursue a mistrial (50:109). As counsel told the court: "I did talk to [Berrios] about the possibility of a mistrial. *He's asked me not to ask for that*" (50:109) (emphasis added).

Berrios cannot direct his attorney at trial not to do something, and then complain on appeal that his counsel failed to do it. *State v. Leighton*, 2000 WI App 156, ¶ 40, 237 Wis. 2d 709, 616 N.W.2d 126 (reasonableness of counsel's actions may be substantially influenced by defendant's own actions); *State v. Oswald*, 2000 WI App 3, ¶ 50 n.7, 232 Wis. 2d 103, 606 N.W.2d 238 (if record supports finding that certain decision was made by defendant himself, defendant cannot be prejudiced by counsel's advice).

Perhaps more importantly, Berrios was not prejudiced by counsel's failure to object to Trevino's unexpected in-court identification or his counsel's failure to move for mistrial. As a matter of law, Berrios cannot be prejudiced by an in-court identification that should have been deemed admissible in the first instance, as discussed above. *Roberson*, 292 Wis. 2d 280, ¶ 31 (defendant suffered no prejudice under *Strickland* when in-court identifications were based on an independent source and were therefore admissible).

Further, as a factual matter, Berrios was not prejudiced by Trevino's identification when two other witnesses clearly identified Berrios as the shooter, and another witness placed the shotgun[9] in Berrios' hands at the time of the shooting.

a. Martin Garcia identified Berrios as the porch shooter.

For example, Martin Garcia clearly testified that he saw Berrios standing on the porch with a shotgun in his hands (50:36-37). As he explained, several shots were fired from the alley first, and then Berrios shot his gun once (50:38).[10] When Berrios fired, he was aiming the gun right at Trevino, towards Trevino's vehicle (50:53).

[9]It is undisputed (Berrios' brief at 3) that the shots which struck Trevino came from a shotgun that contained birdshot, a type of ammunition that hunters typically use to kill birds (49:30). A wadding holds a bunch of little pellets inside the gun, and when the gun is discharged, the pellets release and spread all over, such that when they strike a person, it causes a lot of skin and tissue damage (49:30; 51:36-37).

[10]Garcia testified that after the first shot went off, the gun apparently jammed, so Berrios did not shoot again (50:38-39). Another juvenile witness testified that, after Berrios' shotgun went off twice, he heard it click when cocked again (49:85), but he did not hear the gun discharge again, because the gun apparently jammed (49:85).

As the following exchange demonstrates, Garcia identified Berrios as the shooter in no uncertain terms:

> Q [by the prosecutor]. So you've testified you saw the defendant with the gun?
>
> A [by Garcia]. *Oh, yes, most definitely*.
>
> Q. Did he do anything with the gun?
>
> A. Well, like I said when he shot my cousin [Trevino] I don't know if he was going to shoot me because I put my hands up. I don't know if the gun jammed and that's why. Because he was messing with the gun still.
>
> I put my hands up. I was like, "You don't want to do this. You don't want to go there." Just trying to convince him not to shoot again.

(50:39) (emphasis added).

Garcia then testified that he actually saw the bullets from Berrios' gun strike Trevino, at which point Garcia put his hands up in the air, pleading with Berrios not to shoot him (50:38-40). As Garcia explained, he was right in front of Berrios when Berrios shot the gun (50:40).

b. Elisandra also identified Berrios as the porch shooter.

A second witness, Elisandra,[11] also clearly identified Berrios as the shooter. Elisandra testified that she saw Berrios on the porch, wearing a striped shirt, holding a gun, and engaging in an argument with Garcia (49:108, 110-112). She then heard shots coming from the

[11]The State will refer to all juveniles by their first name only, in order to protect the confidentiality of their identities.

alley, after which the family members scattered (49:111-112). Then, Berrios starting shooting (49:112). As Elisandra testified, she did not see any bullets hit Trevino, but she did see Berrios shoot once (49:112). Berrios pulled the trigger, and then Elisandra started running away (49:112-113). She described the shotgun as being black and double-barreled (49:118-119).

As Elisandra further testified, "the dude with the striped shirt on on [sic] the porch, he started shooting" after the alley shots were fired (49:120). The alley shooter shot into the air, and had a "little hand-held" gun, "[p]robably a nine or a twenty-two" (49:120-121). But Elisandra saw Berrios shoot the shotgun from the porch (49:121-122), holding it straight out, aiming it towards Trevino in his car (49:126-127).

