STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP637-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL S. DENGSAVANG,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND DECISION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE REBECCA DALLET AND THE HONORABLE STEPHANIE ROTHSTEIN, PRESIDING

RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General
SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646
Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
burgundysl@doj.state.wi.us

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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.

SUPPLEMENTAL STATEMENT OF THE CASE

After a five-and-a-half day trial, a jury convicted Michael Dengsavang of (1) attempted first-degree intentional homicide, (2) armed robbery with use of force, and (3) burglary, all as a party to a crime (24A).[1] According to the criminal complaint, police believed that Dengsavang and two accomplices, Thongsavahn Rodthong and Paul Phonisay, committed a crime spree during an approximately 20-minute period on December 13, 2009, where they robbed the owners of a Wauwatosa Happy Wok restaurant at gunpoint; burglarized the owners' nearby apartment; and shot Officer P., a responding police officer, outside the owners' apartment (3:3-8).

Dengsavang sought postconviction relief, claiming that counsel was ineffective on three grounds (47). After the parties briefed the issues, the circuit court denied the motion without a hearing (53).[2]

Dengsavang appealed to this court, but raised only one of the three ineffective assistance claims that he had asserted in his postconviction motion. Brief & Appendix of Appellant, *State v. Michael Dengsavang*, Case No. 2013AP1573-CR, *available at* the Wisconsin Supreme Court and Court of Appeals web site. Specifically, he argued that counsel was ineffective by opening the door to information in an otherwise excluded crime lab

[1]The Honorable Judge Rebecca Dallet presided over the trial.

[2]The Honorable Ellen Brostrom presided over Dengsavang's postconviction proceedings.

report in which the analyst could neither conclusively identify nor exclude Dengsavang's shoeprints from those found at the crime scenes. *Id.* at 13-17.[3] He asserted that he was either entitled to relief outright, or a *Machner* hearing. *Id.*

This court reversed and remanded the postconviction order, concluding that Dengsavang satisfied his burden entitling him to a *Machner* hearing on his raised ineffective assistance claim. *State v. Michael Dengsavang*, Case No. 2013AP1573-CR, slip op. (Wis. Ct. App. Apr. 29, 2014) (per curiam) (80; R-Ap. 101-13). This court observed:

(1) in a pretrial hearing at which trial counsel's then-associate, Attorney Daniel Rieck, represented Dengsavang, the circuit court excluded the State's late-submitted shoeprint report unless the defense opened the door to it on cross-examination;

(2) at trial, Dengsavang's counsel, Attorney Robert D'Arruda, opened the door to information in the report by obtaining confirmation from a police officer that the state crime lab could not conclusively identify Dengsavang's shoes as those that created certain shoeprints near the crime scene; and

(3) it was unclear whether Attorney D'Arruda opened that door to the otherwise excluded evidence without knowing about the pretrial ruling or whether he did so for strategic reasons.

(80:4-6, 10; R-Ap. 104-06, 110) Accordingly, this court remanded for a hearing to obtain Attorney D'Arruda's testimony on why he opened the door to the excluded evidence, without specifically addressing whether the record conclusively

[3]In that appeal, Dengsavang also claimed that the circuit court erroneously exercised its discretion when it admitted information from the shoeprint report. That claim is not at issue in this appeal.

demonstrated that Dengsavang was prejudiced (80:12-13; R-Ap. 112-13).

On remand, the circuit court held *Machner* hearings, at which Attorney D'Arruda and Attorney Rieck testified (91; 92).[4] In a written decision and order, the circuit court held that Dengsavang failed to demonstrate that Attorney D'Arruda was deficient for opening the door to the shoeprint report (86:7-8). It reasoned that because D'Arruda's line of questioning established that the State could not conclusively link the shoeprints at the crime scenes to Dengsavang's common Nike shoes, it was a reasonable attempt to raise reasonable doubt in the jurors' minds (86:8).

The circuit court also concluded that Dengsavang failed to demonstrate prejudice (86:8-9). It noted that this case involved a "mountain of circumstantial evidence" (86:8), including 37 witnesses and over 300 exhibits, and that excising the shoeprint evidence pertaining to the state crime lab's report would have not created a reasonable probability of a different outcome (86:9). Dengsavang appeals.

The State will address additional facts in the argument section below.

[4]The Honorable Stephanie Rothstein presided over the *Machner* proceedings.

ARGUMENT

I. Dengsavang failed to demonstrate that Attorney D'Arruda was deficient or prejudicial when he opened the door to information in the crime lab report.

A. To succeed on his claim, Dengsavang must demonstrate that D'Arruda's performance was deficient and that that deficiency was prejudicial.

