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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP1325-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GEORGE D. TAYLOR,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. BOROWSKI AND THE HONORABLE DANIEL L. KONKOL, RESPECTIVELY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This case may be resolved by applying well-established legal principles to the facts of this case.

SUPPLEMENTAL STATEMENT OF THE CASE

The State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a)2. The relevant facts and procedural history will be discussed below in the argument section.

ARGUMENT

A jury convicted defendant-appellant George Taylor of felony murder-armed robbery for the shooting death of Vincent Cort (28, 39; A-Ap. 1). The jury also convicted Taylor's two co-defendants, Laquan Riley and Steven Hopgood, of other charges. (113:19-20). The circuit court imposed a sentence of twenty-four years on Taylor, comprised of seventeen years of initial confinement and seven years of extended supervision (39; A-Ap. 1).

Taylor filed a postconviction motion asserting *Brady*[1] violations, improper statements by the prosecutor, and ineffective assistance of counsel (66:1; A-Ap. 39). Taylor sought a new trial or, in the alternative, resentencing on the basis of corrected information (66:2; A-Ap. 40). The circuit court denied the postconviction motion without an evidentiary hearing (73; A-Ap. 17-28). The court subsequently denied Taylor's request for reconsideration of its decision (76, 85; A-Ap. 3-9, 10-16).

On this appeal, Taylor challenges the denial of his postconviction motion, as well as rulings during trial. As shown below, Taylor's claims lack merit.

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

I. TAYLOR'S POSTCONVICTION MOTION DID NOT ESTABLISH *BRADY* VIOLATIONS.

Taylor contends that the State committed *Brady* violations by failing to disclose the following three pieces of evidence: 1) surveillance footage of the liquor store parking lot where the shooting occurred; 2) an email referring to a request from prosecution witness Paris Saffold for funds to use as a security deposit on an apartment; and 3) details of the then-ongoing misconduct investigation of a police investigator involved in the Cort homicide investigation (Taylor's brief at 6-12).

There were no *Brady* violations here.

A. Applicable legal principles and standard of review.

The United States Supreme Court held in *Brady* that a defendant "has a constitutional right to material exculpatory evidence in the hands of the prosecutor." *State v. DelReal*, 225 Wis.2d 565, 570, 593 N.W.2d 461 (Ct. App. 1999). A *Brady* violation has three elements: 1) the evidence must be favorable to the accused as either exculpatory or impeaching; 2) the evidence must have been suppressed by the State, either willfully or inadvertently; and 3) the evidence must be material in that prejudice ensued from its suppression. *State v. Harris*, 2004 WI 64, ¶ 15, 272 Wis.2d 80, 680 N.W.2d 737 (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

Evidence is "material" only where a reasonable probability exists that, had it been disclosed, "the result of the proceeding would have been different." *Harris*, 272 Wis.2d 80, ¶ 14. "'The *mere possibility* that an item of undisclosed information might have helped the defense ... does not establish 'materiality' in the constitutional sense.'" *Id.* ¶ 16 (emphasis added) (quoting *United States v. Agurs*, 427 U.S. 97, 109-10

(1976)). Thus, suppression of "information that could form the basis for further investigation by the defense" does not violate *Brady*. *Harris,* 272 Wis.2d 80, ¶ 16. A defendant does not suffer prejudice under *Brady* unless "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (footnote omitted).

As the United States Supreme Court has explained, "a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments." *United States v. Bagley*, 473 U.S. 667, 675 n.7 (1985). As a result, "strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281.

The defendant has the burden of proving a *Brady* violation. *See Harris*, 272 Wis.2d 80, ¶¶ 13-14. On appeal, this court accepts the trial court's findings of fact unless clearly erroneous, but the ultimate determination of whether a *Brady* violation occurred presents a question of law subject to de novo review. *See State v. Lock*, 2012 WI App 99, ¶ 94, 344 Wis.2d 166, 823 N.W.2d 378.

As shown below, no *Brady* violations occurred here.

B. The surveillance footage.

Taylor's first claim is that the State violated *Brady* by failing to disclose the raw footage from the surveillance cameras at Jack's Liquor, where the shooting occurred (Taylor's brief at 6-8). Although at trial the State offered into evidence and displayed a video prepared by the police that included

footage from multiple surveillance cameras, according to Taylor the uncut video was not provided until after trial (Taylor's brief at 7).[2] The video at issue is in the record as Exhibit A Taylor's brief supporting his postconviction motion (67).

According to Taylor, the surveillance video is inconsistent with the testimony of Paris Saffold, who testified at trial testified that he was with the three defendants as the victim's car pulled into the liquor store, and that he heard their conversations about robbing the victim and then observed the shooting and the immediate aftermath (108:17-31; 109).

Taylor asserts that the missing video is inconsistent with Saffold's testimony in two respects. First, according to Taylor, it contradicts Saffold's testimony that Saffold was with the defendants across the street from the liquor store "for 'probably about twenty minutes' before Cort pulled into Jack's lot" (Taylor's brief at 7).[3] Second, Taylor argues that the video is inconsistent with Saffold's testimony that the defendants were in Saffold's vicinity across the street when the victim pulled into the liquor store parking lot, and that none of the defendants crossed the street until the victim drove into the parking lot, went into the store and was getting back into his car (Taylor's brief at 7).

The problem with Taylor's argument is that the surveillance video strongly corroborates the essential elements of Saffold's testimony, and would have reinforced, rather than impaired, Saffold's credibility.

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[2] For purposes of this appeal the State will assume that this assertion is correct.

[3] Taylor locates this testimony at 109:36, but it actually occurs at 108:36.

On direct examination, Saffold testified that on the day of the shooting, June 12, 2010, he lived in an apartment complex on Hampton Avenue at approximately 50th Street (109:3). Saffold stated that he knew the three defendants, and that Steven Hopgood lived in the same apartment complex (109:7-8).

On the day of the shooting, according to Saffold, he was outside the front of the apartment complex talking with the defendants, when an orange car pulled into Jack's Liquor across the street (109:9).[4] At that point, Taylor, referring to the driver of the orange car, remarked: "'Well, that look like the bitch ass nigger that was in the house when I got shot on Thurston'" (109:10).

