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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP161-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM J. THURBER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND DECISION AND ORDER DENYING A POSTCONVICTION MOTION ENTERED IN THE CIRCUIT COURT FOR WINNEBAGO COUNTY, THE HONORABLE DANIEL J. BISSETT, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts.

INTRODUCTION & SUPPLEMENTAL STATEMENT OF THE CASE

The convictions in this case were based on a series of burglaries committed on July 21 or 22, 2010, to a dozen motor homes stored at American Mini Storage in Menasha, Wisconsin (1:2). Based on the subsequent police investigation, the State charged William Thurber for his involvement in the burglaries.

At trial, the State's theory of the case was that Thurber and a second man, Jacob Kent, burglarized the motor homes. During the investigation, Kent admitted to police that he had been involved in the burglaries with Thurber (1:2). He said that Thurber made initial break-ins of the motor homes, moved items to be taken near the entry point, left, and then returned in his truck with Kent for Kent to remove the moved items from the homes (1:2; 30:Exh. 13). Kent also told officers that he had cut himself while entering one of the homes and that they would find a drop of his blood on the driver's seat of that vehicle; police indeed found blood on a driver's seat in one of the motor homes (1:2-3).

Kent, however, recanted at trial, claiming instead that he had committed the burglaries alone and had lied about Thurber's involvement because he thought that Thurber had revealed to police Kent's involvement in a series of burglaries that the two had committed in Outagamie County (71:165-70, 186-91). Accordingly, the State primarily relied on testimony from Detective David Jagla, who had taken Kent's statements during the investigation, as to Kent's original admissions (71:201-05).[1]

[1] Otherwise, the State presented testimony from the twelve motor-home owners as to the damage and items stolen from their homes and from other officers who likewise testified to the immediate investigation of the crimes.

The defense theory was simple: the State failed to meet its burden. The State did not present any physical evidence linking Thurber to American Mini Storage, the motor homes, or the items stolen from those homes, which were never recovered.[2] Accordingly, defense counsel emphasized that Kent's recantations were the truth because he was motivated to lie to police in the first instance, and that the police stopped all other lines of investigation—including the theory that the burglary could have been an inside job based on several nonworking security cameras in the facility site—and focused on Thurber after they had talked to Kent. *See* 72:110-31 (defense counsel's closing argument).

Further, Thurber testified (72:53-68). He explained that he had received stolen material from Kent in the Outagamie burglaries and pleaded guilty for his involvement in that case, but stated that he had no involvement in the burglaries at American Mini Storage (72:55-59).

Based on Kent's claims that the burglaries involved two entries into each motor home—the first by Thurber to create easy access and prepare items to be taken and the second by Kent to retrieve items—the State charged Thurber with twenty-four counts of burglary as a party to a crime, or two per motor home (16:1-6). The jury convicted Thurber of twelve of the twenty-four counts, i.e., one per burglarized motor home (41).

Thurber filed a motion for postconviction relief raising numerous issues (45). As pertinent to this appeal, he alleged the following:

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[2] Police obtained DNA evidence of Kent's presence from the blood found in one of the motor homes, and DNA evidence of Thurber's presence from a cigarette butt found in one of the burglarized homes, but defense counsel successfully had that evidence suppressed (71:10).

- His trial counsel, Attorney Caroline Carver, was ineffective for failing to present a theory that a third party possibly committed the crime, specifically by failing to do the following:
    - Failing to include on the witness list Melissa Blank, a manager at American Mini Storage, to testify to the security camera setup, what she viewed on the available security footage from the hours preceding the burglaries, and the follow-up (or lack thereof) with her from police (45:2);
    - Failing to call as a witness Andrew Lutzow, who installed and maintained the security cameras, and whose truck was visible on security footage entering American Mini Storage early in the morning on July 22, 2010 (45:5); and
    - Failing to obtain and use surveillance video that showed only two vehicles, neither of which were Thurber's, entering the storage facility in the early morning hours on July 22 (45:6).
- Additionally, Thurber alleged that Attorney Carver failed to adequately consult with him about his defense, trial strategy, and other matters (45:6).
- Finally, as an alternative to the first ineffective assistance claim, Thurber argued that the trial court erroneously exercised its discretion in not permitting Blank to testify based on Attorney Carver's failure to list her as a witness (45:7).