To establish ineffective assistance of counsel, a defendant must prove that the representation was (1) deficient and (2) prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must highlight specific acts or omissions that are "outside the wide range of professionally competent assistance." *Id.* at 690. A lawyer's strategic decisions "are virtually invulnerable to second-guessing." *State v. Westmoreland*, 2008 WI App 15, ¶20, 307 Wis. 2d 429, 744 N.W.2d 919.

To prove prejudice, a defendant must demonstrate that there is a reasonable possibility that, but for counsel's deficient performance, the results of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Courts need not address both prongs of the *Strickland* test if the defendant fails to make a sufficient showing on one. *See id.* at 697.

This court's review of an ineffective assistance of counsel claim presents a mixed question of fact and law. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). This court will not disturb a circuit court's findings of fact unless they are clearly erroneous, but reviews the circuit court's legal conclusions as to deficiency and prejudice for errors of law. *Id.* at 127-28.

> Reviewing courts should be "highly deferential" to counsel's strategic decisions and make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." There is a " 'strong presumption' that [counsel's] conduct 'falls within the wide range of reasonable professional assistance.' "

State v. Domke, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364 (citations omitted).

B. D'Arruda was not deficient for opening the door to the inconclusive nature of the shoeprint report.

The pertinent facts as to the court's exclusion of the shoeprint report and D'Arruda's opening the door to information in it follow.

1. The court limited the State to introducing the Crime Lab report on the shoeprints in rebuttal only if the defense opened the door to the report.

At a hearing five days before trial, counsel for Rodthong, who was at that point one of Dengsavang's co-defendants,[5] informed the court that the State exceeded discovery deadlines by producing a report from the state crime laboratory, in which an analyst analyzed images of shoeprints found in the snow near the crime scenes. After listening to counsel's objections to the report, the circuit court ruled that the State could not introduce the report unless the defense "opened the door":

> [T]his . . . [shoeprint] report and the person that offered it, that's all we're talking about here. . . .

[5]According to the CCAP records for *State v. Paul Phonisay*, Milwaukee Cty. Case No. 2009CF5831, and *State v. Thongsavahn Rodthong*, Milwaukee County Case No. 2009CF5832, Rodthong and Phonisay ultimately pleaded guilty to their charges before trial.

> I'm going to order the State can't use it in its case in chief. If for some reason the defense put on somebody or questioned somebody who talks about analyzing shoes or says something to the effect of well, you could have analyzed them, why didn't you analyze them, . . . those would be the kind of situations I will entertain an opening-the-door type issue[.]

(61:10).

The circuit court clarified several times that its order was limited to the state crime laboratory report; it did not place any limitations on testimony regarding the shoeprints or the shoes themselves:

> I'm not making any limitations on the prints themselves or the shoes themselves. That stuff you've had. The only thing that's new is this expert analysis of the prints.

(61:10, 13). As noted above, D'Arruda was not present at that hearing; rather, D'Arruda's associate, Attorney Rieck, represented Dengsavang.

2. D'Arruda elicited testimony that the state crime lab could not conclusively match Dengsavang's mass-produced shoes to the prints.

At trial, Attorney D'Arruda opened the door to information in the shoeprint report when he cross-examined a State's witness, Detective Lisa Hudson, a crime scene investigator for the Wauwatosa Police Department (67:84). Specifically, D'Arruda began by cross-examining Hudson about her testimony on direct regarding her observations of shoeprints left at the scene:

> Q Moving on, you testified to numerous footwear impressions that you saw, is that correct?
>
> A Correct.

Q And one of the shoe print impressions is, as [the prosecutor] referred to, the two round circle shoe print?

A Correct.

Q In other words, similar to the Nike shoes that were recovered from Mr. Dengsavang, correct?

A Correct.

Q Now, I noticed on direct you indicated that in your opinion that the footwear impressions that had the two round circles on it were visually matched to the footwear impressions you saw in the snow, is that correct?

A Correct.

Q When you say "visually match," that means to your eye it looked similar to you?

A Correct.

Q But scientifically matches, it has never been scientifically matched, is that correct?

A I can't answer that, because I am not a footwear expert.

(68:16-17).

D'Arruda then got Hudson to confirm that the state crime lab analyzed photographs of the shoeprints, that it could not conclusively determine that Dengsavang's shoes made the prints, and that Dengsavang's shoes were common, mass-produced Nikes:

Q Okay. Were you aware that impressions were sent to the crime lab or those photos and shoes were sent to the crime lab?

A Yes.

Q And were you aware that the examiner said that he could not make a positive identification?

A Correct.

….

Q All right. You're aware the crime lab could not positively identify those pictures to the shoes, correct?

A Correct.

Q All right. And you're aware too that obviously Nike is a popular selling shoe, correct?

A Correct.

Q And many people, perhaps even yourself, own Nike shoes?

A Correct.