In response, according to Saffold, Hopgood suggested, "let's rob him, let's take his car" (109:13). Following this, Riley volunteered to take the car, and Hopgood went to his apartment and returned with a handgun that he gave to Riley (109:13-17). While Hopgood was retrieving the gun, according to Saffold, Riley put on a dark hoodie and tightened the hood to conceal his face (109:18-19). Saffold did not recall how Riley got the hoodie, but assumed that "he would have to have got it from George [Taylor]" (109:20). According to Saffold, Riley was wearing plaid shorts (*id.*).

Saffold testified that Riley crossed the street "to the middle median" at about the time Cort was leaving the liquor store, and that "the victim is entering his car by the time [Riley] gets to the parking lot" (109:21). According to Saffold, Riley reached the car just after Cort got into the car, and Riley grabbed the door handle, opened the door and fired a single

[4] Jack's Liquor is on the southwest corner of 50th Street and Hampton Avenue, with a McDonald's on the southeast corner of that intersection. Across Hampton, on the north side, are apartment buildings (105:7).

shot into the car as Cort drove away (109:22-23). After the shot, Saffold testified, the car turned right and sped away, and Riley ran back across the street (109:24).

The surveillance video at issue, had it been introduced at trial, would have strongly corroborated Saffold's account. Even though Saffold was testifying two and a half years after the shooting, the video shows events occurring strikingly close to the manner in which Saffold testified they occurred.

Taylor asserts that he appears in the video "walking up to the store/camera in red sweatpants and white T-shirt, talking to several people, showing off his tattoos, then walking away" (Taylor's brief at 7 n. 7). For purposes of this appeal Taylor will assume that he is the man in the video.

Taylor first appears at about 00:35 of the video, walking into the parking lot from the direction of Hampton Avenue; he is wearing red sweatpants and is shirtless, with a white T-shirt in his hands (67:Ex. A-Camera 3 at 00:35).[5] The video from Camera 11 shows clearly that Taylor walked into the parking lot after crossing Hampton Street diagonally, from the location of Saffold's apartment building (67:Ex. A-Camera 11 at 1:10). Taylor appears to talk to some people in the parking lot, and then speaks to someone in the white sedan parked in front of the security camera (67:Ex. A-Camera 3 at 00:36 – 00:43).

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[5] The images on the surveillance video move at a high rate of speed. The only means the State's counsel knows for scrutinizing the images is by frequently and rapidly pausing the action, thereby freezing frames of the video. Because the State was unable to play the video directly in the format in which it was saved on the DVD, it had to be converted into a format playable on the State's computer. Whether this altered the elapsed time reflected as the video plays is unknown to the State. The prosecutor apparently had the same problem playing the video in its saved form, and attached a disk with a reformatted version to the State's response brief—but the disk in the record appears to be blank (71:13, n. 10 and Exh. 1).

As the white car pulls out of its parking spot, Taylor puts on the white T-shirt, talks with another man, and then disappears from view toward the liquor store building (*id.* at 00:47-00:54). Taylor then reappears and walks across the parking lot and crosses 50th Street toward the McDonald's, which is on the corner of Hampton Avenue and 50th Street (*id.* at 00:57). The view from Camera 11 confirms Taylor's movements from a different angle (67:Ex. A-Camera 11 at 1:10).

The video then shows Taylor stopping to talk to what appear to be three persons on the corner by the McDonald's sign, and then crossing Hampton Avenue in the direction of Saffold's apartment complex (67:Ex. A-Camera 3 at 00:59).

Shortly after Taylor crosses Hampton Avenue, the video shows Cort's orange car pull into the parking lot (*id.* at 1:00). This places Taylor in the immediate vicinity of Cort's arrival at Jack's Liquor, and also places him across Hampton Avenue in the vicinity of Saffold's apartment—exactly as Saffold testified. The video from Camera 11 again confirms Taylor's movements in relation to Cort's arrival (67:Ex. A-Camera 11 at 1:10).

The video from Camera 3 then captures the sequence leading up to and including the shooting and its immediate aftermath—again confirming the essential features of Saffold's account. The video shows Cort getting out of his car and walking toward the store, and then—after the passage of an unknown number of minutes—returning to his car (67:Ex. A-Camera 3 at 1:01-1:14).

As Cort is opening his car door, a figure dressed in dark clothes is walking briskly toward Cort's car, and reaches the car after Cort has closed the door but before the car starts moving (*id.* at 1:15 – 1:16). The dark-cladded person is seen extending his arm towards the car as it begins to move, and then the car

appears to speed away, turning right (southbound) onto 50th Street (*id.* at 1:16). Simultaneously, the shooter is shown running across 50th Street, turning at the corner and running a short distance eastbound along the sidewalk in front of the McDonald's, and then crossing to the north side of Hampton Avenue (*id.*).

The view from Camera 11 even more clearly shows that the shooter crossed Hampton Avenue at 50th Street from the direction of Saffold's apartment building, and after the shooting ran across 50th Street and veering back in the same direction from which he came (67:Ex. A-Camera 11 at 1:41-43).

With minor exceptions, the video would have shown that Saffold's recollection was remarkably accurate. The sequence of events, the route the shooter took to and from the incident, and the facts of the encounter and its aftermath were very close to Saffold's recollection. That Saffold had never seen the video would have substantially bolstered his credibility even more (108:44).

True, Saffold did not have all of the details correct. It was apparent that, contrary to Saffold's testimony, Riley was not wearing plaid shorts; the State conceded the point (114:19-20). The defense also impeached Saffold on his testimony that Riley opened the door of the car before he shot Cort, based upon the absence of support from the surveillance video and the lack of Riley's fingerprints on the door handle (114:34). Yet despite these inconsistencies, the jury clearly believed Saffold's essential account, which meshed exceedingly tightly with the surveillance video.

Taylor's contends that adding two more inconsistencies would have tipped the balance from conviction to acquittal—namely the length of time Saffold and the defendants were in front of Saffold's apartment before Cort pulled up, and the

location of the defendants at the time Cort arrived. Taylor's argument doesn't withstand scrutiny.

The latter is not an inconsistency at all. Saffold's testimony that none of the defendants went across the street to the liquor store until Cort arrived is consistent with the video. The crux of Saffold's testimony was that all of the defendants were in the vicinity of Saffold's apartment building when Cort arrived, and that Riley then crossed the street and shot Cort just after Cort had gotten back into his car (109:9-10). Even if Taylor had gone over to the liquor store shortly before the shooting, the video clearly shows that he had left the parking lot and crossed Hampton Avenue when Cort's car arrived (67:Ex. A-Camera 3 at 00:57; Camera 3 at 1:10).