The court then asked Elisandra what Berrios was wearing on the day of the shooting, and Elisandra replied, "[a] striped shirt with like a collar and some light jeans" (49:143). She then described the other man on the porch and the man in the alley with some detail, but reiterated that the individual on the porch holding the gun was "[t]he dude with the striped shirt" (49:144).

c. Andrew placed the gun in Berrios' hands on the porch at the time of the shooting.

In addition to Garcia's and Elisandra's testimony that Berrios shot the gun at Trevino, another juvenile witness, Andrew, placed the gun in Berrios' hands at the time of the shooting, even though Andrew did not actually see Berrios shoot the gun.

Andrew testified that he saw Berrios on the porch holding a black shotgun with a shoulder strap (49:83-84,

94). Andrew then heard Berrios cock the gun, after which the gun went off twice (49:84-85). Andrew specifically testified that he saw Berrios with the shotgun, and that he saw Trevino getting shot with the spray of shotgun pellets while Trevino was inside the truck (49:86). Andrew could see that Trevino was hit on his side and on his arm while trying to shield his face (49:86). Trevino was also bleeding from his ear (49:86).

On cross-examination, Andrew admitted that he did not see Berrios actually shoot the gun, and that he had initially told police that the shots came from the alley, not the porch (49:87-88). Upon further questioning, however, Andrew testified that he knew the shots which hit Trevino came from Berrios' shotgun, even though Andrew did not see anyone fire from the porch (49:89). As Andrew further explained:

> When I heard the first shots I was—'cause they were arguing. So I was looking up the stairs at the guy [on the porch] holding the shotgun [*i.e.*, Berrios]. And then [Berrios and Martin Garcia are] going back and forth, and I'm just watching. And then you hear two shots come out of the alley. And then everybody like paused for a minute and started running. And then that's when you hear the shotgun go off.

(49:92).

On re-direct examination, Andrew reiterated that he could see Berrios with the shotgun on the porch, and explained that he could distinguish the shots coming from the alley from the shots coming from the shotgun on the porch, because the shots from the porch were closer and louder, whereas the shots from the alley were farther away and could be heard echoing through the alley (49:95). Andrew also knew that the shots hit Trevino, because he could hear it go off, after which he saw the shotgun pellets hitting Trevino's car and Trevino being wounded in the arm and face (49:96-97).

On re-cross examination, Andrew further testified that he knew the shots had come from the porch, not the alley, because of the manner and position in which the shots hit Trevino's vehicle (49:97-99). On re-direct, Andrew again testified that he did not see Berrios actually pull the trigger, but that he did see the shotgun pellets strike Trevino's vehicle, and he did see Berrios with the shotgun on the porch (49:102).

d. Other testimony and physical evidence corroborated the witnesses who identified Berrios as the porch shooter.

Moreover, other witnesses' testimony corroborated the witnesses who identified Berrios as the shooter. For example, although Dora did not see Berrios shoot or see him with the gun, Dora's testimony still corroborated that Berrios was on the porch when the shots were fired (49:54-56, 63, 67-69). At the time, Berrios was wearing a white striped shirt and had been arguing with Garcia and fighting with her family members (49:54-56, 67-69).

Similarly, Berrios' sister, Martha Rojas, corroborated that Berrios was probably wearing "a blue and white stripe polar" at the time of the shooting (50:89). Thus, even this defense witness's testimony matched Dora's (49:54-56, 67-69) and Elisandra's (49:144) description of what the shooter was wearing—a striped shirt.[12]

[12]In contrast, the other man on the porch was wearing something completely different: a black muscle shirt with a black cross and dark pants (49:144). And the alleyway shooter was probably wearing a tan shirt (49:144).

Although Rojas testified that she did not see Berrios with a gun at any point when he was standing on the porch (50:79, 82), she admitted that she did not see who shot any of the guns, nor did she know where any of the shots came from (50:80-81). And she also admitted that she was not looking at the porch when the shots were fired, because she had stepped inside the house for the 10 to 15 seconds between when she last saw Berrios on the porch and when she heard the shots fired (50:81, 83, 86).