The court held hearings[3] on the postconviction motion, at which Blank, Lutzow, Attorney Carver, and Thurber testified (74; 75). After the hearings, the circuit court denied Thurber's motion in an oral ruling (76; 52).

The State will address relevant facts and testimony from the trial, *Machner* hearings, and the circuit court's decision in the argument section of this brief.

SUMMARY OF ARGUMENT

Thurber now appeals, raising the bulleted issues above as well as an ineffective assistance claim based on cumulative error. He argues that Attorney Carver should have more aggressively emphasized the security setup at American Mini Storage to cast Lutzow as the more-likely perpetrator by calling Blank and Lutzow to testify, by presenting the surveillance video, and by consulting with Thurber more. And he claims that the circuit court should have permitted Blank to testify despite her absence from the witness list, given that it did not become apparent that her testimony would be needed until mid-trial.

Thurber is not entitled to relief. His ineffective assistance claims fail because Attorney Carver employed a reasonable defense strategy to which Blank's and Lutzow's testimony and the surveillance video would have added nothing and possibly weakened Thurber's defense. In addition, Carver testified credibly to her regular contact and discussions with Thurber; Thurber fails to identify anything that could have likely changed the result if Carver had personally met with him.

Finally, the circuit court soundly exercised its discretion in not permitting Blank to testify. Even it should have permitted her to testify, any error was harmless because Blank's

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

testimony would have been cumulative to (and less favorable to the defense than) Detective Jagla's.

STANDARD OF REVIEW

As for Thurber's claims of ineffective assistance of counsel, those are mixed questions of fact and law. *See State v. Carter*, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695 (citations omitted). This court will uphold the circuit court's factual findings unless they are clearly erroneous. *Id.* (citation omitted). "Findings of fact include 'the circumstances of the case and the counsel's conduct and strategy.'" *Id.* (quoting *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305) (quotation marks omitted). And "this court will not exclude the circuit court's articulated assessments of credibility and demeanor, unless they are clearly erroneous." *Id.* (citing *Thiel*, 264 Wis. 2d 571, ¶ 23). Whether counsel's assistance was ineffective is a question of law that this court reviews de novo. *Id.*

Thurber also challenges the circuit court's discretion in excluding Blank as a witness. This court upholds a circuit court's discretionary decision to admit or exclude evidence so long as the circuit court "examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." *State v. Novy*, 2013 WI 23, ¶36, 346 Wis. 2d 289, 827 N.W.2d 610.

ARGUMENT

I. The circuit court correctly concluded that Attorney Carver was not ineffective (1) for planning to not present Blank and Lutzow or the surveillance video, and (2) based on her adequate consultation with Thurber.

A. In an ineffective-assistance analysis, a trial court's determination that counsel employed a reasonable strategy is virtually unassailable on appeal.

To prove that Attorney Carver was ineffective, Thurber must establish both that her performance was deficient and that this performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To show deficient performance, Thurber must establish that Attorney Carver "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See id*. In proving Carver was deficient, Thurber must overcome a strong presumption that Attorney Carver acted reasonably within professional norms. *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (citation omitted).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. Thus, Thurber must demonstrate that Attorney Carver made serious mistakes that could not be justified in the exercise of objectively reasonable professional judgment, deferentially considering all the circumstances from Carver's

contemporary perspective to eliminate the distortion of hindsight. *See Strickland*, 466 U.S. at 689-91.

A trial court's determination that counsel had a reasonable trial strategy is "virtually unassailable in an ineffective assistance of counsel analysis." *State v. Maloney*, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620. "Judicial scrutiny of an attorney's performance is highly deferential." *State v. Maloney*, 2005 WI 74, ¶25, 281 Wis. 2d 595, 698 N.W.2d 583 (citing *Strickland*, 466 U.S. at 689).

To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. *Strickland*, 466 U.S. at 687. 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.'" *Thiel*, 264 Wis. 2d 571, ¶20 (quoted source omitted).

B. Carver's decisions to not name Blank as a witness, to not call Lutzow as a witness, and to not present the surveillance video were consistent with her reasonable trial strategy and were neither deficient nor prejudicial.

As a preliminary matter, this court must view Carver's decisions as to Blank, Lutzow, and other evidence in Thurber's case-in-chief in light of the reasonableness of her defense strategy that the State failed to satisfy its burden of proof.

