STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP1623-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAYMOND L. NIEVES,

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 RICHARD J. SANKOVITZ AND THE HONORABLE JEFFREY A. WAGNER, 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.

## INTRODUCTION

Defendant-Appellant Raymond L. Nieves appeals from a judgment of conviction for one count each of first-degree intentional homicide and of attempted first-degree intentional homicide, both counts by use of a dangerous weapon and as a party to the crime (30; 31; 32; 33). *See* Wis. Stat. §§ 940.01(1)(a); 939.32; 939.63(1)(b); 939.05.

A jury convicted Nieves and his codefendant Johnny Maldonado of these crimes for shooting SB and SV in a Milwaukee alley early in the morning of April 11, 2009. SB died. SV did not,[1] and at trial, was the primary witness against Nieves and Maldonado. According to SV, the four men were all members of the Maniac Latin Disciples in Waukegan, Illinois. The State asserted that Nieves's and Maldonado's motive for shooting the men was their fear that SB and SV would give information to law enforcement about a homicide of a rival gang member that the four men had committed in Waukegan.

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[1] Wisconsin Stat. § (Rule) 809.86(1) requires that crime victims, other than those of homicides, be identified in appellate briefs by an identifier to protect their privacy and dignity. SB is a victim of a homicide and may be identified by his full name. SV, a victim of an attempted homicide, arguably does not qualify for the exception. The State will identify both victims by their initials.

Nieves also appeals an order denying his motion for postconviction relief without a hearing (50; 66). In his motion, Nieves sought a new trial on three grounds, all of which he also asserts on appeal (50:12-16; Nieves's brief at 15-26). Specifically, Nieves argues that: (1) his trial counsel was ineffective for failing to investigate and present an alibi defense; (2) he and Maldonado should have had separate trials pursuant to *Bruton v. United* States, 391 U.S. 123 (1968) because testimony from a jailhouse informant to whom Maldonado confessed implicated Nieves and Maldonado did not testify; and (3) the circuit court erred when it allowed SV to testify about a hearsay statement someone made to him that Nieves and Maldonado were planning on killing him and SB (50:12-16; Nieves's brief at 15-26).

This court should reject these arguments and affirm the circuit court. First, the court properly denied Nieves's ineffective assistance claim without a hearing because he did not allege sufficient facts to show that the evidence he argues that counsel should have presented would have supported an alibi or otherwise helped his defense.

Second, Nieves has forfeited appellate review of his severance argument based on the informant's actual testimony because he never objected to it at trial. Instead, this court's review is limited to the circuit court's pretrial decision denying Nieves's severance motion, which it properly denied. Should this court address Nieves's argument relating to the informant's testimony, it should find no error because the testimony did not include a statement from Maldonado implicating Nieves in the crimes. And even if the testimony implicated Nieves in some way, its admission was harmless error.

Third, the circuit court did not err when it admitted SV's testimony about what the other person told him because it was not introduced for its truth, and thus, was not hearsay. And even if the court erred in admitting the testimony, it was harmless error.

## ARGUMENT

### I. The circuit court correctly denied without a hearing Nieves's claim that trial counsel was ineffective for failing to pursue an alibi defense.

#### A. Applicable law and standard of review.

Before a defendant can succeed on an ineffective assistance of counsel claim, the circuit court must hold an evidentiary hearing to preserve counsel's testimony. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

A defendant is not automatically entitled to an evidentiary hearing. *State v. Ziebart*, 2003 WI App 258, ¶ 33, 268 Wis. 2d 468, 673 N.W.2d 369. To obtain one, the defendant must allege facts in his postconviction motion that "'allow the reviewing court to meaningfully assess [the defendant's] claim.'" *State v. Allen*, 2004 WI 106, ¶ 21, 274 Wis. 2d 568, 682 N.W.2d 433 (quoting *State v. Bentley*, 201 Wis. 2d 303, 314, 548 N.W.2d 50 (1996)). A postconviction motion sufficient to meet this standard should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *Allen*, 274 Wis. 2d 568, ¶ 23.