Q And a lot of the Nike shoes have similar or the same model, would have probably similar sole—similar soles as this Nike shoe in question, correct?

A Correct.

Q Because Nike shoes are mass produced, are they not?

A Correct.

Q They are not—if somebody is making pottery, you might make one pot one way, another one a different way. When you mass produce a shoe, like an automobile, you can make literally millions of those the same way?

A Correct. There was only one shoe print and one person under a tree.[6]

Q Well, like we said, all you could do is visually match that shoe print, correct?

A Correct.

Q No positive identification has been made of that footwear impression, has it?

[6]Police found Dengsavang hiding under a tree near the crime scenes.

A Not positively, no.

(68:17, 18-19).

On redirect, Detective Hudson again acknowledged that the state crime laboratory could not definitively identify Dengsavang's shoes as the only shoes that could have made the shoeprints found at the scene (68:22-23). Hudson also agreed that the analyst could not rule out Dengsavang's shoes as capable of making the prints (68:23-24).

In all, Hudson's testimony was the only evidence of the shoeprint report presented to the jury. The State never attempted to introduce the report or testimony from the crime lab analyst who prepared it.

3. The *Machner* hearing testimony demonstrated that D'Arruda likely knew about the pretrial order and reasonably opened the door to the ultimately inconclusive information in the report.

At the *Machner* hearing on remand, Attorneys D'Arruda and Rieck testified. The focus of the testimony was whether (1) D'Arruda was aware of the pretrial order barring the State from using the shoeprint report in its case-in-chief; and (2) whether D'Arruda's opening the door to information in the report was part of a reasonable trial strategy.

a. Rieck and D'Arruda likely discussed the pretrial ruling.

D'Arruda testified that he was familiar with the shoeprint report and confirmed that Rieck attended the hearing for D'Arruda (91:7-8). Although he stated he had no independent recollection, D'Arruda said that he heard of the results of the hearing, that he "definitely remember[ed] discussing it" with Rieck, and that he was "sure [Rieck] must have told [him] about the Court's ruling" (91:7-8). D'Arruda said that it was

common practice for an associate to cover a pretrial hearing, and that he and the associate would discuss important matters that came up at any of those hearings (91:19). D'Arruda said that the court's pretrial ruling here was important and that Rieck would have discussed it with him (91:20).

Attorney Rieck agreed that it was not uncommon for him to appear in court for D'Arruda (92:8). When he did so, he would "get [him]self up to speed" on the case by reading the file and talking to the attorney so that he was well-prepared (92:8). He would take "voluminous" notes and then summarize them for the lead attorney (92:8). He'd put the notes in the file sideways so they stuck out; he'd put the file on the attorney's chair so the attorney could not miss it; and he'd call or text the attorney to make sure the attorney got the information and notes (92:8-9).

Rieck said that he had no reason to believe that he deviated from that practice after the pretrial hearing in Dengsavang's case (92:9). He stated that he was "very familiar" with Dengsavang's case and had attended other hearings for D'Arruda (92:10). Rieck likewise agreed that the pretrial ruling in this case was "important," that it warranted a call to D'Arruda, and that he recalled phoning D'Arruda about it, although he could not remember if they had talked or he had left a voice mail (92:15-16). In any event, he testified, even if he only left a voice mail, he still would have left his file with his notes in a conspicuous position for D'Arruda (92:16).

b. D'Arruda's opening the door to the inconclusive shoeprint report evidence was consistent with Dengsavang's defense strategy.

D'Arruda testified that Dengsavang's defense strategy was that he was innocent, that there was no direct evidence connecting him to the crime, and that he was simply caught in the wrong place at the wrong time (91:7). D'Arruda noted that Hudson's testimony brought out that Dengsavang was wearing

shoes that were mass-produced in the millions, and that the State could not conclusively identify Dengsavang as having made the prints (91:11). D'Arruda acknowledged that he could not recall whether he had a specific strategic purpose to open the door to the testimony, but stated that the information he brought out—that the report was inconclusive and that there are millions of shoes that could have produced the shoeprints—was not inconsistent with Dengsavang's theory that he was an innocent bystander at the wrong place at the wrong time (91:18). D'Arruda further acknowledged that even though he opened the door to the report, the State nevertheless could not prove that Dengsavang undoubtedly made the shoeprints (91:21).

Overall, D'Arruda could not recall whether he made a specific strategic decision to open the door to the shoeprint report (91:11-12). But he also said that his practice was that he would not introduce excluded evidence that could hurt a client unless he had a reason to do so (91:23). He suspected here that because the State's case was largely circumstantial, Dengsavang was never positively identified as the shooter, and there were other people in the area at the time of the crimes, he opened the door to emphasize the ubiquity of the shoes Dengsavang was wearing and to plant the seeds of reasonable doubt for the jury (91:23, 38).