As to the length of time the defendants were with Saffold before Cort arrived, it is unclear whether Saffold was referring to all of the defendants, just to himself, or to a combination of himself and some but not all of the defendants (108:36). Regardless, the video irrefutably places Taylor in the immediate vicinity of Cort's car as it was arriving at the liquor store (67:Ex. A-Camera 3 at 01:00).

In sum, the video footage at issue would have seriously hurt, not helped, Taylor. It would have confirmed Saffold's testimony that Taylor saw Cort arrive in the orange car, and the video is consistent with Taylor being in front of Saffold's apartment complex, just as Saffold testified.

Taylor incorrectly asserts that the missing surveillance video, because it would have impeached aspects of Saffold's testimony, was by definition material and thus not harmless, under *Harris* (Taylor's brief at 8). *Harris* involved a child sexual assault victim, and the undisclosed information was that the victim had reported sexual assaults by her grandfather (not the

defendant) shortly before the assaults at issue. *Harris*, 272 Wis.2d 80, ¶¶ 5, 28.

Taylor seems to suggest that the nondisclosure of evidence tending to impeach a key witness—to *any* degree—constitutes a *Brady* violation (Taylor's brief at 8). But *Harris* says no such thing. The court reiterated the general principle that "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Harris*, 272 Wis.2d 80, ¶ 14. Taylor has fallen far short of this showing here.

Taylor also asserts a second *Brady* violation based upon the video footage, namely that the footage also showed that he was in the liquor store parking lot at the same time as witness Latoria Dodson, supporting a theory that the shooter was "poised to do the crime" before Cort arrived (Taylor's brief at 8).[6]

The court need not address this argument. Taylor did not assert it in his postconviction motion and thus forfeited it. *Townsend v. Massey*, 2011 WI App 160, ¶ 25, 338 Wis.2d 114, 808 N.W.2d 155 ("the forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court").

Even though forfeited, the argument lacks merit. Taylor argues that since the video shows Taylor in the parking lot at the same time as Dodson, the shooter was at the liquor store "already poised to do the crime"—even before the orange car

[6] Dodson's parked yellow car is visible at the time Cort pulls into the lot (67:Ex. A-Camera 3 at 01:00) (Taylor's brief at 8).

appeared (Taylor's brief at 8). But this is not what the evidence showed.

Dodson testified that as she pulled into Jack's Liquor she saw the young man she later identified as the shooter "walking past my car with a black – all black with a black hoodie on" (105:61). According to Dodson, the young man was walking by the large liquor store sign, and she saw him again when she heard the gunshot and saw him running "[a]cross Hampton down across the field" (105:62-63).

Dodson agreed she could have been at the store for ten to fifteen minutes (105:80). But she did not know whether the person she saw on her way in was "lurking" outside of the store while she was inside (*id.*). In fact, she did not see him again until after she had exited the store, heard the shot and looked back (105:62-63, 84). Even assuming that the person Dodson saw initially was the shooter, there was ample time for him to cross Hampton and have the exchange described by Saffold—just as Taylor appears to have done—and then return with the gun and shoot Cort.

Nonetheless, the record established that Dodson was mistaken. During closing argument the prosecutor acknowledged that Dodson's testimony about seeing the shooter as she pulled into the parking lot was inconsistent with the video shown at trial: "I submit it's a mistake she made" (114:25). Counsel for defendant Riley agreed, stating:

> There's no way that [Dodson] could have identified the face of a person in the running up and the running away. She says it's because the person is at the sign, that's how she sees the face. But the problem is, as was shown during the cross-examination, that would have meant that that person was at that sign for five minutes, ten minutes, however long Dodson is in the store. And that's not what

> we hear from Saffold, but, more importantly, *it's not what we secure on the video*.

(114:47 (emphasis added)).[7]

In short, the belatedly provided surveillance video does not establish, as Taylor contends, that the shooter was continuously present in the vicinity of the liquor store from before Cort arrived until the shooting. On the contrary, as shown above, the movement of the shooter walking across the parking lot is entirely consistent with Saffold's testimony that Riley walked across Hampton Avenue and reached Cort's car just after Cort had gotten inside.

C. Saffold's security deposit.

Taylor's next candidate for a *Brady* violation is an email exchange referring to the State paying $770 for a security deposit for Saffold before trial, which was not disclosed until after the trial (Taylor's brief at 9-11). According to Taylor, this payment showed that the State was "'buying"' Saffold's testimony, and would have provided additional evidence of Saffold's bias and, ostensibly, his motivation to fabricate testimony (Taylor's brief at 10 n. 9).

Taylor's argument is meritless. First, introducing the email chain into evidence at trial would have done far more harm than good to Taylor's case. The email requesting authorization for the funds shows that Saffold was hardly asking for a handout merely because he was low on funds.

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[7] The trial exhibits, including the video shown at trial, were not included in the record on appeal. As the appellant, Taylor is responsible for providing this Court with a record adequate for review of the issues raised. In the absence of the exhibits, this Court will "presume that every fact essential to sustain the circuit court's decision is supported by the record." *Butcher v. Ameritech Corp.*, 2007 WI App 5, ¶ 35, 298 Wis.2d 468, 727 N.W.2d 546.

Instead, it reveals that Saffold had been placed into the witness protection program and that "[h]e and some of his family had to move into a shelter outside of Milwaukee to protect himself and his family from the defendant's (sic) friends" (67-Exh. I; A-Ap. 77). The security deposit was needed to facilitate Saffold's remaining in a safe place outside of Milwaukee, given the threats to him and his family (*id.*).

Evidence that Saffold felt threatened by the defendants or their associates vastly counterbalances any "bias" from the provision of a security deposit. If anything, this would have bolstered Saffold's credibility, given his fear that cooperating with the State in this case could result in harm to himself or his family.

That this evidence would have been damaging to the defendants is evident from the response of Taylor's trial counsel when the prosecutor expressed his intention to introduce evidence that due to threats Saffold had been placed into witness protection: "Judge, then we would certainly object to that as being prejudicial" (110:15). Precisely.

Further, the record was clear that Saffold hoped to receive the $10,000 reward offered by Cort's family for the arrest and conviction of those responsible for Cort's death. Saffold admitted on direct examination that he was aware of the reward and hoped to obtain it (108:30-31). Each defense counsel in turn brought it up in cross examination (108:40; 110:40-41).