In other words, the motion must allege what the defendant expects to prove at the hearing. *See State v. Love*, 2005 WI 116, ¶ 75, 284 Wis. 2d 111, 700 N.W.2d 62. The defendant cannot rely on conclusory allegations in the hopes

of supplementing them at the hearing because the hearing is not intended to be a fishing expedition. *Id*. "The defendant should plead a reasonably full statement of the facts in dispute so that both parties can prepare and litigate the real issues efficiently and the evidentiary hearing will serve as more than a discovery device." *Id*.

If the petitioner does not raise sufficient facts, if the allegations are merely conclusory or if the record conclusively shows that the petitioner is not entitled to relief, the trial court has the discretion to deny a request for an evidentiary hearing. *Bentley*, 201 Wis. 2d at 309-10 (citation omitted).

Because Nieves is claiming that his trial counsel was ineffective, the standards governing such claims provide the framework for assessing whether he adequately pled his motion. To show counsel was ineffective, 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 show 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 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. *See Strickland*, 466 U.S. at 689-91.

To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. *Id*. at 687. A defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. 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).

Whether a motion is sufficient to warrant an evidentiary hearing is a legal issue this court reviews de novo. *Bentley*, 201 Wis. 2d at 310. In determining whether a motion was sufficient, an appellate court will review only the allegations contained in the four corners of the motion. *See Allen*, 274 Wis. 2d 568, ¶ 27.

### B. Nieves's motion failed to allege sufficient nonconclusory facts to establish that the evidence he faults trial counsel for not presenting amounted to an alibi or otherwise would have assisted his defense.

Nieves's postconviction motion was inadequate to require the circuit court to hold a hearing. In it, Nieves asserted that his trial counsel should have used three pieces of evidence to establish an alibi: (1) Nieves's pretrial monitoring records; (2) his cell phone records; and (3) affidavits from Nieves's grandmother and brother (50:14-15).

Specifically, Nieves alleged that the pretrial monitoring records would have shown that Nieves called his monitoring agent from his mother's landline in Waukegan on the night of the shootings (50:14). Counsel attempted to obtain the records before trial, but mistakenly sent her investigator to Kenosha instead of Waukegan to look for them (85:78). Counsel was able to obtain some information about the records during trial, but not the records themselves, and the court did not allow her to introduce any information about them (90:64-76). The motion further alleged that the cell phone records, which counsel obtained but never had an expert review, would show that his phone was not in Wisconsin at the time of the shootings (18; 50:14-15). Nieves claimed that the affidavits would show that he was living with his mother and working with his brother in Waukegan around the time of the shooting (50:15). Nieves also faulted counsel for not filing a notice of alibi (50:15).[2] The motion concluded:

> All of this information would have been relevant and admissible to an alibi defense at trial. Defense counsel conceded during the trial that she failed to seek the pretrial monitoring records. She also failed to have the cell records analyzed by an expert witness, and failed to interview witnesses necessary to present the alibi defense.
>
> Trial counsel was deficient for failing to adequately investigate this matter and present a defense she should have been aware of well in advance of trial. Nieves[ ] was prejudiced because he lost the right to present this evidence to the jury during the trial. As a result of the ineffective assistance of trial counsel, Nieves[ ] was unable to present the only defense he could present to the charges.

(50:15-16).

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[2] At the final pretrial hearing, defense counsel said in response to motion in limine by the State that she was not intending to present an alibi (21; 83:2).