1. Carver employed a reasonable trial strategy under the circumstances.

The defense theory at trial was that the State failed to meet its burden of proof. Through cross-examination, Carver brought out that the State presented no evidence of recovered property to link Thurber to the burglaries (71:221); that police stopped investigating other compelling leads as soon as they talked to Kent (71:213, 218, 221-22); and that Kent had a motivation to lie and appeared to be angry at Thurber when he made his initial admissions to police (71:188-89, 207-08).

Consistently with those efforts, Carver argued that under oath, Kent was telling the truth by recanting his admissions (72:122-28). She further argued that the State was engaging in tactics to sway the jury without meeting its evidentiary burden by charging him with two burglaries per home, by eliciting sympathy for the motor home owners and their losses from the crimes, by emphasizing Thurber's past record and past involvement with Kent, but without presenting an evidentiary case to establish that Thurber, beyond a reasonable doubt, committed the crimes (72:112-18).

At the *Machner* hearing, Carver explained that she had twenty-six years of experience as a lawyer, with criminal trial work as her focus (74:30). She explained that the defense theory in this case was that the State failed to meet its burden of proof:

> I saw from the get-go we had an old case, it had already been initiated through the system and dismissed. And I saw from the get-go that there didn't seem to be a whole lot of evidence, physical or witnesses with a lot of thorough investigation to be presented [by] the State to prove [its] case. . . . The more I got into it, I saw there were significant weaknesses in the State's case.

(74:32-33). Correspondingly, the emphasis of her cross-examination of Detective Jagla at trial was the "lack of a thorough investigation, . . . lack of follow up with [Blank], the missing [security camera] video tapes" (74:45).

But to that end, she sought to bring in that information as to the lack of investigation and lack of follow-up on other leads through Detective Jagla (rather than Blank or other non-police witnesses), because that information was "much more damaging" to the State coming from police than it would have been through other witnesses (74:47, 67).

Carver also remarked that generally, less was more for a defendant's case-in-chief when the theory was that the State failed to meet its burden:

> In my experience, I think it's always simpler to put on less as far as the defense, especially if you're viewing the State's case as weak to begin with and lacking a lot of supportive, you know, evidence for their burden beyond a reasonable doubt.
>
> . . . .
>
> . . . I always like to have that argument before the jury that, look, the State's failed to meet [its] burden and I don't see where, you know, that shifts the burden to the defense by putting on more witnesses.

(74:68).

Carver also noted that she needed to tread carefully in eliciting evidence that the police investigation ended prematurely, because presenting additional witnesses to that end risked opening the door to previously excluded DNA evidence tying Thurber to the crime scene:

> I thought it was a coup that we got that DNA [excluded] because that was the only physical link . . . the State had to Mr. Thurber that he had been present at the scene[,] so when that was excluded and I knew the State wouldn't be able to use that evidence, I thought that was a big strong point for our case. And I was extremely concerned about protecting that exclusion and I didn't want to . . . risk ever opening the door to allow that to come in because I thought that was very prejudicial and very damaging to his case if that had gone to the jury or if they had even suspected that there was something to that extent[.]

(74:70).

In all, Carver based her decision-making on the defense theory "that the burden is on the State" and there was a lack of evidence to support the criminal counts without Thurber bringing in extra witnesses or materials (74:76).

The court found that Carver's strategy was reasonable:

> she did have a defense strategy, that the State was not able to meet its burden of proof, that she did utilize that strategy throughout trial, she did address that in her closing argument a number of times, and that in light of the DNA not being admitted that it was a strategic decision on her part to not press that issue in some respects and I do think that is a reasonable strategy that was employed by Miss Carver in this case and that her representation of the defendant in this case was effective.

(76:13-14).

In light of that "virtually unassailable" determination, *Maloney*, 275 Wis. 2d 557, ¶23, Carver's strategy was reasonable. And consistently with that strategy, Carver's decisions regarding Blank, Lutzow, and the video evidence were neither deficient nor prejudicial, for the reasons set forth below.

2. Carver was not ineffective for failing to name Blank as a witness given that she elicited all of the information Blank would have provided—and to better effect—from Detective Jagla.

At trial, the State called Detective Jagla to testify to his interview with Kent, Kent's admissions, and Kent's implication of Thurber (71:199-205). During cross-examination, consistently with the defense strategy, Carver asked Detective Jagla questions that brought out answers to support the defense theory that Kent had lied to police:

- Kent was angry and upset when he implicated Thurber in the burglaries (71:207). Specifically, Jagla recalled that Kent was upset with Thurber because Kent thought Thurber had turned him in (71:207-08).