In short, even if the security deposit were a "gift" rather than a payment necessary to protect Saffold, its modest size pales in comparison with the $10,000 reward Saffold freely admitted he would like to receive. The omission of the deposit hardly would have swung the verdict from guilty to not guilty.

D. Investigation of Detective Gomez.

Taylor's final *Brady* claim is his allegation that the State was required to turn over "*the details* of the allegations and investigations" of the lead investigator, Detective Rodolfo Gomez, for misconduct and dishonesty (Taylor's brief at 11-12). According to Taylor, the year after the trial, 2013, the Milwaukee Police Department fired Gomez for misconduct in public office, namely "beating a suspect"; Gomez's disability retirement application was deemed fraudulent; and a federal jury concluded that Gomez "had lied on a warrant application" (Taylor's brief at 11).

Had the details of the complaints and investigations of Gomez been disclosed before the trial, Taylor asserts, he could have used them "to impeach any investigation result involving Gomez" (Taylor's brief at 11).

Taylor's theory fails. The evidence at issue would have consisted of "other acts" evidence, the admissibility of which is governed by a three-part test: "first whether the other-acts evidence is offered for an acceptable purpose; second, whether the proffered evidence is relevant; and third, whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice." *State v. Missouri*, 2006 WI App 74, ¶ 9 n. 2, 291 Wis.2d 466, 714 N.W.2d 595, *citing State v. Sullivan,* 216 Wis.2d 768, 772–73, 576 N.W.2d 30 (1998). The evidence of alleged misconduct by Detective Gomez could not have satisfied this test.

First, Detective Gomez did not testify at trial, thus his credibility was not at issue. This readily distinguishes this situation from that in the cases Taylor cites. *United States v. Bagley*, 473 U.S. 667, 670 (1985) (undisclosed evidence would have impeached the prosecution's "two principal witnesses at the trial"); *Missouri*, 291 Wis.2d 466, ¶¶ 4-8 (disallowed

evidence would have impeached the trial testimony of the arresting police officer); *Harris*, 272 Wis.2d 80, ¶ 28 (undisclosed evidence was "directly relevant to the credibility" of the key witness—the victim of the alleged sexual assault).

This is not a case in which, as in *Missouri*, the case turned "on the credibility of [the] police officer versus the credibility of the defendant."*Missouri*, 291 Wis.2d 466, ¶ 25. Because Detective Gomez did not testify at trial, Gomez's credibility was not relevant, and any of his "other acts" would not have been admissible. Detective Formolo testified in detail about the investigation, and was subject to full cross-examination, allowing the jury to evaluate the quality of the investigation (105:104-111; 106:3-84).

Moreover, *Missouri* involved proffered testimony showing that an officer involved in Missouri's arrest had, in another case, engaged in the same type of abusive, racist tactics that Missouri alleged had occurred in his case—including evidence-planting. *See Missouri*, 291 Wis.2d 466, ¶¶ 3-9. The court's decision turned on the similarity of misconduct at issue, in that the proffered testimony in Missouri's case was intended to show that the officer at issue had also engaged in abusive, racist tactics in another situation. *See id.* ¶ 16.

And even assuming that Taylor could meet the first two prongs of the *Sullivan* test for Gomez's misconduct, any probative value of such evidence would be substantially outweighed by potential prejudice. *See Sullivan*, 216 Wis.2d at 772-73. Without anything else in the record to support the notion that Gomez conducted a shady investigation in this case, any evidence of his other misconduct would merely invite speculation by the jury.

In rejecting Taylor's postconviction motion, the circuit court correctly concluded that the evidence of Gomez's alleged transgressions would have been inadmissible, since at the time

of trial Gomez was merely under investigation; he had not been adjudicated guilty of any misconduct (73:4-5; A-Ap. 20-21). Allowing the defendants to pursue Gomez's alleged bad acts would have created a trial of Gomez for conduct unrelated to Taylor's case, in which Gomez was not a witness. Allowing such a mini-trial would not only have been an irrelevant distraction, but would have been unfairly prejudicial to the State.

In sum, Taylor has asserted no valid *Brady* violations.

II. THE PROSECUTOR'S COMMENTS DID NOT WARRANT A MISTRIAL.

Taylor's next claim is that the circuit court erred by not declaring a mistrial based upon allegedly improper statements by the prosecutor (Taylor's brief at 13-15). Taylor asserts that the prosecutor on one occasion during cross-examination "vouched" for Saffold, and twice during closing argument suggested to the jury that the State had substantial additional evidence but would spare the jury from hearing it due to the impending Christmas holiday.

A daunting burden confronts a party seeking to obtain a mistrial based upon improper comments by a prosecutor. Argument is impermissible only "where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence." *State v. Draize*, 88 Wis.2d 445, 454, 276 N.W.2d 784 (1979). And "[e]ven if there are improper statements by a prosecutor, the statements alone will not be cause to overturn a conviction. Rather, the statements must be looked at in context of the entire trial." *State v. Mayo*, 2007 WI 78, ¶ 43, 301 Wis.2d 642, 734 N.W.2d 115. Taylor's argument falls well short of this standard.

The first comment cited by Taylor came during a testy exchange during a series of attempts by Taylor's counsel to impeach Saffold with his prior testimony at the preliminary hearing (110:45-50). At one point the prosecutor objected because the portion of testimony offered "was not a complete colloquy" (110:48). A short while later, this exchange occurred:

> Q. Do you remember testifying about this subject at the hearing back in April of this year?
>
> A. Yes.
>
> Q. And do you remember, at page 39, line 5, stating, question – answering this question:
>
> > Question: When you say that Quan tried to take the car from Vincent, what exactly did you see?
> >
> > Answer: Well, Donte gave him the gun, and he set his self off. You know, he ran across the street and volunteered to take the car. I guess that was the plan, to take the car. And, you know, he made it across the street a little too slow.

(110:49-50).

When Taylor's counsel continued by saying "[a]nd there's more there that I'm sure the State can follow up with," the prosecutor replied, "[b]ecause it's the truth" (110:50). The circuit court then admonished both sides to "stop being chippy. Stop arguing in front of the jury. Stop" (*id.*).

Taylor's counsel subsequently moved for a mistrial on the ground that the prosecutor had improperly vouched for the truth of Saffold's testimony (110:67). The prosecutor responded: "It's not the truth of what the witness said, it's the truth of what is in the transcript is what I was referring to ... I mean you can

make a transcript a lie if you take out excerpts of it, and my point is []taking out little excerpts, you could take out words if you wanted" (110:67).