Because he could not remember his decision-making on this portion of the trial, D'Arruda summed up that he either was aware of the pretrial ruling and opened the door to strategically help Dengsavang's defense or he was unaware of the court's pretrial ruling but brought up the inconclusive nature of the report because he thought it would help Dengsavang (91:39).

4. The circuit court soundly concluded that Dengsavang failed to demonstrate deficient performance based on D'Arruda's opening the door to the shoeprint report.

In its written decision and order, the circuit court concluded that D'Arruda was not deficient:

> Clearly defense counsel's line of questioning of Detective Hudson was a credible defense strategy calculated to attempt to raise reasonable doubt as to whether his client committed the crimes of which he was accused. The point to be made to the jurors was that *despite* the fact that the shoes worn by the defendant had been compared by an expert to the prints at the scene, his shoes were not able to be determined to be the same shoes as the prints found at the scene. This is a strategy obviously designed to raise doubt in the minds of the jurors. The corollary argument (i.e. that the shoes had not been excluded) is arguably outweighed by failure of the examiner to reach a definite conclusion that the shoes matched. Trial counsel then made the point with the witness that "Nike shoes are mass produced" perhaps by the millions. . . .
>
> Further, associate counsel's testimony supports the proposition that trial counsel was aware of the court's ruling and made a conscious decision to proceed with this as a small way to try to chip away at the mountain of circumstantial evidence. Even if one totally discounts or ignores associate counsel's testimony and his routine practice and assumes that trial counsel did not know about the ruling, this line of questioning was not an unreasonable strategy to pursue to undermine the impact of the evidence.

(86:8) (emphasis omitted).

The circuit court's decision was consistent with *Strickland* and had support in its findings based on the *Machner* testimony. Both D'Arruda and Rieck testified that their general practice was to share information from hearings, and both stated that the nature of the pretrial decision in this case was an important one that Rieck would have immediately shared with D'Arruda. Further, regardless of whether D'Arruda was aware of the ruling, his opening the door to the inconclusive nature of

the report was helpful to Dengsavang's defense. As the court noted, even though D'Arruda's cross-examination allowed the State to raise the corollary proposition that Dengsavang's shoes were not excluded as possible matches, that point did not necessarily outweigh the fact that an expert could not conclusively link Dengsavang's shoes to the crime scene prints.

Generally, Dengsavang argues that the circuit court should have made different findings based on D'Arruda's many statements that he couldn't remember specifically talking to Rieck about the shoeprint report or about his specific decision-making process (Dengsavang's br. at 20-21). Dengsavang argues that the court should have found, based on Rieck's remarks that D'Arruda was having issues at that time that negatively impacted the functioning of their law firm, that D'Arruda likely never learned of the pretrial order (Dengsavang's br. at 21).

But the court was entitled to find that despite D'Arruda's lack of specific memory, D'Arruda knew about the order based on Rieck's and D'Arruda's testimony as to their normal practice. The postconviction court is the ultimate arbiter of the credibility of trial counsel and all other witnesses at a *Machner* hearing. *See Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980).

And the court was entitled to find, based on Rieck's statements, that while the law firm may have been in "disarray" at the time of the proceedings, those problems negatively impacted the law firm as a business, not necessarily D'Arruda's trial performance or Rieck's and D'Arruda's communication on trial issues. Indeed, Rieck made no comments on whether D'Arruda's issues at the time affected his professional performance generally or specifically to Dengsavang's trial.

Dengsavang also argues that the record does not support the court's conclusion that D'Arruda either made a strategic decision to open the door knowing about the pretrial order, or reasonably opened the door without knowing about the pretrial order (Dengsavang's br. at 22-24). That argument is baseless. As the circuit court explained, bringing in the limited testimony that (1) crime lab experts compared Dengsavang's shoes to prints found at the crime scene, (2) the experts could not conclusively match the shoes to the prints, and (3) Dengsavang was wearing mass-produced Nike shoes with ubiquitous soles, was consistent with Dengsavang's defense that he was an innocent bystander.

Finally, even if D'Arruda was not aware of the pretrial ruling, counsel's strategic decisions made after a less-than-complete investigation of the facts and law may still be adjudged to be reasonable. *State v. Carter*, 2010 WI 40, ¶34, 324 Wis. 2d 640, 782 N.W.2d 695. Here, D'Arruda articulated a reasonable strategic reason—i.e., to introduce reasonable doubt as to Dengsavang's involvement—for opening the door to the otherwise excluded evidence. *Cf. Domke*, 337 Wis. 2d 268, ¶41 (noting that counsel's failure to articulate valid strategic reason for not objecting did not satisfy less-than-complete rule in *Carter*).