These allegations were not enough to force the circuit court to hold a hearing. They lack the specificity required by *Allen* and *Bentley*. Notably, Nieves's motion does not explain how the evidence gave him an alibi. It does not, for example, say exactly how the pretrial monitoring records made it impossible for Nieves to have been in Milwaukee at the time of the shooting. It does not state the time he allegedly called his agent or compare it to the time SB and SV were shot. The motion also does not explain how the cell phone records show that the phone was not in Milwaukee on the night of the shooting, or why this matters. The motion does not even allege that Nieves had the phone in his possession at the relevant time. Finally, the motion fails to state why Nieves's living and working in Waukegan made it impossible for him to have been in Milwaukee on the night of the shooting. *See State v. Harp*, 2005 WI App 250, ¶ 16, 288 Wis. 2d 441, 707 N.W.2d 304 (a purported alibi that would leave it possible for the accused to be the guilty person is no alibi at all). [3]

Instead of establishing the importance of the evidence in his motion, Nieves's asserted that the evidence was explained in the motion's attachments (50:15). This is inadequate. The relevant allegations need to be in the four corners of the motion. *See Allen*, 274 Wis. 2d 568, ¶ 27.

[3] In his circuit court reply brief and on appeal, Nieves also characterizes this evidence as providing a "pseudo-alibi defense" or a "quasi-alibi defense" (Nieves's brief at 18; 65:5). Presumably, Nieves means that the evidence would have shown it was less likely that he was in Milwaukee at the time of the shooting rather than conclusively proving he was not. But because of its lack of detail, Nieves's motion does not adequately explain why the evidence supports that inference either.

Further, the motion's attachments do not make Nieves's claim much clearer. In his appellate brief, Nieves asserts that the pretrial monitoring records show that he called his agent the night before the homicide, April 10, 2009 (Nieves's brief at 18). But there is nothing in the attachments that explains how the records show this. Nieves attached a call log for April 2009 to his motion, but its notations are not clearly explained (50:25). There is no affidavit, for example, from the person who created the record explaining just what it means or how it proves that Nieves called the night before the shooting. There is also no statement from Nieves saying he made the call.

Nieves did not submit the cell phone records that supposedly prove his phone was not in Milwaukee at the time of the shooting. Instead, he attached a statement from the expert who reviewed the records that reaches this conclusion (50:35-37). That statement does not specifically explain how the records support the expert's conclusion, information that the expert would have to provide at any motion hearing, and thus, needed to be first alleged in Nieves's motion. *See Love*, 284 Wis. 2d 111, ¶ 75. And, like the motion, the attachments to it do not allege that Nieves possessed his phone at the relevant times. No mention is made of this crucial fact until counsel stated in his affidavit included with Nieves's circuit court reply brief that, "I believe Nieves will testify that he was carrying this phone at all times during the time period of the alleged homicide . . . and attempted homicide" (65:21).

The affidavits from Nieves's grandmother and brother also do not support an alibi. While the grandmother's affidavit establishes that the number on the supervision records is hers and that Nieves lived with her in April 2009, and Nieves's brother's affidavit says that during April 2009,

they were both working for the same paving company, neither affidavit provides any information that makes it impossible for Nieves to have been in Milwaukee during the shooting.

Because Nieves's motion did not sufficiently explain how the evidence would have supported his defense, it also failed to adequately allege that trial counsel was deficient for not obtaining and presenting this evidence, or that Nieves was prejudiced as a result. *See State v. Provo*, 2004 WI App 97, ¶ 15, 272 Wis. 2d 837, 681 N.W.2d 272 ("'A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding.'") (quoted source omitted).

Nieves's motion insufficiently alleged prejudice for another reason. The motion asserted Nieves was prejudiced because he was unable to present the alibi evidence, which he claimed was the only defense he had to the charges (50:16). That is not the correct test for prejudice, which, in this case, required Nieves to show a reasonable probability of a different result had trial counsel presented the evidence. *See Strickland*, 466 U.S. at 694. Nieves's motion did not engage in this analysis in any way.

And, while Nieves states in his appellate brief that the circuit court should have granted him a hearing, he does not argue that his postconviction motion satisfied the pleading requirements of *Bentley* and *Allen* (Nieves's brief at 16-20). Simply saying that he never got a chance to introduce the alibi evidence because the court denied him a hearing is not enough to show error. He has to prove he was entitled to a

hearing. This court should affirm the circuit court's decision to deny Nieves's ineffective assistance of counsel claim.