Further, contrary to Berrios' contention that "the lack of physical evidence" caused the jury to get a "murky picture" (Berrios' brief at 23), the physical evidence clearly corroborated that Berrios was the shooter. For example, Detective Carrasco testified that the shotgun pellet spray hit Trevino's vehicle on the top of the driver's side area door frame, coming from an elevated position downwards into the dash, not straight through the back or side of the vehicle (51:22-24, 30-32). The only conclusion the jury could reach from the shots' trajectory is that the shots which hit Trevino came from the elevated porch where Berrios was standing, aiming down towards Trevino's vehicle (52:30), and did not come from the alley or the street (52:55, 57).

Other witnesses similarly testified that the shots hitting Trevino came from the porch, not the alley. As Garcia testified, Berrios fired from the porch, aiming the gun right at Trevino, towards his vehicle (50:36-37, 53).

As Elisandra testified, the alley shooters shot into the air with a "little hand-held" gun, "[p]robably a nine or a twenty-two" (49:120-121), whereas the shotgun was black and double-barreled (49:118-119) and was aimed from the porch towards Trevino in his car (49:121-122, 126-127).

As Andrew testified, he knew the shots that hit Trevino came from the porch, not the alley, because the porch shots were closer and louder than the alleyway shots (49:89, 92, 95), and because of the manner and position in

which the shots hit Trevino's vehicle (49:97-99). Andrew could also tell from Trevino's injuries (*i.e.*, to his side, arm, ear, and face) that Trevino had been shot with the spray of shotgun pellets (49:86), not from the alleyway shots.

This court should not be persuaded by Berrios' attempt (Berrios' brief at 21-23) to create inconsistencies where none exist. This is not a case with a "chaotic mosaic of witness accounts" (*id.* at 21). Even assuming minor inconsistencies existed with respect to witnesses' conflicting accounts as to the exact timing of the shots or whether the gun had a strap, the State's witnesses still consistently and definitively pointed to Berrios, either as the shooter or as the person who held the gun on the porch. And the physical evidence also clearly pointed to the porch, not the alley, as the origin of the shots that injured Trevino—again implicating Berrios as the shooter.

To the extent that Berrios insinuates that the adults coached the juveniles to identify Berrios as the shooter (Berrios' brief at 22), the record does not bear out this assertion. Even if Andrew somehow "learned" from Garcia earlier that the gun jammed (*id.*), Andrew still clearly testified that he saw Berrios with the gun, heard Berrios cock the gun, and then saw Trevino getting shot with the spray of shotgun pellets (49:84-86). Similarly, Elisandra did not admit that "she and the others discussed what they would say on the witness stand" (Berrios' brief at 22). Rather, her precise testimony was that she talked with Garcia and Trevino about what happened and about the case (49:131-132).

In short, Trevino's testimony did not prejudice Berrios in any way, nor did Trevino's testimony cloud the identification issue, because Trevino's testimony (*i.e.*, that Berrios was coming down off of Berrios' porch when Berrios aimed the shotgun and shot him (50:21-22)) was cumulative to that of two other witnesses who clearly identified Berrios as the porch shooter (*i.e.*, Garcia and Elisandra), and cumulative to another witness who clearly

placed the gun in Berrios' hands while Berrios was standing on the porch (*i.e.*, Andrew). *State v. Speese*, 199 Wis. 2d 597, 605-06, 545 N.W.2d 510 (1996) (evidence that was duplicative to what other witnesses compellingly testified rendered any errors harmless); *Jones v. Dane County*, 195 Wis. 2d 892, 937-38, 537 N.W.2d 74 (Ct. App. 1995) (improperly admitted evidence considered harmless if it is cumulative).

Moreover, nothing about Trevino's identification was highlighted to the jury. The State did not attempt to revisit the issue of Trevino's identification at any point after the prosecutor's initial question (50:12). During closing argument, the State did not mention Trevino's identification, instead relying on the identification testimony of the other witnesses (52:22-23, 25-29). When discussing Trevino's testimony generally, the State only referred to Trevino's testimony about where his truck was located when he was shot, and the photos depicting Trevino's injuries (50:28-29). But the State never again mentioned anything about Trevino identifying Berrios as the shooter.[13]

For these reasons, Berrios was not prejudiced by his counsel's failures related to Trevino's identification. Simply put, there is no reasonable possibility that the jury could have had reasonable doubt that Berrios was the shooter. *Strickland*, 466 U.S. at 694 (to prove prejudice, defendant must show reasonable probability that, but for counsel's errors, result of proceeding would have been different).