C. D'Arruda's opening the door to the inconclusive state crime lab results was not prejudicial.

There is no reasonable probability that Hudson's testimony elicited with respect to the state crime lab report affected the outcome of the trial. Thus, even if one assumed that D'Arruda was deficient for opening the door to information in the excluded crime lab report, Dengsavang cannot establish prejudice in light of the information's neutral-to-helpful nature, its very limited use during trial, and the voluminous circumstantial evidence supporting the jury's verdict of guilt.

First, all that D'Arruda's opening the door presented to the jury was testimony that a professional at the state crime lab had analyzed the shoeprints found at the scene and could neither conclusively identify nor exclude Dengsavang as the person who made them. At worst, that information is neutral. And as the circuit court noted, the information that the analyst could not make a match was more helpful to Dengsavang than the revelation that he was not excluded, particularly given that D'Arruda brought out that Dengsavang was wearing mass-produced shoes (86:8).

And in several respects the testimony aided the defense. There was nothing about the crime scene shoeprints that distinguished them from other Nike shoes of a similar model (68:16-19). Moreover, the information that D'Arruda elicited undermined the reliability of Detective Hudson's opinion that Dengsavang's soles appeared to match the crime scene shoeprints. *See* 67:88-89. The only thing that the State could salvage from the crime lab report was the point that Dengsavang's shoes could have made the crime scene shoeprints (68:22-23). As the circuit court stated at the final pretrial conference, the crime lab report did not appear to have much probative value for the State (61:11).

Second, given the dubious value that the report served, it is no surprise that the only discussion of information from the report appeared briefly during D'Arruda's cross-examination of Detective Hudson (68:17-19) and the State's redirect (68:22-25)—four pages in over 1000 pages of transcript taken over the five-and-a-half-day trial. The State never attempted to enter the report into evidence or present an analyst to discuss it. And neither party mentioned the report during closing argument.

To be sure, the State *did* introduce substantial evidence of the shoeprints found at the crime scenes and of how they compared to Dengsavang's shoes, but that evidence was not

affected by the court's pretrial exclusion order.[7] The court's order excluded only the shoeprint report, not testimony from officers who observed the shoeprints and noted their likeness to Dengsavang's soles (*see, e.g.*, 65:35-36; 67:88-90), not the photographs of the shoeprints and shoe soles (*see* 11 (listing dozens of exhibits)), and not the exhibits of Dengsavang's shoes themselves (*see* 11:7 (describing Exh. 137)). Hence, even if D'Arruda had not opened the door to the report, the jury still would have heard all of the other, stronger shoeprint evidence.

Which leads to the third point: this tepid crime lab report evidence had no impact on the verdict. Dengsavang's defense was that he was caught in the wrong place at the wrong time (63:46-47). But the State presented insurmountable evidence that Dengsavang committed all three crimes:

- The Happy Wok owners testified that two armed masked men entered through the front door of the restaurant, robbed them, and left through the back door (63:64-66, 69; 64:7). The robbers restrained the owners with duct tape, stole cash, threatened to kill the owners and their son, and took their apartment keys (63:64-65, 69, 71-72). After the robbers left, the owners freed themselves and called 911 (63:70).

- Police investigating the robbery observed two sets of shoeprints going into the front door of Happy Wok and the same two sets outside the rear of the restaurant (67:86-89, 93-94). One set of shoeprints displayed the word "Nike" (the Nike shoeprint); the

[7]Dengsavang writes that without Hudson's "testimony on the contents of the shoeprint report, there *were* no shoeprints as far as the jury was concerned" (Dengsavang's br. at 23). That is false. Again, the State could—and did—introduce a mountain of evidence about the shoeprints unrelated to the crime lab report and the court's pretrial order.

other had a pattern involving two circles (the circle shoeprint) (67:88).[8] Police also saw the circle shoeprint on a door that one of the robbers kicked during the robbery (64:41).

- The shoeprints observed at the rear of the restaurant appeared to be heading northbound toward the nearby Normandy Village apartments where the owners lived (67:94).

- At the owners' address at Normandy Village, police saw the same Nike and circle shoeprints in the fresh snow outside the residence (67:95-96).

- The restaurant owners' young son, who was in the apartment, testified that two masked robbers entered the apartment using his parents' keys and robbed it (64:50-53). The son testified that one burglar had white shoes and the other had red shoes (64:54); he had told police that the burglars wore ski masks, gloves, and had handguns (64:52, 55). When shown Dengsavang's shoes, the son said that they looked like the burglar's red shoes (64:54).

- After police responded to the 911 call from Happy Wok, Officer P. was dispatched to Normandy Village (66:33-34). She found the owners' building, left her squad car, and saw two suspects dressed in black with hooded sweatshirts leaving the building (66:35-36).