- Although he thought Kent had some knowledge about the burglaries, Detective Jagla admitted that he had doubts about Kent's description of how the burglaries went down: "I probably did have reservations about what he was telling me. It sounded awfully one-sided" (71:209-10).

Carver also elicited answers from Detective Jagla that supported an inference that the police dropped all other viable leads as soon as they got Kent's admission:

- Detective Jagla testified that there were several security cameras at American Mini Storage, but that only the front camera recording vehicles entering the main front gates worked (71:212). Jagla said that because the back camera was not working, it had apparently stopped working on the night of the burglaries, and a week's worth of footage had disappeared without explanation, he initially suspected the camera repair person, i.e., Andrew Lutzow, to be involved in the burglaries (71:213, 218). Jagla said that he had talked to "the girl at the office," i.e., Blank, who could not explain why the camera had stopped operating or what had happened to the previous week's footage (71:213, 218).

- Jagla acknowledged that there was footage from the camera at the front gate, and that it showed a pickup truck and a Mercury Marquis entering at around 1:30 a.m. on July 22 (71:214-15). Jagla said that police followed up on the Marquis and found that it was not involved in the burglaries (71:216). Jagla later said that he did not "specifically recall viewing a black pick-up

truck on the video at 1:30" but that Blank "advised [him] of that and then she's the one that gave me the name of Andy Lutzow" (71:218).

- Jagla acknowledged that he did no follow-up investigation as to the black pickup or Lutzow (71:214, 218-20).

- Jagla stated that his "investigation stopped in regards to any other leads or potential suspects" after he learned that Kent was in custody and talking about the burglaries (71:221).

The next day, Carver sought to have Blank testify, based on the State's successful hearsay objections that kept out additional testimony from Jagla that he had Blank watch the video and that he communicated with her about it (72:41-42). Carver stated that she did not provide the State with notice of Blank as a possible witness because she thought that she would elicit that information from Jagla (72:41-42). The court excluded Blank as a witness based on Carver's failure to provide notice to the State (72:46).

At the *Machner* hearing, Blank testified to the following information that largely overlapped Jagla's testimony:

- She worked for American Mini Storage in July 2010 (74:6). She said that at the time, they were upgrading their security camera system, which included four total cameras. She said that just before the break-in on July 21 or 22, all of the cameras were working but that after, two were not, including one that was positioned to capture activity around the motor homes that were burglarized (74:7-9).

- She watched the footage from camera at the front gate and saw Lutzow's pickup truck enter at around 1 or 1:30 a.m., but did not see it leave (74:13, 15-16). She

said that the video did not show a vehicle driven by Thurber and Kent (74:11).

- She told Jagla of everything she saw on the videos, she told him where the cameras were located, and she told him of Lutzow and seeing his truck on the video. Blank testified that Jagla had an opportunity to review the video (74:18).

Blank provided the following additional information:

- The cameras did not work because of an ongoing power outage issue at American Mini Storage (74:9-10).

- The camera aimed at the burglarized motor homes was mounted on a light post. But because of the power outage, the light post was unlit, thus the camera mounted there would not have been visible in dark early morning hours (74:12).

- There were three ways in and out of American Mini Storage; only one of those points, i.e., the front entrance, would have been captured by a camera (74:14-16).

At the *Machner* hearing, Carver said that generally, all of her decisions as to whether to present witnesses was driven by the simple defense theory that the State failed to satisfy its burden (74:76). Specifically as to Blank, Carver said that she had considered naming Blank as a case-in-chief witness but decided against it. Because the defense strategy was to show the lack of a thorough police investigation and lack of evidence, having Jagla describe the lack of investigation would have been much more damaging to the State than it would have had it come through Blank (74:44-45, 67). Further, Carver had concerns that presenting witnesses to more directly implicate someone else, i.e., Lutzow, as the burglar would risk opening the door to the

previously suppressed DNA evidence tying Thurber and Kent to the scene (74:70).

That said, Carver stated that she later sought to have Blank testify because she thought that Jagla had denied talking with Blank, which had "surprised" her (74:44-45). Carver admitted that had Blank testified, the defense theory that someone else did it "would have been stronger," (74:49). But Carver also acknowledged that she would have had Blank explain that several cameras were broken, that she told police that, and the police did not follow up, all of which was information that Carver acknowledged was in police report and that the jury heard through Jagla's testimony (74:67).