[13]To the extent that defense counsel discussed Trevino's identification testimony during his closing argument, it was only to impeach the testimony and suggest reasons why the jury should not believe it (52:33-34, 36-38).

2. Berrios was not prejudiced by counsel's failure to object to the court's response to the jury's question about Trevino's hospital statement, because the court's response simply repeated the substance of Detective Glidewell's unobjectionable testimony.

Berrios next argues that counsel was ineffective for 1) stipulating to and/or failing to object to the court's response to the jury's questions about Trevino's hospital statement to Detective Glidewell; and 2) stipulating to and/or failing to object to the court sending a redacted version of Trevino's statement back into the jury room as an exhibit (Berrios' brief at 20-22, 24-28).[14]

Specifically, Berrios argues that the court's actions were "dramatic in that the court identified and favored" Trevino's trial testimony over the version Trevino gave to Detective Glidewell in the hospital, thereby impermissibly promoting the State's theory of prosecution over Berrios' theory of defense and/or affixing an improper "judicial imprimatur" or "directive" on the testimony (*id.* at 20-22, 26-27, 29).

[14]Berrios mischaracterizes the court's actions as a "reinstruction" (Berrios' brief at 25-28). The court sent the exhibit back to the jury room and responded to the jury's question about the exhibit (55 [A-Ap. 106-108]); but neither of those actions constitutes a "reinstruction." A reinstruction is when the court re-instructs the jury after the jury asks for clarification about the legal principles or jury instructions in the case. *State v. Hubbard*, 2008 WI 92, ¶¶ 23-29, 55-57, 313 Wis. 2d 1, 752 N.W.2d 839 (court has discretion to determine necessity for, extent of, and form of reinstruction when responding to jury's request for clarification about previously-given jury instruction).

As a preliminary matter, Berrios fails to cite any authority for the proposition that a court's response to a jury question (or sending back an exhibit in response to a jury question) somehow adds an improper judicial "imprimatur" to disputed issues in a case. For this reason alone, this court should reject Berrios' argument outright. *Pettit*, 171 Wis. 2d at 646-47 (appellate court need not address inadequately briefed arguments).

If Berrios' "imprimatur" argument were true, the mere admission of any instruction or evidence by a court might be assailed by a similar attack. *Cf. Collier v. State*, 30 Wis. 2d 101, 106-107, 140 N.W.2d 252 (1966) (rejecting defendant's argument that trial court's admission of evidence constituted improper imprimatur of trial judge).

Here, as in *Collier*, the jurors received instructions that they were the sole arbiters of witness credibility (52:14-15), effectively negating any improper inference that the court was somehow "vouching" for Trevino's trial testimony as being more credible than his hospital statement. *Collier*, 30 Wis. 2d at 107. This court should assume that the jury followed the instructions on evaluating witness credibility. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989) (court presumes jury follows instructions given to it).

Moreover, any objection that defense counsel would have made to the court's actions would not have been sustained. The circuit court had discretion in determining not only what type of response to give to the jury's question, but also in determining what kind of exhibits could be sent back to the jury room. *Hubbard*, 313 Wis. 2d 1, ¶¶ 23-29 (court has broad discretion in responding to jury's request for clarification on jury instruction); *State v. Anderson*, 2006 WI 77, ¶¶ 27-28, 291 Wis. 2d 673, 717 N.W.2d 74 (whether to send exhibit to jury room during deliberation is discretionary decision).

This court will not reverse the circuit court's decisions absent an erroneous exercise of discretion. *Hubbard*, 313 Wis. 2d 1, ¶¶ 23, 28; *Anderson*, 291 Wis. 2d 673, ¶¶ 28-29. Factors that a circuit court should consider in determining whether an exhibit should be sent into the jury room include: 1) whether the exhibit will aid the jury in proper consideration of the case; 2) whether a party will be unduly prejudiced by submission of the exhibit; and 3) whether the exhibit could be subjected to improper use by the jury. *Anderson*, 291 Wis. 2d 673, ¶ 27.

Here, the circuit court properly exercised its discretion, not only in sending back the redacted exhibit, but also in its response to the jury's question. First and foremost, Berrios himself gave consent to have the redacted exhibit sent back, and Berrios' counsel also agreed to the court's additional instruction after having first consulted Berrios about it (52:66-67).