- While returning to her squad to attempt to intercept the suspects, Officer P. saw a silver Audi parked next to the building speed out of the parking lot (66:38-40). Suspecting the Audi to be the getaway vehicle, she

[8]To clarify, both Rodthong and Dengsavang wore Nike shoes (65:39), just apparently different models.

initially followed it but returned to the Normandy Village grounds to assist her partner, who was chasing a suspect (66:41).

- When she pulled back into the Normandy Village grounds, Officer P. saw one of the suspects she had seen leaving the owners' building approximately 30 feet from her (66:41-43). While moving toward Officer P., he aimed a gun and fired multiple gunshots at her, one of which struck her above the left hip (66:42-43).

- A witness, Nicholas Tomlin, who was outside his residence across the street from Normandy Village, saw the shooter shoot Officer P., cross the street, and run toward his residence (64:99-101). Nicholas then called his father, James Tomlin, who was inside the residence, to warn him of the shooter (65:7-8).

- James saw the suspect run through his yard and hide behind a neighbor's tree. James kept the perpetrator in view by running from window to window (65:10-11).

- Officers followed the single set of circle shoeprints that the shooter made to the tree near the Tomlins' property, and could see Dengsavang's red shoes sticking out from under the tree (65:31, 34-37). The soles of Dengsavang's shoes featured the same circle pattern as in the circle footprints (65:39).

- Officers seized Dengsavang and found a single black glove where he had been lying (65:54). Officers discovered Dengsavang approximately ten minutes after the shooting (65:45).

- The officers then retraced the circle shoeprints and found, one or two feet off the trail, the matching glove, keys to the owners' apartment, a ski mask, and

a handgun (65:55-57). The ski mask contained Dengsavang's DNA (69:51-52).

- Officers also followed the Nike shoeprints leaving Normandy Village, which eventually led them to an identical ski mask and set of gloves (both of which had Rodthong's DNA), and other evidence that allowed them to find and arrest Rodthong (67:10, 13, 39, 55-60, 81; 69:53-54).

- Officers found an insurance card on Dengsavang that led them to Phonisay's address, where officers found nearly $1000 in cash, including some old $20 bills that the Happy Wok owners testified that the robbers had stolen (68:89-92). Officers later found and searched Phonisay's silver Audi, where they found two unusually folded bills that one of the owners stated that the robbers had taken, a glove with Dengsavang's DNA, Rodthong's cell phone, and duct tape matching the tape used in the Happy Wok robbery (68:61-63, 66-67).

- Phone records showed that Dengsavang, Rodthong, and Phonisay were regularly calling each other until 9:29 p.m. on the night of the crimes (69:87-93). The calls stopped until 10:36 p.m., when Dengsavang and Phonisay exchanged multiple calls until 10:44 p.m., shortly before Dengsavang's arrest (69:95-98). Phone records also showed that over the course of the evening, Dengsavang had moved from downtown Milwaukee to the vicinity of the Happy Wok to Normandy Village (69:90-97).

In light of this overwhelming evidence connecting Dengsavang to the crimes, introduction of testimony that the crime lab could not conclusively determine that Dengsavang's shoes made the crime scene shoeprints could not have reasonably affected the outcome of the trial.

D. D'Arruda was not ineffective for failing to object to Detective Hudson's testimony on double hearsay or lay witness grounds.

Dengsavang also claims that D'Arruda was ineffective for failing to object to Detective Hudson's testimony regarding the information from the shoeprint report because her testimony was double hearsay and impermissible lay witness testimony about the report results, given that Hudson did not prepare the report (Dengsavang's br. at 24-29).[9] The State briefly addresses these arguments in the interest of completeness, but frankly, they are nonsensical.

As an initial matter, it is not clear how those proposed objections would have occurred, given that D'Arruda opened the door to testimony from Hudson about the shoeprint report. Does Dengsavang propose that D'Arruda should have interrupted and objected to his own questioning? If he's arguing that D'Arruda should have objected to the State's redirect on the evidence that D'Arruda introduced, how could those objections be deemed anything but waived? *See, e.g.*, *Simpson v. State*, 83 Wis. 2d 494, 509, 266 N.W.2d 270 (1978) (invoking well-established proposition that an opponent waives objections to testimony unless raised when he or she is reasonably aware of its objectionable nature); *State v. Frizzell*, 64 Wis. 2d 480, 483-84, 219 N.W.2d 390 (1974) (stating that defendant waived objection to the receipt of otherwise excluded evidence that he introduced).

[9]For the reasons described in Part II, *infra*, this court may simply decline to address these claims, given that Dengsavang abandoned them on his initial appeal. As this court noted, Dengsavang only raised a claim of error as to D'Arruda's opening the door to the excluded shoeprint report. All of his other claims, including the double hearsay claim, were abandoned, and his lay witness claim was inadequately briefed (80:8 n.6, 13; R-Ap. 108 n.6, 113).