The circuit court held that Carver was not ineffective for not naming Blank as a witness during discovery (76:6-8). It reviewed Jagla's trial testimony and Blank's *Machner* testimony and concluded that "it doesn't appear that there would have been anything of value that she would have added to trial" (76:7-8).

The circuit court's factual findings were not clearly erroneous, and its legal conclusion was correct. Carver was not deficient for failing to name Blank as a defense witness in the first instance, because not calling her was consistent with the reasonable defense strategy to emphasize the State's failure to meet its burden. Carver had no reason to believe that Blank would have provided unique information to support that defense that could not have been elicited from Detective Jagla.

And even if Carver should have named Blank as a witness as a contingency plan, Thurber cannot demonstrate prejudice. As the circuit court noted, Carver would have had Blank state that cameras on the premises were not working, that she saw two vehicles enter American Mini Storage on the morning of the burglaries, that she communicated that to police, and that the police did not follow up. But Jagla provided all of that information. *See* 71:213 (stating that the back camera was not

working, that it stopped working on the night of the burglaries, and that Blank could not explain why the system stopped working); 71:214 (stating that the front gate video showed only two vehicles entering the facility before the burglaries occurred); 71:218 (stating that Blank told him of footage and stating that he did not investigate Lutzow).

Indeed, if Carver made any mistakes at trial, it was her seeking to have Blank testify based on her view at the time that she did not get the information she wanted out of Jagla. As Carver herself acknowledged at the *Machner* hearing, everything that she would have had Blank say was in the police report and in Jagla's testimony on cross-examination.

Finally, without Blank's testimony, the jury was left with an inference that planted seeds of reasonable doubt. Through Jagla, the jury learned that a key camera had suddenly stopped working without explanation just before the burglaries; that a working camera had shown two vehicles, including Lutzow's truck, entering the facility early in the morning of the burglaries, but police only followed up with one of them; that Lutzow had been accessing the non-working camera; and that police did not investigate Lutzow, the second vehicle, or anything else once Kent made his admissions. That provided the jury with the inference that someone, possibly Lutzow, had deactivated the key camera to burglarize the trailers, that Lutzow must have been involved because his pickup truck (and no other unexplained vehicle) had entered the facility, and that police simply dropped the ball by failing to investigate Lutzow or the pickup truck.

Blank's testimony would have weakened that inference in several ways. First, she clarified that the key camera stopped working because of an overarching power outage at the facility, which took months to address and required repairs to the underlying power grid. That testimony would have weakened the inference that the actual burglar or burglars broke or

deactivated the camera to burglarize the motor homes. Second, she would have clarified that there were two additional ways for vehicles to enter and exit the facility other than the main gate, which would have eliminated the inference that the Lutzow's pickup truck necessarily was involved in the burglaries.

Thurber argues that Blank would have provided details about the positioning and visibility of the nonworking camera, which would have created an inference that experienced burglars such as Kent and Thurber would not have risked obvious detection (Thurber's br. at 36). But any inference[4] to that effect would have been undercut by Blank's explanation that the cameras would not have been visible in the darkness (74:12).

In sum, Thurber cannot demonstrate deficient performance or prejudice based on Carver's decision to not name Blank as a witness.

3. Carver was not ineffective for failing to have Lutzow testify.

Like Blank's testimony, Lutzow's testimony would have added nothing to the proceedings—and more likely would have hurt Thurber's defense. Hence, Carver was not ineffective for failing to call him to testify.

At a continuation of the *Machner* hearing, Lutzow testified that he was hired to install the camera security system after several previous break-ins had occurred at American Mini

[4] The potential strength of that inference is questionable at best. The jury could have likewise inferred that Kent and Thurber saw the cameras but guessed that they would not capture their actions in the dark; that they guessed that the cameras were simply deterrents; or that they were oblivious and that their past experiences as burglars did not necessarily mean that they were careful burglars.

Storage (75:5, 10). He stated that there was insufficient power and electricity to support the facility's needs and that those power issues were never resolved (75:8-10). He described the whole electrical system at the facility as "a mess" (75:19).

Lutzow said that it was not unusual for him to enter the facility in the early morning hours to work for a few hours on the installation, because it was easier without anyone else around and he figured that he could deter would-be burglars (75:10-12). Lutzow also confirmed that in addition to the main driveway, there was at least one other way for a vehicle to access the facility (75:15).