## II. Nieves is not entitled to a new trial on the grounds that the circuit court should have severed his case from Maldonado's.

### A. Nieves forfeited any severance challenge based on the informant's actual testimony by not objecting to it during trial.

Nieves next argues that the circuit court should have severed his and Maldonado's cases for trial pursuant to *Bruton* because the State introduced a statement that Maldonado made to a jailhouse informant named Ramon Trinidad that implicated Nieves in the shootings (Nieves's brief at 20-23). Nieves forfeited appellate review of this claim beyond that of the circuit court's pretrial decision not to sever because he did not object to Trinidad's testimony when it was introduced.

Nieves moved before trial to sever his case from Maldonado's based on Trinidad's statement (17). The circuit court denied the motion, accepting the State's assertion that it could examine Trinidad in a manner that would not result in Maldonado's testimony implicating Nieves in the shooting (82:2-8). The court also said that Nieves could raise additional arguments for severance should they develop (82:8).

Trinidad testified at trial that Maldonado confessed to him that he shot two "shorties" – a term used to describe new gang members – in an alley in Milwaukee because he thought they would implicate him in a homicide in Illinois (89:16-20). Trinidad also said one of the "shorties" survived and was the only witness against him (89:18-20).

During his testimony, Trinidad said several times that Maldonado used the pronouns "they" and "them" (89:17-21). Nieves did not object. On appeal, Nieves relies on this testimony to establish that severance was required under *Bruton* because Maldonado's use of these pronouns were references to Maldonado and Nieves, Maldonado did not testify, and thus, Nieves could not cross-examine him about his statements to Trinidad. *See Bruton*, 391 U.S. at 135-36; *Richardson v. Marsh*, 481 U.S. 200, 206 (1987).

This court should conclude that Nieves has forfeited any reliance on Trinidad's testimony to prove a violation of *Bruton*. The failure to renew a severance motion when additional grounds for severance are discovered amounts to a forfeiture of the argument on appeal. *See State v. Nelson*, 146 Wis. 2d 442, 457, 432 N.W.2d 115 (Ct. App. 1988); *State v. Gollon*, 115 Wis. 2d 592, 604, 340 N.W.2d 912 (Ct. App. 1983).

Admittedly, Nieves's objections to Trinidad pretrial and on appeal are the same – that his use of "they" in recounting his conversations with Maldonado meant that Maldonado was implicating Nieves in the shooting – and *Nelson* and *Gollon* speak to situations where a basis for severance arises that is different than the original grounds asserted (82:4; Nieves's brief at 11, 20-23).

Under the circumstances, though, Nieves should still have had to object to Trinidad's trial testimony. Before trial, the circuit court accepted the State's assurance that it could present Trinidad's testimony without creating a *Bruton* problem, and limited the testimony accordingly. If Nieves thought the State or Trinidad was exceeding the scope of the court's pretrial order, then he had an obligation to object even though he had made the same objection earlier. A

contemporaneous objection, or at least one that occurred during the conference outside the jury's presence after Trinidad's testimony,[4] would have alerted the circuit court that Nieves was taking issue with Trinidad's testimony and given the court a fair opportunity to correct any problems while the trial was still occurring. *See State v. Ndina*, 2007 WI App 268, ¶ 12, 306 Wis. 2d 706, 743 N.W.2d 722 (timely objection enables circuit court to avoid or correct errors with minimal disruption of the judicial process).

### B. There was no *Bruton* violation because the informant's testimony did not implicate Nieves, and even if it did, it was harmless error.

Should this court reach the merits of Nieves's claim, it should hold that the admission of Maldonado's statement though Trinidad did not violate *Bruton*. It is clear from Trinidad's testimony that his use of "they" and "them" in recounting Maldonado's confession was Maldonado referring to himself, SB, and SV. Maldonado's statements that Trinidad testified about did not implicate Nieves, Nieves's confrontation rights were not violated, and severance was not required.