The circuit court subsequently instructed the jury to ignore the comments of counsel, including the specific comment at issue (110:109).

Taken in context, the prosecutor was not vouching for Saffold's truthfulness, but rather the self-evident nature of what was in the transcript of his prior testimony. There is no reason to believe the jury took it any differently or if it did, that this fleeting comment impugned the integrity of the trial.

Taylor also complains about two comments the prosecutor made during closing argument, namely references to "'38 witnesses'" and to "'14 CDs worth of evidence'" (Taylor's brief at 14). These comments, according to Taylor, suggested to the jury that the State's case was supported by numerous other witnesses and pieces of incriminating evidence. Further, Taylor accuses the State of currying favor with the jury by sparing them from a prolongation of the trial right before Christmas (Taylor's brief at 14-15).

Taylor's argument is meritless. Although Taylor does not provide citations to the objectionable comments during the State's closing, it appears that they occurred during the rebuttal. As it had during trial, the insinuation that the police investigation lacked thoroughness or integrity—or both—appeared during closing arguments. Riley's counsel stated, "The original interview [with Saffold] is just with Detective Gomez. It's a homicide. There's only one detective?" (114:48). Further, the bullet "is claimed magically to be found, you know, year and a half later under the car seat ..." (114:49).

On rebuttal, the prosecutor addressed the attack on the police investigation as follows:

> This is not a situation where somehow the police have done a poor job or the police have done an illegal job that they're insinuating. On the witness list are 38 members of the Milwaukee Police Department that are on here. In terms of discs and interviews and photographs turned over to the defense, A through X –

(114:65-66).

The prosecutor clearly was responding to the defense's attempt to impugn the police investigation, as opposed to signaling to the jury that there were numerous other incriminating witnesses and pieces of evidence. In fact, the prosecutor freely acknowledged in his closing argument that there were no witnesses other than Saffold who could identify the shooter: "Would I rather have witnesses who come forward besides Paris Saffold? ... Yes. ... Are there such witnesses out there? Maybe, maybe not in this case." (114:18).

Given the full context, it is implausible to assert that the jury could have taken the prosecutor's comments to indicate that the State had other witnesses to the crime that it could have called, but chose not to. The jury knew full well the extent and quality of the State's evidence, particularly given the prosecutor's candor about the lack of witnesses.

Taylor has failed to establish that any of the disputed comments were improper, much less that they tainted the fairness of the trial and called the verdict into question.

III. THE TRIAL COURT DID NOT IMPROPERLY RESTRICT TAYLOR'S CROSS-EXAMINATION OF SAFFOLD.

Taylor next argues that the circuit court deprived him of his right of confrontation by unduly restricting his cross-

examination of Saffold (Taylor's brief at 15-21). This argument also fails.

The right to confront witnesses is not absolute, and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973. As the Supreme Court held in *Delaware v. Van Arsdall*, 475 U.S. 673 (1985):

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."

Id. at 679 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam).

A circuit court has broad discretion in determining the relevance and admissibility of proffered evidence. *State v. Hammer*, 2000 WI 92, ¶ 43, 236 Wis.2d 686, 613 N.W.2d 629. In determining the admissibility of evidence, the standard of review is whether the circuit court erroneously exercised its discretion. *Id* An erroneous exercise of discretion will not be found if a reasonable basis supports a circuit court's decision. *Id* However, questions of constitutional significance, such as a defendant's right to confrontation, are reviewed without deference to the circuit court. *Id.*

Under these guiding principles, Taylor's claim fails.

Taylor complains that the circuit court unduly limited his ability to establish through cross-examination that Saffold was motivated by the reward money and by the avoidance of prosecution for cocaine possession following his arrest in Wauwatosa (Taylor's brief at 17-18).

As Taylor acknowledges, on direct examination Saffold freely admitted that he was motivated by both objectives (Taylor's brief at 17). The defense attorneys went after Saffold on the personal benefits he would obtain from a conviction in the case—both the reward money (108:60-61; 110:40-41) and the possible expungement of his marijuana conviction and favorable consideration on the potential cocaine prosecution (108:53, 59-60).

Not surprisingly, in their closing arguments all three defense counsel hammered away on Saffold's personal motivations to help obtain a conviction (114:27). Hopgood's counsel, Attorney Jensen, focused on Saffold's obvious self-interest at the very outset of his argument (*id*.). In reference to Saffold's desire to cooperate to avoid punishment for the cocaine arrest, he stated "[a]nd I think because of his nine prior criminal convictions and juvenile adjudications, Mr. Saffold correctly reckoned that this time he was in trouble, could be expensive" (*id.*).

Next up was Hopgood's closing argument, and his attorney followed suit: "Mr. Saffold is a liar. We know that ... Nine prior convictions, stories that keep changing, all sorts of motive to get this story to his credit, the $10,000" (114:39, 54).

Taylor's trial counsel similarly pounded away on Saffold's motives to lie:

> [A]as you go through each one of these [instructions about credibility], think about Paris Saffold:
>
> "Whether the witness has an interest or lack of interest in the result of the trial." Well, he does. He's beating a drug charge and going to get $10,000

(114:59). Taylor's counsel continued this theme later:

> I think what we can all agree on, he is a man of questionable repute and integrity. And it's one thing to say, okay, guy like Paris Saffold comes in, solves the case, and everything is good. It's another thing to say take every detail that man says, honor him as a hero, reward him, set him free, and take as true from the mound every word that man says. And that's just utterly ridiculous.

(114:64).

The jury thus was well aware of Saffold's admitted motivations to fabricate testimony. But Taylor argues that he should have been allowed to probe more aggressively on his cross-examination of Safford, delving more deeply into Saffold's "feelings" about the possible consequences of his cocaine arrest (Taylor's brief at 18). Taylor specifically complains that the circuit court would not allow him to refer to the felony status of the cocaine charge, or to allow non-open-ended questions.

The circuit court prohibited defense counsel from discussing whether Saffold's marijuana or cocaine cases were felonies or misdemeanors "on top of all the other reasons that Mr. Saffold may or may not have been lying or being less than truthful" (110:4). When Taylor's counsel insisted he should be allowed to "inquire into how reliable is this person by going into his hopes and expectations by doing what he's doing," the court agreed with the State that additional cross-examination

would be cumulative (110:6). The court also was concerned about the risk of misleading the jury, because the chances that Saffold would have been sent to prison were "slim to none" (*id.*).