Like with Blank, Carver considered calling Lutzow as a witness for the case-in-chief but strategized that it was best to not do so (74:51). She knew that the jury would hear that Lutzow worked on the cameras, that he knew which cameras were working properly, and that police did not follow up with him, leaving it with an inference that he was possibly involved in the burglaries (74:51). In her view, bringing in Lutzow to explain why the cameras did not work would have weakened that inference (74:51-52). Further, not calling Lutzow as a witness was consistent with her strategy to emphasize the State's failure to meet its burden, not to suggest to the jury that Thurber had a burden to prove that someone else did it (74:68).

Carver's decision to not call Lutzow was neither deficient nor prejudicial. It was consistent with the defense strategy to simply emphasize the State's failure to meet its burden. Further, like with Blank, not having Lutzow testify retained the inference that there was a mysterious third party who had access to the facility, who had knowledge of the security cameras, and who police did not investigate. As Carver correctly noted, having Lutzow come in and explain the power situation at the facility would have weakened that inference.

Thurber argues that Lutzow would have helped Thurber's cause because when he first came in to testify at the *Machner* hearing, he refused to take the witness stand, invoked the Fifth Amendment, and asked the State to extend him immunity for his testimony (74:20-26) (Thurber's br. at 40). In Thurber's view, had the jurors seen that outburst, it would have strongly suggested that Lutzow had something to hide and instilled strong doubts in their minds that Thurber was the burglar (*id.*).

But as the circuit court noted, the jury would not have heard any such outburst from Lutzow: "The Court would not have allowed that to be presented in front of the jury. It would have certainly had the jury excused and would have addressed those immunity/5th Amendment type issues outside of the presence of the jury" (76:8-9).

Indeed, the conditions surrounding Lutzow's statements at the initial *Machner* hearing would not have been present at trial. As an initial matter, the State was unaware at the *Machner* hearing that Thurber intended to call Lutzow as a witness (74:25). Accordingly, it did not know what Lutzow would say or whether an offer of immunity was even necessary, let alone advisable. Lutzow did not appear at the hearing represented and did not appear to have talked to an attorney about his rights and scope of his testimony at the hearing (74:26-28).

The circuit court continued the *Machner* hearing to allow Lutzow time to consult with an attorney and with the district attorney's office (75:3). At the continuation, Lutzow testified about the camera setup and power issues at American Mini Storage without any apparent concerns about immunity or self-incrimination, or without any mention of the State having extended him immunity for his testimony.

Had Carver planned on Lutzow testifying at trial, she would have had to provide notice to the State. Accordingly, the State would have talked to Lutzow before trial, and presumably any concerns Lutzow had about his testimony would have been

addressed well before he actually sat before the jury. In any event, as the court noted, it would not have permitted the jury to hear Lutzow's concerns and confusion over immunity and his Fifth Amendment rights.

Accordingly, Thurber cannot demonstrate deficient performance or prejudice based on Carver's decision to not name or call Lutzow as a witness.

4. Carver was not ineffective for not showing the surveillance video of two vehicles entering the facility to the jury.

Thurber next argues that Carver was ineffective for not obtaining and presenting to the jury the surveillance video showing only a Mercury Marquis and Lutzow's pickup truck entering the facility during the early morning hours before the burglary (Thurber's br. at 46).

At trial, Detective Jagla stated that the surveillance video showed a Marquis and pickup, but no other vehicles entering the facility (71:214-15). At the *Machner* hearing, Carver stated that she was aware that the videos were long and would have shown a Marquis and a pickup entering the facility (74:50-51). Given that, the circuit court concluded that Carver was not ineffective for failing to show the jury the video (76:11).

That conclusion was correct. The video would have shown only two cars entering the facility before the burglaries, a fact that Detective Jagla had acknowledged. Presenting the video would have added nothing. Accordingly, Thurber cannot demonstrate that Carver's performance in that regard was deficient or prejudicial.

C. Carver adequately consulted with Thurber.

At the *Machner* hearing, Attorney Carver stated that Thurber was "a very active client compared to others[,] so knowledgeable and very communicative[,] and did assist in his

defense significantly more than other clients" (74:31). Carver estimated that she communicated with Thurber more than ten times in preparing for trial (74:62-63). She said that most of the communication with him was through letters, but that she also "met with him a couple of times" through videoconferencing at his institution (74:63-64). Carver testified that Thurber never complained to her about not communicating with him (74:32).