In *Bruton*, the Supreme Court held that a defendant's Sixth Amendment confrontation right is violated when the

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[4] In *State v. English-Lancaster*, 2002 WI App 74, ¶ 17, 252 Wis. 2d 388, 642 N.W.2d 627, this court declined to find waiver based on a defendant's failure to contemporaneously object to evidence that he claimed violated the trial court's pretrial order. The defendant objected the next time the jury was excused after the alleged error occurred. *Id.* ¶¶ 10, 17. In contrast, here, Nieves did not complain about Trinidad's actual testimony until his postconviction motion. His failure to object to the testimony during the trial should amount to a forfeiture of his right to complain about it on appeal.

confession of a nontestifying codefendant implicating the defendant as a participant in the crime is admitted at their joint trial. *Bruton*, 391 U.S. at 137. This is so even if the trial court instructs the jury not to consider the statement against the defendant. *Id.* at 135-36.[5] But, this prohibition does not apply when the codefendant's statement is redacted to omit any reference to the defendant's name or his existence. *Richardson*, 481 U.S. at 211.

Whether to sever codefendants for trial is normally a matter within the circuit court's discretion. *Cranmore v. State*, 85 Wis. 2d 722, 755, 271 N.W.2d 402 (Ct. App. 1978). But, whether the circuit court's admission of evidence violates a defendant's confrontation rights is a question of law. *State v. Manuel*, 2005 WI 75, ¶ 25, 281 Wis. 2d 554, 697 N.W.2d 811. And because a court's exercise of discretion cannot be based on an erroneous view of the law, *see State v. Martinez*, 150 Wis. 2d 62, 71, 440 N.W.2d 783 (1989), this court's review of whether the admission of Trinidad's statement was error presents a legal question that this court reviews de novo. *See Manuel*, 281 Wis. 2d 554, ¶ 25.

As noted, the circuit court denied Nieves's severance motion after the State said that it could question Trinidad so that he would not recount Maldonado's statement in a way that would implicate Nieves (82:2-8). Nieves argues this was error because *Bruton* "requires severance when a co-defendant makes a confession which implicates the other defendant" (Nieves's brief at 20). This is incorrect. *Richardson* holds that *Bruton* does not require separate trials if the codefendant's statement is redacted to omit any reference to the defendant. *Richardson*, 481 U.S. at 211. The

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[5] Wisconsin Stat. § 971.12(3) is intended to provide a mechanism to ensure trials are conducted in conformity with *Bruton*. *State v. King*, 205 Wis. 2d 81, 97, 555 N.W.2d 189 (Ct. App. 1996).

State said it could introduce Maldonado's statement without implicating Nieves. The circuit court's acceptance of the State's assurances in denying Nieves's pretrial severance motion was consistent with *Richardson*.

Nieves next contends that Trinidad's actual testimony required severance because, despite the court's ruling, he used pronouns that were references to Nieves and Maldonado when he recounted Maldonado's confession (Nieves's brief at 21-23). This court should reject this argument.

First, it is undeveloped. Nieves asserts that Trinidad referred to him and Maldonado as "they" and "them" during his testimony, and provides a citation to Trinidad's testimony in support, but he undertakes no meaningful analysis of what Trinidad actually said or how it implicated him in the crime (Nieves's brief at 21). This court does not review issues that are inadequately briefed, or claims that are broadly stated but not specifically argued. *State v. Blanck*, 2001 WI App 288, ¶ 27, 249 Wis. 2d 364, 638 N.W.2d 910 (citing *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) and *Fritz v. McGrath*, 146 Wis. 2d 681, 686, 431 N.W.2d 751 (Ct. App. 1988)). This court should reject Nieves's argument as a result of his failure to specifically explain how Trinidad's testimony violated his right to confrontation.