During its deliberations, the jury posed the question, "Can we have the police report from [Trevino], [Trevino's] statement from the hospital admitted into evidence as No. 13?" (52:66). After the court discussed it with the prosecutor and defense counsel, and after defense counsel obtained Berrios' consent about it, everyone agreed that the court would send to the jury a copy of the supplemental police report as Exhibit 13a, with the information about the dismissed charge redacted (52:66; 55:2-3 [A-Ap. 107-108]).

In addition, after obtaining Berrios' agreement, Berrios' counsel also agreed to the court's "cautionary reminder" about the exhibit, which consisted a statement summarizing Detective Glidewell's testimony—namely, that "Mr. Trevino was in extreme pain in the hospital . . . [when the statement was taken] and was asking the detective if he was going to die" (52:66-67; 55:1 [A-Ap. 106]).

This court should not overturn an alleged but waived instructional error when, as part of the defendant's trial strategy, the defendant himself requests or agrees to the instruction. *State v. Damon*, 140 Wis. 2d 297, 301-02, 305, 409 N.W.2d 444 (Ct. App. 1987) (no error when defendant not only failed to object to instruction given, but in fact requested instruction). Berrios cannot create his own alleged error by deliberate choice of trial strategy, and then expect to receive benefit from that error on appeal. *Id.* at 305.

Further, under the *Anderson* factors, the circuit court properly exercised its discretion, because it undertook a rational process to reach a reasonable conclusion. *Anderson*, 291 Wis. 2d 673, ¶ 28. Under the first *Anderson* factor, the court properly found that the exhibit would aid the jury in proper consideration of the case, because both parties had already agreed that the redacted exhibit should be back to the jury room. *Id.* ¶ 27. Similarly, under the second *Anderson* factor, the court properly found that Berrios would not be unduly prejudiced by submission of the exhibit, because again, both parties agreed to send the redacted exhibit back after the jury requested it. *Id.*

This was not a case where the jury had been prejudiced by having undue weight placed upon certain evidence by the court's *sua sponte* actions; rather, the jury itself considered the evidence important enough to request the exhibit during its deliberations. *Id.* ¶ 106. Therefore, the court properly exercised its discretion in deciding that it was appropriate for the jury to have the information it requested, because both parties agreed that it was appropriate for the jury to have the information it requested. *In re Commitment of Lombard*, 2004 WI App 52, ¶ 20, 271 Wis. 2d 529, 678 N.W.2d 338 (court not obligated to provide jury with information solely because jury believes information is important to decision; but court's role is to exercise discretion and decide whether it is appropriate for jury to have information it requests).

Berrios' real dispute is not with the redacted exhibit itself but with the court's comments or instructions to the jury about the exhibit. Berrios' argument, at its core, falls under *Anderson's* third factor—namely, that the exhibit could be subjected to improper use by the jury, because the court's instruction about the exhibit would allegedly overemphasize Trevino's trial testimony (which Berrios says supported the State's position) or undercut Trevino's out-of-court statement to Detective Glidewell (which Berrios says tended to support the defense's position). *Anderson*, 291 Wis. 2d 673, ¶ 27.

In other words, Berrios argues that the court's remark—"Please consider, in addition to this text [in the report]," that Trevino was in pain when Detective Glidewell interviewed him (55 [A-Ap. 106])—had the effect of telling the jury to believe one version over the other, as in *Anderson*. *Anderson*, 291 Wis. 2d 673, ¶¶ 103-105 (in sending videotape of witness's out-of-court statement back to jury, risk of overemphasis of that statement relative to testimony given from witness stand).

But as the postconviction court found in denying Berrios' motion (40:4-5 [A-Ap. 104-105]), the trial court's instruction to the jury did nothing but reiterate Detective Glidewell's unobjectionable trial testimony that Trevino was in pain when he gave his hospital statement (52:13-14, 18). By telling the jury to "[p]lease consider" that testimony (55:1 [A-Ap. 106]), the court was <u>not</u> placing an "instructional rebuttal or caveat to the [police] report," as Berrios contends (Berrios' brief at 27). Nor was the court improperly commenting on the evidence by telling the jury that the police report "was not as helpful to Mr. Berrios as they might think," or telling them to discount the report, as Berrios contends (*id.* at 26-27).