None of the cases Taylor cites help his cause. In *State v. Barreau*, 2002 WI App 198, ¶ 51, 257 Wis.2d 203, 651 N.W.2d 12, the trial court had precluded the defendant from cross-examining a key prosecution witness about possible unrelated criminal charges, from which the jury could have inferred "potential bias." However, although precluded from discussing the possible criminal charges, the defendant was allowed to question the witness about his motivation to lie, and "[w]hen the record shows that the witness's credibility was adequately tested, the defendant's right of confrontation has not been violated." *Id.* ¶ 53. The court found that the additional evidence sought by the defendant "would have been largely cumulative," and thus its exclusion did not violate the defendant's confrontation right. *Id* at ¶ 54.

The same is true here. Saffold openly admitted on the stand that he was hoping for consideration on his cocaine arrest. If anything, the jury most likely would have assumed that a cocaine charge was more serious in terms of potential incarceration than would those with knowledge of the system, including Saffold, who had experience with the drug court.

Nor do the other cases Taylor cites help his argument. In *United States v. Anderson*, 881 F.2d 1128, 1132-34 (D.C. Cir. 1989), the trial court had disallowed cross-examination on a homicide charge against a prosecution witness that had been dismissed before trial, absent evidence of a formal cooperation agreement. The appellate court reversed. It determined that the dismissal of charges that could be refiled, evinces "'a protocypical form of bias on the part of the witness.'" *Id.* at 1138.

But the court also made clear that it was the disallowance of any reference to the dismissed charge that comprised the confrontation violation. It recognized that "'a trial [court] may limit cross-examination only after there has been permitted, *as a matter of right,* a certain threshold level of cross-examination which satisfies the constitutional requirement." *Id.* at 1139.

That threshold was clearly crossed in this case. The defense vigorously cross-examined Saffold, who admitted that he was motivated to obtain consideration on a potential criminal charge (108:53, 59-60).

As in *Anderson*, in *State v. Lenarchick*, 74 Wis.2d 425, 446, 247 N.W.2d 80 (1976), the trial court prohibited the defendant from cross-examining a prosecution witness about dismissed charges in the absence of any promises of favorable treatment. *See also State v. Yang*, 2006 WI App 48, ¶ 17, 290 Wis.2d 235, 712 N.W.2d 400 (trial court erred in precluding defendant from seeking to establish alleged threats made by ex-wife that could have established bias). Here, by contrast, the jury heard plenty about Saffold's motivation to cooperate with the State in this case.

Moreover, even if the circuit court erred in restricting Taylor's cross-examination of Saffold, any error was harmless. Because Saffold's motivations to falsify testimony were on full display, through his own candid admissions, the additional inquiry sought by Taylor would not have appreciably altered the jury's view of Saffold's credibility, rendering any error harmless. *Barreau*, 257 Wis.2d 203, ¶ 57.

Thus the circuit court's restrictions on Taylor's cross-examination of Saffold did not violate his right of confrontation.

IV. TAYLOR WAS PROPERLY TRIED WITH HIS CODEFENDANTS.

Taylor's next claim is that the trial court violated his due process rights by not trying him separately from his codefendants (Taylor's brief at 21-27). But Taylor never made this claim below and cannot raise it now. *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis.2d 486, 611 N.W.2d 727 ("issues must be preserved at the circuit court").

Taylor made a demand for a speedy trial on June 7, 2012 (8). Pursuant to Wis. Stat. § 971.10(2)(a), the court was required to try Taylor within ninety days, and trial was scheduled for September 4, 2012 (1:3, docket entry for June 18, 2012). The State moved for joinder of the defendants' trials (9), which the circuit court took up at a hearing on August 13, 2012 (97:15). Defendant Hopgood opposed the joinder motion on the ground that it was untimely (*id.*). Taylor's counsel then stated:

> I have a more practical problem with the joinder in that we have a speedy trial demand filed. We have a date for trial scheduled for September 4th. And if the matter is to be joined, we'd ask that my client be released from custody pending the new trial date.

(97:16).

Taylor's counsel thus implicitly recognized that the remedy for a speedy trial act violation is the release of the defendant pending trial, as provided by Wis. Stat. § 971.10(4). And as Taylor recognizes, any speedy trial issue disappeared when the State released him on bail (Taylor's brief at 23).

Taylor acknowledges that his counsel never challenged joinder on due process grounds (Taylor's brief at 23, n. 25). Yet that does not stop Taylor from implying the contrary when he cites a statement by his trial counsel differentiating his case

from that of his co-defendants (Taylor's brief at 23, citing 99:4). He neglects to mention that the issue before the court was the speedy trial demand and whether an exception was appropriate—not joinder (99:2-5).[8]

Nor would Taylor's argument have traction even if he had preserved it below. Given that the State had to prove the underlying attempted armed robbery, and charged Taylor as a party to the crime, the facts surrounding the crime—from its inception through its completion—would necessarily have been admissible had Taylor been tried alone. Taylor's assertions that testimony about Riley and Hopgood was irrelevant to him is simply wrong.

Taylor's challenge to joinder thus fails.

V. THERE WAS NO INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Taylor identifies a number of ways in which his trial counsel was ineffective (Taylor's brief at 27-35), and in a separate section argues that he was entitled to an evidentiary hearing on these claims (*id.* at 40-42). To avoid repetition and to focus on the issue before this court—namely whether Taylor was entitled to an evidentiary hearing on his claims—the State will address Taylor's arguments together in this section.

As shown below, the circuit court properly rejected Taylor's claims without a hearing.

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[8] At a prior hearing, when joinder *was* an issue, Taylor's counsel stated: "I'm taking somewhat of a neutral or not a strong position on this issue, that's assuming that there are no *Bruton* or statement issues." (98:9).

A. Applicable legal principles and standard of review.

1. Ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, the defendant must show that the attorney's performance was deficient and that this deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The reviewing court will second-guess counsel's strategic or tactical decision only if it is shown to be an irrational trial tactic or if it was based upon caprice rather than upon judgment. *State v. Felton*, 110 Wis.2d 485, 502-03, 329 N.W.2d 161 (1983). "Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight.... [T]he burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845 (1990); *Strickland*, 466 U.S. at 689-90.

To prove prejudice, the defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact: the circuit court's findings of fact are upheld unless they are clearly erroneous, whereas whether counsel's performance was deficient and prejudicial to the defense presents a question of law reviewable de novo. *Mayo*, 301 Wis.2d 642, ¶ 32 (citations omitted).