Second, Nieves is wrong that Trinidad testified that Maldonado implicated him "several times" in the crimes. The references to "they" and "them" of which Nieves complains are to Maldonado, SB, and SV.

Trinidad testified that Maldonado told him "shit went bad because of what they did in Illinois, so he had to do what he got to do" (89:16). The State asked Trinidad what

Maldonado had been involved in, and Trinidad replied "another shooting" (89:16-17). Trinidad also testified that Maldonado told him he was going to kill the two "shorties" because they were not going to keep quiet about the Illinois homicide and his plan was to bring them to Milwaukee and kill them (89:17). The State clarified that by "they," Trinidad meant Maldonado and the "shorties" (89:17). Trinidad also testified that Maldonado told him that he and the "shorties" had stayed at a house in Kenosha that belonged to Nieves's mother or "baby mama" for a day or two (89:21-22). None of this testimony says that Nieves was involved with any of this activity.

The only statement in Trinidad's testimony about Maldonado's confession that arguably refers to Nieves is when Trinidad said Maldonado told him, "They brought them to a dark alley, if I'm not mistaken, and laid them on the ground" (89:18). "They" could be understood as a reference to Maldonado and Nieves. But even assuming this is what Trinidad meant, any error was harmless.

The erroneous failure to sever defendants for trial when required by *Bruton* can be harmless. *See State v. King*, 205 Wis. 2d 81, 97-98, 555 N.W.2d 189 (Ct. App. 1996). An error is harmless when the beneficiary of the error proves beyond a reasonable doubt that the error did not contribute to the verdict obtained. *See State v. Harris*, 2008 WI 15, ¶ 42 307 Wis. 2d 555, 745 N.W.2d 397.

If Trinidad was referring to Nieves when he said "they," it was harmless error. At best, Trinidad made one improper reference that Maldonado implicated Nieves in the crimes. The rest of his testimony about Maldonado's confession makes clear that his use of plural pronouns were references to Maldonado and the victims. *See State v. Norman*, 2003 WI 72, ¶ 48, 262 Wis. 2d 506, 664 N.W.2d 97

(frequency of error is a consideration in determining whether it is harmless).

Further, Nieves also confessed to Trinidad in jail. When Trinidad asked Nieves how "he get away like that, referring to the surviving victim," Nieves replied he "didn't spark. He got his guy" (89:23). That Nieves admitted his involvement in the crimes renders harmless any improper reference to him in Trinidad's testimony about Maldonado's confession. While Trinidad was a jailhouse informant, it is unlikely that the jury believed that just one of the men confessed to Trinidad and that he was lying that the other one had also confessed. Instead, it is more probable that the jury either concluded that both men admitted their involvement to Trinidad or he was fabricating their confessions. If the jury believed Trinidad, then it believed that Nieves confessed to him. If the jury did not believe him, then it most likely concluded he was lying about both Maldonado's and Nieves's confessions. Either way, the error is harmless.

Finally, the primary issue at trial was whether SV correctly identified Nieves and Maldonado as the men who shot him and SB. The evidence strongly suggests that he did. SV's testimony established that he knew both defendants well. They were all members of the same gang, had committed a serious crime together, and had been hiding out in Wisconsin in the days before the shooting, so it is doubtful that SV was making a mistaken identification (87:30-35, 39-54).

That leaves the possibility that SV was falsely accusing Nieves, but Nieves never really developed a reason why this would be so. At closing, Nieves argued that SV was really shot by members of the rival gang whose member the

men had killed in Waukegan (91:78). But why SV would blame his fellow gang members instead of his rivals if they were the true shooters is unclear. SV admitted his role in the Waukegan homicide and that he was facing charges for it (87:40-42, 91, 105, 124-26). If SV wanted to get Nieves and Maldonado in trouble, he could have just told police that they helped kill someone in Waukegan. The benefit of falsely accusing the men of the shooting in Milwaukee is not clear and was not established at trial.[6] Even if one small part of Trinidad's testimony was improper, it was a harmless error.