Rather, the court's instruction was, in essence, summarizing Detective Glidewell's unobjectionable testimony back to the jury—an action that was clearly proper. *See Anderson*, 291 Wis. 2d 673, ¶ 104 (rather than sending videotape of witness's out-of-court statement

back to jury room, court should have re-read witness's in-court testimony in order to answer jury's question about the testimony).

The jury evidently needed Detective Glidewell's police report in order to resolve the case, such that the court properly provided the redacted exhibit when the jury asked for it. *See id.* ¶¶ 104, 107. The court's instructions about that exhibit were nothing more than comments about the circumstances under which the report was given—and those comments, in turn, were merely a summary or repetition of Detective Glidewell's (and others') testimony (40:5 [A-Ap. 105]).

Therefore, the court's actions here were analogous to actions upheld in the seminal *Jensen* case. *State v. Jensen*, 147 Wis. 2d 240, 250, 432 N.W.2d 913 (1988). Here, the witness (Detective Glidewell) testified, in part, to explain the context in which the victim (Trevino) told the witness (Detective Glidewell) about the crime, similar to how the witness in *Jensen* testified about the context in which child sexual assault victims often reveal the crimes against them. *Id.*

In *Jensen*, such context testimony was not tantamount to telling the jury that the victim-witness was truthful (*i.e.*, the ultimate opinion about whether the crime occurred), but was instead admissible to explain why victims may not come forward in giving their statements sooner. *Id.* at 250, 255-56. Likewise here, the court's instruction about Detective Glidewell's testimony was not tantamount to telling the jury to believe an ultimate opinion (*i.e.*, that Trevino's hospital statement was not worthy of belief because he was in pain); but rather, was merely reiterating to the jury the previously-given testimony about the circumstances surrounding Trevino's hospital statement. Such an instruction was permissible, as it merely helped the jury to understand the evidence in the case. *Id.* at 256-57.

Moreover, similar to the defendant's confession in *Jensen* that was properly sent back to the jury room as an exhibit, the court's response here did nothing more than reiterate the contents of Trevino's police statement, as well as the circumstances under which the statement was given, neither of which was in dispute in the case. *See id.* at 261-62. As in *Jensen*, neither the written exhibit nor the court's instruction here overemphasized Trevino's trial testimony over the contents of his statement to Detective Glidewell. *Id.*

In summary, the court's actions here did not constitute an erroneous exercise of discretion. *Hubbard*, 313 Wis. 2d 1, ¶¶ 23, 28; *Anderson*, 291 Wis. 2d 673, ¶¶ 28-29. And as discussed above, any instructional error would have been harmless and did not prejudice Berrios, because two other witnesses besides Trevino identified Berrios as the shooter, and another witness also placed the gun in Berrios' hands. *Anderson*, 291 Wis. 2d 673, ¶ 27 (court's exercise of discretion also subject to harmless error analysis). This court should affirm the circuit court's proper exercise of discretion. *Id.* ¶¶ 28-29.[15]

C. Berrios was not prejudiced by counsel's failure to introduce evidence that he claims should have been admitted.

Berrios' second category of ineffective-assistance claims relate to counsel's failures vis-à-vis evidence that was never introduced—namely, the jury did not hear "crucial" evidence in the form of: 1) countervailing evidence as to why Trevino's identification was unreliable (Berrios' at 19, 25, 27, 30); and 2) a curative instruction as

[15]Contrary to Berrios' contention (Berrios' brief at 19-20), the *Arroyo* case is completely distinguishable and inapposite here, because that involved a court's reinstruction which had the effect of unconstitutionally shifting the burden of proof on the defendant to prove the intent element in the crime—an error which could not be harmless. *Arroyo v. Jones*, 685 F.2d 35, 38-41 (2nd Cir. 1982).

to the reliability of Trevino's identification testimony (*id.* at 19-20, 30). Again, however, Berrios was not prejudiced by his counsel's omissions.

1. Berrios was not prejudiced by counsel's failure to introduce countervailing evidence on cross-examination to further undermine Trevino's identification.

Berrios first argues that his counsel was ineffective for failing to introduce countervailing evidence to impeach Trevino's identification during cross-examination—namely, evidence that Trevino was unable to pick Berrios out of a pre-trial photo array, yet at trial was able to provide "considerable detail of what happened," which Berrios argues would have given the jury a reason to discount Trevino's trial testimony, because Trevino only identified Berrios after seeing that Berrios was the person charged (Berrios' brief at 19, 25, 27, 30).