In any event, Dengsavang cannot demonstrate prejudice based on D'Arruda's failure to object on hearsay or lay testimony grounds in light of the overwhelming evidence of his guilt, as summarized in part C., *supra*.

II. The circuit court properly limited the *Machner* hearing to the only ineffective assistance claim that Dengsavang raised on appeal and that this court identified as requiring the hearing.

Dengsavang also argues that D'Arruda was ineffective for failing to impeach Officer P. about discrepancies between her initial description of the shooter and Dengsavang's actual characteristics (Dengsavang's br. at 29-32), and faults the circuit court for not expanding the scope of the *Machner* hearing to allow him to gather evidence in support of that claim (Dengsavang's br. at 39). But Dengsavang disregards that the circuit court had previously denied this claim without a hearing and that he abandoned it when he did not raise it in his initial appeal to this court.

Given that, any one of several doctrines supports the circuit court's discretion in limiting the *Machner* hearing to the shoeprint report testimony issue.

First, the "law of the case doctrine is a 'longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.'" *State v. Stuart*, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82 (cited source omitted). But there are "certain circumstances, when 'cogent, substantial, and proper reasons exist,' under which a court may disregard the doctrine and reconsider prior rulings in a case." *Id.* ¶24 (citation omitted).

For example, "a court should adhere to the law of the case 'unless the evidence on a subsequent trial was substantially different, [or] controlling authority has since made a contrary

decision of the law applicable to such issues.'" *Id.* (cited sources omitted). More broadly, "'[i]t is within the power of the courts to disregard the rule of "law of the case" in the interests of justice.'" *Id.* (citing *State v. Brady*, 130 Wis. 2d 443, 447, 388 N.W.2d 151 (1986)).

Here, Dengsavang raised his claim that D'Arruda was ineffective based on the failure to impeach in his original postconviction motion seeking a *Machner* hearing (47:16-19). The circuit court denied the claim without a hearing. In so holding, the circuit court first noted that Officer P.'s initial description was one she had given to another officer after she was shot, in which she said the shooter was a "black male, five eight, or unknown race, all black clothing, hood up, five foot eight, thin" (53:4). During her trial testimony, Officer P. said the shooter was "about five-nine with a slender build, wearing all black clothing at the time" and that she was not able to see the suspect's hair or the color of his skin. Meanwhile, Dengsavang is Asian, five-foot-ten, and weighed 180 pounds at the time of his arrest, and stated that he was not "thin" (53:4).

The court concluded that the discrepancies that Dengsavang complained of were negligible and that, in any event, any failure by D'Arruda to impeach Officer P. did not impact the verdict, given the voluminous evidence supporting Dengsavang's involvement in the crimes:

> The defendant asserts that counsel should have impeached Officer [P.] with her prior inconsistent statement. The prior statement was not made by Officer [P.] but another officer. That officer described the shooter as "black male . . . or *unknown race*." Even if his statement could be imputed to Officer [P.] under a hearsay exception, the court finds no ineffective assistance from counsel's failure to impeach Officer [P.] with it at trial. Given Officer [P.'s] limited opportunity to observe the shooter, the fact that the shooting took place at night, and the fact that the shooter was wearing black clothing, hooded and standing about 30 feet away when he started firing at the officer, it is not surprising that the officer's description did not match on all fours with the defendant's

> physical characteristics.[5] In any case, as the State suggests, there was plenty of compelling circumstantial and physical evidence connecting the defendant to the crime scenes and these crimes. There is no reasonable probability that the jury would have set aside all of that evidence based upon negligible inconsistencies in Officer [P.'s] description of the shooter.
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> [5]Even so, the officer's description is not that different from the defendant's true physical characteristics. The difference between 5 feet 8 inches and 5 feet 10 inches is not very significant and not necessarily discernible at night at a distance of 30 feet. Moreover, the term "thin" is a subjective term. A person 5 feet 10 inches tall weighing 180 pounds may reasonably be characterized as "thin." Finally, the defendant did have black clothing in his possession. He may have been wearing blue jeans, but that may not have been readily apparent to the office[r] at night while seated in her squad car from a distance of 30 feet.

(53:4-5).