Carver testified that Thurber "was very adamant that he wanted to testify" (74:39). She stated that she generally discusses the pros and cons with defendants wishing to testify, and that there were pros and cons to Thurber testifying in this case, but could not recall her specific discussion on that matter with Thurber (74:40).

Thurber denied that he wanted to testify, that Carver convinced him to do so, and that he was "[v]ery surprised" when the State cross-examined him about his conduct during Outagamie burglaries he had committed with Kent (74:82-83). Thurber described his communications with Carver as limited, and the written communications as ineffective because he was dyslexic and needed face-to-face meetings (74:87-88, 90). He said that they only had one video conference a week before the trial (74:88). He said that Carver ignored his requests to subpoena Lutzow to testify (74:87, 89).

The circuit court found that Carver's testimony was credible, and that based on her statements that Thurber was an active client, that he was adamant about testifying, that there was significant written communication, and that she met with him over video conference, that there was adequate communication in this case (76:10-11).

That finding was not clearly erroneous and that conclusion was sound. Thurber suggests that had Carver met with Thurber more, or at least personally, he would have understood how damaging his own testimony would be (Thurber's br. at 47). But the circuit court found that Thurber

affirmatively wanted to testify. Indeed, the court engaged in a colloquy before Thurber testified, in which Thurber stated that he had adequate time and opportunity to talk with Carver about his decision to testify, that he had adequate time to think about his decision, and that she explained the advantages and disadvantages of doing so (72:48-49).

In sum, Thurber cannot demonstrate deficient performance or prejudice based on Carver's pre-trial communications with him.

D. There was no cumulative error.

Finally, Thurber argues that the above errors, taken together, were cumulatively ineffective and warrant a new trial (Thurber's br. at 47-48).

Simply because Thurber, in hindsight, can formulate many ways in which he believes that Carver was deficient does not persuade that Carver was actually deficient in any way. "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (citing *Strickland*, 466 U.S. at 690). Indeed, counsel's "[f]ocusing on a small number of key points may be more persuasive than a shotgun approach." *Yarborough*, 540 U.S. at 7. Thurber fails to overcome the presumption that Carver's trial choices were strategic and the circuit court's unassailable conclusion that Carver engaged in a reasonable trial strategy.

And merely multiplying the number of allegations of ineffective assistance does not make up for a lack of merit in the individual claims. *Thiel*, 264 Wis. 2d 571, ¶61. There cannot be cumulative prejudice when there is no prejudice to accumulate. *Estate of Hegarty v. Beauchaine*, 2006 WI App 248, ¶248, 297 Wis. 2d 70, 727 N.W.2d 857. "'Zero plus zero equals zero.'" *Id.* (quoting *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976)).

II. The circuit court soundly exercised its discretion in excluding Blank as a witness.

As an alternative to his first ground of ineffective assistance of counsel, Thurber argues that the court erroneously exercised its discretion in excluding Blank as a witness when Carver sought to have her testify in Thurber's case-in-chief.

Carver did not identify Blank as a witness during discovery. *See* Wis. Stat. § 971.23(2m)(a). The court determined that Blank's testimony was not being offered for impeachment or rebuttal, but rather for Thurber's case in chief (72:40-46). Accordingly, it excluded Blank based on the notice violation, which it was well within its discretion to do.

Further, even if the preferred remedy for such violations is a continuance to allow the other party time to interview the witness, *Kutchera v. State*, 69 Wis. 2d 534, 542, 230 N.W.2d 750 (1975), the court's failure to grant such a continuance was harmless for the same reasons set forth in the ineffective assistance argument above. *See State v. Hilleshiem*, 172 Wis. 2d 1, 18, 492 N.W.2d 381 (Ct. App. 1992) (harmless error analysis applies to circuit court's erroneous decisions to exclude a witness) (citing *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985)). As explained in more detail in Part I.B.2 above, Blank's testimony would have been cumulative to Detective Jagla's and possibly detrimental to Thurber's defense. Accordingly, any error by the court in excluding Blank as a witness did not prejudice Thurber. He is not entitled to relief.

CONCLUSION

For the foregoing reasons, the State respectfully asks that this court affirm the judgment of conviction and the decision and order denying postconviction relief.

Dated this 26th day of August, 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 6211 words.

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Sarah L. Burgundy
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I hereby certify that:

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

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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 26th day of August, 2015.

_____

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