But Berrios' argument suffers from one major flaw. Had Berrios' counsel did as Berrios now proposes, Berrios' counsel likely would have violated the same pretrial order prohibiting any testimony relating to Trevino's identification of Berrios (48:28).[16] Under the trial court's order, then, Berrios' counsel was prohibited from introducing such countervailing evidence, such that his failure to do so cannot be deemed deficient performance.

Perhaps more importantly, Berrios was not prejudiced by his counsel's omissions. As discussed

[16]As the court explained in its pretrial ruling, "*any* evidence of identification or [sic] Mr. Berrios either by name *or by description* here in court is excluded" (48:28) (emphasis added).

above, Berrios' counsel had already used other permissible and admissible methods to impeach Trevino's identification in the only ways he could, given the court's pre-trial order. For example, counsel got Trevino to admit that he never told police that he saw anyone shooting him from the porch, and had instead told police that he was shot by the three individuals in the alley (50:21-22). Counsel also got Trevino to admit that he did not know Berrios, and cross-examined Trevino about his potential motive to lie about the shooting (50:22-23).

Similarly, during counsel's cross-examination of Detective Glidewell, counsel also got the detective to admit that Trevino identified three unknown Hispanic males in the alley as the shooter or shooters, but not anyone from the porch (51:13-17).

Thus, the jury had already heard that Trevino was unable to specifically identify any specific shooter—let alone Berrios as the shooter—at the time Trevino gave his statement to Detective Glidewell (*i.e.*, in the hospital right after the shooting). For that reason, it was not prejudicial in any way for counsel to omit the prohibited, inadmissible evidence that Trevino had also failed to identify Berrios as the shooter in a photo array. The jury had already heard that Trevino was unable to identify the shooter shortly after the crime.

Moreover, counsel clearly capitalized on these themes during his closing argument (52:33-34, 36-37). Counsel's argument indirectly gave the jury the evidence that counsel could not give directly—the evidence that Berrios now says should have been given. First, counsel argued that Trevino's in-court identification was not worthy of belief:

> [Trevino] talked about the people on the porch, two Hispanic males on the porch. He didn't say anything about them having a shotgun. He didn't say anything about them threatening him in any way.
> ….

> He would have said, if the man on the porch [*i.e.*, Berrios] had a shotgun, that he did. He didn't. *Why he's changing now I think is clear*, using your common sense and the other evidence you have.

(52:33-34) (emphasis added).

Counsel continued by suggesting the reason why the jury should not believe Trevino's in-court identification—namely, because Trevino, in essence, had given a prior inconsistent statement. Counsel argued that Trevino had not identified Berrios as the shooter while in the hospital, but then changed his story after Garcia told him to identify Berrios as the shooter:

> [Garcia] talked to the kids. He talked to [Trevino], and that's why they testified the way they did. *That's why [Trevino] changed his story*. He came in here and tried to identify Mr. Berrios with a shotgun in his hand shooting it for the first time ever. *But, again, when he's in the hospital bleeding, worried about what his health is going to be, he says it was the guys who came around from the alley*.

(52:36-37) (emphasis added).

In short, counsel did the best he could under the constraints he had, and the jury heard the crux of the information that Berrios wanted presented—namely, that Trevino gave a prior inconsistent statement and was unable to identify the shooter around the time of the crime. For that reason, Berrios was not prejudiced by counsel's failure to introduce the countervailing evidence from the photo array, which—at most—would have further undermined Trevino's already-undermined in-court identification. *Cf. State v. Sandoval*, 2009 WI App 61, ¶ 37, 318 Wis. 2d 126, 767 N.W.2d 291.

Here, as in *Sandoval*, even if Berrios' attorney had introduced further evidence from the photo array to show that the witness (Trevino) had not previously identified Berrios, the result of the trial would not have been different because:

> the jury could have easily chosen to believe [the witness's] trial testimony over [the witness's] earlier [prior inconsistent] statements. Or the jury may have disregarded [the witness's] testimony altogether, given that he was inconsistent on the stand. … [The witness], in the beginning of his testimony, denied seeing [the defendant] with a gun but after prodding, testified that he did see [the defendant] with a gun. In essence, the jury witnessed firsthand [the witness's] flip-flopping and still convicted [the defendant]. We conclude that, even if [the defendant's] attorney had impeached [the witness] with his prior inconsistent statements, the outcome of the trial would have been the same.