In his initial appeal to this court, Dengsavang did not raise the impeachment claim, and this court noted that it was abandoned (80:8 n.6; R-Ap. 108 n.6). By not raising a claim of error to the court of appeals on this claim, Dengsavang signaled to the State and this court that it did not disagree with the trial court's ruling on it.[10] And by rightly recognizing the claim to be abandoned, this court effectively deemed the circuit court's decision denying relief on the impeachment ground as the final decision on the issue. Hence, this court determined that Dengsavang abandoned the claim and thus was not entitled to relief on it. That is the law of the case, the circuit court was

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[10]In his brief, Dengsavang asserts that the courts have ignored his many attempts to litigate this claim, writing that "the argument has never been ruled on, at any court level" (Dengsavang's br. at 32). In response, the State directs Dengsavang to the circuit court's original decision expressly denying relief on the claim (53:4-5).

bound to follow it, and Dengsavang presents no "cogent, substantial, and proper reasons" for the circuit court to have allowed Dengsavang to relitigate a claim on which he already obtained an adverse decision.[11]

Moreover, the circuit court's recognition that the *Machner* hearing was limited to the shoeprint report issue was consistent with this court's mandate. "'On remand the [circuit] court has jurisdiction to take such action as law and justice may require under the circumstances as long as it is not inconsistent with the mandate and judgment of the appellate court.'" *Wright v. Wright*, 2010 WI App 84, ¶5, 326 Wis. 2d 265, 787 N.W.2d 60 (*per curiam*) (quoted source omitted). When this court reverses and remands a case for further proceedings, the circuit court can carry into effect the mandate of this court only so far as its discretion extends. *See id.* (citation omitted). The circuit court "is left free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision." *See id.* (citation and internal quotation marks omitted).

Again, Dengsavang advanced only the ineffective assistance claim as to the shoeprint report to this court in his first appeal. This court agreed that testimony "from Dengsavang's trial counsel at a *Machner* hearing addressing the questioning that opened the door to allowing the otherwise excluded evidence" was required (80:12; R-Ap. 112). This court summed up "that the circuit court erred in denying *this allegation* of ineffective

[11]Alternatively, Dengsavang is barred under the doctrine of issue or claim preclusion, given that there is privity in the parties and claim that he raised in his original motion. *See Lindas v. Cady*, 183 Wis. 2d 547, 558-59, 515 N.W.2d 458 (1994) (discussing doctrine). Or this court may simply deem the claim barred based on and the general prohibition against relitigation of previously raised claims. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

assistance of counsel without an evidentiary hearing. Because Dengsavang's motion alleged sufficient facts, that if true, would entitle[] him to relief on his *claim* of ineffective assistance of counsel, we reverse and remand for an evidentiary hearing" (80:13; R-Ap. 113) (emphasis added).[12] In sum, the court only talked about the single raised claim of ineffective assistance based on the shoeprint report.

But during the *Machner* hearing on remand, counsel for Dengsavang nevertheless attempted to elicit testimony from D'Arruda as to the impeachment allegations (91:14). The State objected, arguing that Dengsavang appeared to be exceeding the scope of this court's ruling, and the circuit court agreed (91:14-15). It stated that it had reviewed this court's decision and that this court considered two issues: first, whether the original pretrial order was improper, and second, whether counsel was ineffective for opening the door as to the shoeprint report (91:15). It disagreed with Dengsavang's counsel's position that this court ordered a *Machner* hearing on the whole motion, not just the issue raised in the original appeal (91:16-17).

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[12]This court also wrote at the end of paragraph 17, in which it had explained that Dengsavang was entitled to a hearing on counsel's handling of the shoeprint report, that it remanded "for a hearing on this specific issue" (74:11). This court denied the State's later motion for reconsideration, but in its order so doing, it made a correction to paragraph 17 removing that last sentence, but noting that the "result remains the same" (79:2). This court then filed a corrected opinion seemingly to reflect the erratum, but that opinion still had the "Consequently, we remand for a hearing on this specific issue" sentence at the end of paragraph 17 (80:13; R-Ap. 113).

Accordingly, it is not clear to the State whether this court intended to keep that last sentence in paragraph 17. But even if this court did remove it, the order cannot be read to encompass any ineffective assistance claims other than the single one that Dengsavang advanced in his original appeal.

Given the claims Dengsavang had raised on his first appeal and a plain reading of this court's decision remanding for a hearing, the circuit court properly exercised its discretion in declining to broaden the scope of the *Machner* hearing to encompass Dengsavang's previously denied and abandoned claims.[13]

CONCLUSION

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

Dated this 8th day of December, 2015.

BRAD D. SCHIMEL
Attorney General

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646
Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
burgundysl@doj.state.wi.us

[13]Because this court cannot assess the merits on the impeachment issue without a *Machner* hearing, and because the circuit court previously ruled that Dengsavang is not entitled to a *Machner* hearing on the issue, the State does not address the merits of that claim (Dengsavang's br. at 29-32). Moreover, because there is only one claim of ineffective assistance before this court on appeal, any deficiency by D'Arruda cannot be cumulative. Therefore, the State likewise does not further address Dengsavang's argument on that point (Dengsavang's br. at 32-36).

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 7098 words.

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Sarah L. Burgundy
Assistant Attorney General

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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 8th day of December, 2015.

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Sarah L. Burgundy
Assistant Attorney General