## III. The circuit court did not improperly admit SV's testimony that someone told him that Nieves and Maldonado were planning to kill him, and if it did, it was harmless.

Finally, Nieves argues that the circuit court erred when it overruled his hearsay objection to SV's testimony that someone named Boogie Man told him that Nieves and Maldonado were going to kill him (Nieves's brief at 23-26; 87:51-52). The court concluded the testimony was not hearsay because it was not introduced to prove the truth of the matter asserted, but rather, to show how SV felt upon hearing the comment (87:52).

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[6] The circuit court precluded Nieves from asking SV if Maldonado and Nieves were also charged for the Waukegan shooting and suggesting that if they were not, then SV was blaming them for the Milwaukee shooting because he was taking the fall for what happened in Waukegan (89:3-4). The court thought this testimony might "bog down" the jury (89:4). The court permitted Nieves to argue that SV's Waukegan charges gave him a reason to falsely accuse the defendants (89:4). Regardless of the court's rulings, the State still asserts that it makes little sense for SV to accuse Nieves and Maldonado of the Milwaukee shooting if rival gang members did it.

The circuit court did not err. An out-of-court statement that is not admitted for its truth is not hearsay. *See* Wis. Stat § 908.01(3). A court may properly admit statements not for their truth, but rather to show their effect on the listener's state of mind. *State v. Wilson*, 160 Wis. 2d 774, 779, 467 N.W.2d 130 (Ct. App. 1991). The State asked SV if Boogie Man said anything to him that caused him concern, and the court admitted what Boogie Man said to establish what SV's concern was. This was a non-hearsay purpose. Further, the circuit court told the jury it was not admitting the statement for its truth. The jury is presumed to have listened to the court. *State v. Gary M.B.*, 2004 WI 33, ¶ 33, 270 Wis. 2d 62, 676 N.W.2d 475.

Nieves's argument that the statement was hearsay despite the circuit court's ruling is undeveloped. He claims that admitting a statement not for its truth "is a common approach to allowing statements otherwise hearsay into evidence" (Nieves's brief at 25). Nieves also argues that SV's statement about Boogie Man was irrelevant, and thus, the court's decision to admit it was "seriously flawed" (Nieves's brief at 25). This argument comes nowhere close to showing that the statement was hearsay or that the court otherwise erred by admitting it. *Pettit*, 171 Wis. 2d at 646 (this court does not address undeveloped arguments).

Nieves also contends that his counsel was ineffective for not arguing that the evidence should have been kept out under Wis. Stat. § 904.03 because its probative value was substantially outweighed by the possibility of unfair prejudice (Nieves's brief at 25-26). Nieves has not shown that his counsel could have successfully objected on these grounds. His postconviction argument on this issue was limited to one conclusory sentence that was insufficient to get a hearing or preserve the issue for appellate review.

Finally, even if the circuit court should not have admitted SV's statement about Boogie Man, any error was harmless. As already argued, the trial's outcome depended primarily on whether the jury believed SV that Nieves and Maldonado took him and SB to an alley in Milwaukee and shot them. SV knew both defendants very well and would not have mistaken someone else for them. And the testimony at trial did not establish any significant reason SV might have had to falsely accuse the men. That someone told SV shortly before the shooting that Maldonado and Nieves were planning to kill him and SB does not give SV a reason to falsely accuse the men. It neither bolsters nor undermines SV's identification. The jury chose to believe SV's testimony about the shooting. It would have done so even had he not been allowed to say anything about Boogie Man.

## CONCLUSION

The State respectfully requests that this court affirm the circuit court's judgment of conviction and order denying Nieves's motion for postconviction relief.

Dated this 17th day of April, 2015.

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 5,379 words.

Dated this 17th day of April, 2015.

_____
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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 17th day of April, 2015.

_____
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