2. Entitlement to an evidentiary hearing.

A defendant is not automatically entitled to an evidentiary hearing on a postconviction motion, including one asserting ineffective assistance of counsel. *State v. Bentley*, 201 Wis.2d 303, 310-11, 548 N.W.2d 50 (1996). If the motion on its face fails to allege sufficient facts to raise a question of fact, or if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the circuit court may in its discretion summarily deny the motion. *Id.* at 309-11 (citing *Nelson v. State*, 54 Wis.2d 489, 497-98, 195 N.W.2d 629 (1972)).

A circuit court must conduct a hearing on a claim of ineffective assistance only when the defendant alleges sufficient material facts that, if true, entitle him or her to relief. *Bentley*, 201 Wis.2d at 309-10; *Nelson*, 54 Wis.2d at 497-98. Whether the motion is sufficient to entitle a defendant to a hearing is a question of law subject to de novo review. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis.2d 358, 805 N.W.2d 334. If the motion is insufficient or the record conclusively shows that the defendant is not entitled to relief, this court deferentially reviews the circuit court's discretionary decision whether to grant a hearing. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis.2d 568, 682 N.W.2d 433.

B. Failure to present exculpatory testimony of Taylor's cousin.

Taylor's first claim is that his trial counsel was ineffective for not calling as a witness Taylor's cousin, Kelli Walton (Taylor's brief at 28-29). This claim relies on an affidavit Walton executed in May 2014, asserting that on the day of the shooting she had switched cars with Taylor, and kept Taylor's white

BMW until about 10:30 p.m. (76:7; A-Ap. 16).[9] This assertion is inconsistent with Saffold's testimony that Taylor was driving a white BMW at the time of the shooting (109:26-27).

The circuit court concluded that in light of the whole record, even if Walton had testified in line with her affidavit there is no reasonable basis to believe it would have made a difference in the outcome (85:6; A-Ap. 8). The record supports the circuit court's determination.

The circuit court catalogued the numerous ways in which the defendants impeached Saffold: the desire to receive the $10,000 reward; the consideration on his cocaine arrest and the possible expungement of his marijuana conviction; the almost two-year delay in reporting his information about the shooting; his nine prior convictions; and his possible grudge against Riley (85:3-4; A-Ap. 5-6). And yet, "[d]espite all of the unsavory things that came out at trial about Paris Saffold, the jury nevertheless believed him" (85:4; A-Ap. 6). In light of the entire record, the circuit court concluded that "there is not a reasonable probability the jury would have found Walton's testimony persuasive or credible" (85:6; A-Ap. 8).

An independent fact, apparently unknown to the circuit court, provides an independent basis for this conclusion: Kelli Walton had a prior conviction for theft.[10] Although a trial attorney's failure to call a potential witness can constitute ineffective assistance even though grounds existed to impeach

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[9] Taylor initially submitted a report from an investigator summarizing the interview with Walton (67-Exh. J; A-Ap. 78-79). In response to the circuit court's denial of his motion on the ground that there was no affidavit, Taylor submitted the report in affidavit form and moved for reconsideration (76:6-7; A-Ap. 10-16).

[10] According to CCAP, Ms. Watson was convicted of felony theft on August 1, 2007, in Milwaukee County case number 2007CF1514.

the witness' credibility, the existence of a prior conviction of the witness is another matter. *State v. Jenkins*, 2014 WI 59, ¶ 62, 355 Wis.2d 180, 848 N.W.2d 786. Here Walton's prior conviction would have undermined her credibility and supports the correctness of the circuit court's rejection of Taylor's claim.

Because the record as a whole conclusively demonstrates Taylor was not entitled to relief, no hearing was required.

C. Failure to impeach Saffold with evidence that he knew Taylor at the time he was shot and was aware of the shooting.

At trial Saffold testified that at the time of the shooting in June 2010 he had known Taylor "for about two years" (109:7). He also testified that he did not know that Taylor previously had been shot (109:11).

Taylor asserts that his trial counsel could have impeached or rebutted this testimony by arguing that Saffold admitted knowing Taylor at the time Taylor had been shot (Taylor's brief at 30). But Saffold's testimony that he had known Taylor "about two years" was obviously a rough estimate and did not necessarily mean he knew Taylor at the time Taylor was shot.

The only other evidence suggested by Taylor are statements in a police report summarizing the interview of Saffold after he had been arrested for cocaine possession, namely: 1) "Paris stated [that Taylor] was known to hang out in the area of N. 61st street and W. Thurston Street" (67-Exh. F, p. 3; A-Ap. 69); and 2) "Paris stated he believed [Taylor] may have been shot at about four years ago, in the area of N. 60th and W. Thurston Ave" (67-Exh. F, p. 4; A-Ap. 70). But neither of these statements is inconsistent with Saffold's testimony that he first

learned of the prior shooting of Taylor on the day Cort was shot.

Glaringly absent from Taylor's argument is the identification of any witnesses or information—much less any that were known to Taylor's trial counsel—establishing that Saffold knew Taylor at the time Taylor was shot, or that Saffold was otherwise aware that Taylor had been shot. Taylor's claim fails.

Taylor has failed to allege sufficient facts establishing ineffective assistance; hence the circuit court was not required to hold a hearing on his claim.

D. Failure to offer evidence that Saffold had a grudge against Taylor.

Next Taylor claims that his trial counsel was ineffective for not introducing evidence that Saffold had a grudge against Taylor based upon a prior conflict between himself and Saffold (Taylor's brief at 31-32). Taylor asserts the following:

> Taylor informed counsel that he had clashed with Saffold prior to the crime. He (with Riley) "intervened" after Saffold had abused a cousin, Tinnile Reynolds. This gave Saffold a motive to incriminate Taylor.

(Taylor's brief at 31).

Taylor does not specify what he told his trial counsel, including how he "intervened," or when he did so. His claim is conclusory and vague, and did not warrant a hearing.

Further, Taylor acknowledges that Riley's counsel cross-examined Saffold to try and establish bias on Saffold's part based upon this incident (Taylor's brief at 32). This line of questioning obviously did not sway the jury with respect to

Riley, who Saffold identified as the shooter of Cort, and there is no reason to believe it would have made any difference with respect to Taylor either.