Sandoval, 318 Wis. 2d 126, ¶ 37.

Likewise, here, the jury had already witnessed Trevino's "flip-flopping" firsthand, hearing him first say that Berrios was the shooter (50:20-22), but then hearing him later admit, upon further prodding by defense counsel, that he had originally told police that he had been shot by the three (unknown) individuals in the alley (50:21-22). The jury also heard Detective Glidewell's testimony that, right after the crime, Trevino could not, and did not, identify Berrios while in the hospital (51:13-17). Yet, despite Trevino's inconsistent trial testimony, the jury still convicted Berrios.

Simply put, Berrios has failed to show that he was prejudiced by his counsel's failure to introduce the photo array evidence. *Sandoval*, 318 Wis. 2d 126, ¶ 37.

2. Berrios was not prejudiced by counsel's failure to request a curative instruction addressing Trevino's identification.

Finally, Berrios argues that his counsel was ineffective for failing to request a curative *Telfaire*[17] instruction about how the jury should assess Trevino's eyewitness testimony, particularly because the court had just given the jury instructions which (Berrios argues) had the effect of improperly emphasizing Trevino's trial testimony over his earlier statement (Berrios' brief at 19-20, 30).

But as Berrios concedes (*id.* at 19), a *Telfaire* instruction is not mandatory in Wisconsin. *See, e.g.*, *Hampton v. State*, 92 Wis. 2d 450, 462-63, 285 N.W.2d 868 (1979) (court's refusal to give *Telfaire* instruction was not error even though requested instruction correctly stated Wisconsin law); *State v. Waites*, 158 Wis. 2d 376, 383-84, 462 N.W.2d 206 (1990) (courts not required to give more detailed eyewitness instruction in all situations where accuracy of eyewitness identification is at issue).

Therefore, Berrios' counsel was not deficient in failing to request the instruction. *State v. Hamm*, 146 Wis. 2d 130, 141 n.1, 150, 153, 430 N.W.2d 584 (Ct. App. 1988) (counsel not deficient for failing to seek "*Hampton*-type" instruction because defendant "had no right to it").

Moreover, even if Berrios' counsel had requested the curative instruction, and even if the court had agreed to give it to the jury (which is not a given), Berrios still cannot show that there was a reasonable probability that had the jury been given the instruction, it would have had

[17]A longer instruction than pattern instruction Wis. JI-Criminal 141 (2013) which takes its name from *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972).

a reasonable doubt about Berrios' guilt. *Strickland*, 466 U.S. at 694 (prejudice prong).

This court has made clear that there may be dangers inherent in identification testimony when the identity of the criminal is an important issue in the case. *See, e.g., Waites*, 158 Wis. 2d at 383-84. But this court has also made clear that such dangers are ameliorated when the court gives instructions on reasonable doubt and witness credibility, *id.*, as the court did here (52:11-12, 14-15.

Here, the jury was already well aware that the shooter's identity was the key issue in the case, but the instructions that Berrios wanted given would have been redundant to the instructions already given to the jury about witness credibility and the need to scrutinize all witness testimony carefully (52:14-15). *See Hampton*, 92 Wis. 2d at 463. As the *Hampton* court explained, such standard instructions are sufficient where, as here:

> [T]he supposedly mistaken identity is claimed to have resulted from facts which similarly affect all persons' ability to accurately perceive, rather than a certain defect or disability from which a particular witness is claimed to suffer, the need for expert testimony would seem to diminish significantly. All people, including those serving on a jury, recognize at least to some extent the difficulties involved in attempting to accurately perceive and remember events in stressful situations.

Id. at 461.

Therefore, a more specific instruction on identification testimony was not necessary, Berrios' counsel was not deficient in failing to request it, and Berrios was not prejudiced by his counsel's failure to request it. *Id.*; *Hamm*, 146 Wis. 2d at 153-54.

CONCLUSION

Because Berrios was not prejudiced by any of his counsel's alleged errors or omissions, the State respectfully requests that this court AFFIRM the judgment of conviction and the circuit court's order denying Berrios' postconviction motion for relief without a hearing.

Dated this 30th day of October, 2014.

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 10,459 words.

Dated this 30th day of October, 2014.

_____
SARAH K. LARSON
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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 30th day of October, 2014.

_____
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