E. Failure to offer evidence that Taylor had no grudge against the victim or his twin brother.

Taylor next faults his trial counsel for not seeking to establish through cross-examination of the victim's twin brother, Donald Cort, that Taylor did not have a grudge against Donald Cort based upon the shooting of Taylor in 2008 (Taylor's brief at 32-33). According to Taylor, "Taylor had no grudge against any Cort twin, and no reason for one. The Cort twin present during the 2008 shooting *helped convict Taylor's shooter*, so Taylor owed him *gratitude*, not grudge" (Taylor's brief at 32).

But Taylor's claim is entirely speculative and conclusory. The only evidence he offers to support this claim are statements in a search warrant affidavit that Donald Cort assisted the police in identifying Taylor's shooter, and that in a subsequent encounter with Taylor, Taylor stopped Donald "and asked if he had anything to do with him being shot," which Donald denied (67-Exh. M, pp. 1-2, A-Ap. 84-85) (Taylor's brief at 32-33).

But these statements merely confirm that Taylor was aware that Donald was present when Taylor was shot, and that Taylor subsequently confronted Cort about it. Although Donald apparently told Taylor that he was not involved but instead had cooperated with the police, Taylor offers nothing to indicate that Taylor believed Donald's explanation and did not hold it against Donald. Conspicuously absent is any helpful testimony Donald would have provided had Taylor's counsel made the risky decision to aggressively cross-examine the victim's brother.

Taylor thus falls far short of showing a reasonable probability that such evidence could have resulted in acquittal. His assertion that additional cross-examination of Donald Cort would have established that Taylor did not have a grudge against Cort is entirely speculative, and did not merit an evidentiary hearing.

F. Failure to offer evidence of alternative suspects.

Taylor also contends that his trial counsel was ineffective for not offering evidence of "three alleged admissions to the crime. One of these—Armstrong's admission—was corroborated by several key factual details. See supra" (Taylor's brief at 33).

Although Taylor provides no specific reference to the record, the state presumes that Taylor intends to refer to a police report submitted with Taylor's postconviction motion (67-Exh. D; A-Ap. 62-63).[11] Missing from Taylor's motion is the aftermath of the alleged admission, including the reasons the police did not charge Armstrong, which apparently were strong enough that none of the three defense attorneys pursued it at trial.

Nor has Taylor even purported to show that evidence of Verdale Armstrong's statements would have been admissible as so-called *Denny* evidence. *State v. Denny*, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984). A defendant seeking to introduce evidence of a third party perpetrator must establish that there is "a legitimate tendency" that the third party actually committed the crime, which in turn requires establishing that the third party had motive, opportunity, and a direct

[11] Taylor refers to nothing in the record about the other two admissions; hence the court need not consider them.

connection to the crime. *State v. Wilson*, 2015 WI 48, ¶ 3, 362 Wis.2d 193, 864 N.W.2d 52.

At most Taylor has alleged only the first element; he suggests nothing to show that Armstrong had either the opportunity to commit the crime or a direct connection to it. An obvious problem with Armstrong's admission is that Armstrong plainly is not the shooter as depicted on the surveillance video. Armstrong is 6'1" and weighs 265 pounds; the shooter is much smaller (67:Ex. A-Camera 3 at 01:15 – 01:16).[12] Hence Taylor cannot show that Armstrong had either the opportunity or a direct connection to the crime.

Moreover, even if the evidence at issue met the *Denny* test, Taylor has not shown any deficiency on the part of his counsel in not offering it at trial. Had the defendants done so, it would have induced the State to explain why those leads did not pan out, which would have undercut the defense strategy of trying to disparage the quality of the police investigation. Further, that there were multiple confessions to the same crime would have diluted the force of any of them singly, since they could not all be true.

In short, Taylor's counsel was not ineffective for not attempting to show that Armstrong committed the crime, and no hearing was warranted.

[12] Armstrong's height and weight are publicly available through the Wisconsin Department of Corrections website (at http://offender.doc.state.wi.us/lop/searchbasic.do) since Armstrong is currently incarcerated.

G. Failure to present a ballistics expert.

Taylor argues that his trial counsel was ineffective "for not presenting expert opinion testimony regarding the alleged killing bullet" (Taylor's brief at 34-35). Taylor's claim has two critical flaws.

First, at trial Taylor has waived this claim by expressly agreeing to a stipulation that the recovered bullet had been fired, but had "an insufficient amount of DNA for further testing" (110:89-90, 112). The latter fact clearly suggests that there was some DNA on the bullet, but not enough to analyze.

Taylor's postconviction theory is that the bullet was never fired and did not pass through a human body (which would have resulted in the absence of DNA). He cannot now assert that his counsel was ineffective for not seeking an expert to refute facts to which he stipulated.

Second, even without the stipulation, Taylor's motion lacks any opinion or report from a ballistics expert concluding that the bullet could not have killed Cort. Instead, Taylor provides a letter from "criminologist Greg Martin" opining that the bullet did not appear to have traveled through a body (Taylor's brief at 34; 67-Exh. N; A-Ap. 88-89).

All we know of Mr. Martin comes from his letterhead, which reveals only that he is a licensed investigator and a self-described "criminologist"; neither a curriculum vitae nor any expert report is attached (67-Exh. N; A-Ap. 88-89). Further, Martin viewed photographs of the bullet, and was only able to observe it directly through "a plastic bubble" (*id.*). There was no showing that Martin was qualified to render expert ballistics testimony.

In short, Taylor waived his challenge to the authenticity of the bullet through the trial stipulation. Moreover, he cannot establish prejudice because he has failed to establish that expert testimony was available that would have refuted the State's case. His motion failed to assert sufficient facts to establish a claim and, by definition, to warrant an evidentiary hearing.

H. Failure to raise other issues.

Taylor also cites three other instances of ineffective assistance, namely: 1) the failure to effectively argue for mistrial "based on prosecutorial vouching and improper statements;" 2) admitting in the PSI and at sentencing "that Taylor drove Riley away after the crime;" and 3) failing to obtain a lesser-included instruction on "'aiding and abetting a felon'" (Taylor's brief at 35).

Taylor develops none of these arguments, and this court thus should not consider them. *See State v. Pettit*, 171 Wis.2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court "may decline to review issues inadequately briefed").

VI. TAYLOR IS NOT ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE.

Taylor seeks a new trial in the interest of justice. He faces a daunting standard:

> [s]uch discretionary reversal power is exercised only in "exceptional cases." *Id.,* ¶ 25; *State v. Hicks,* 202 Wis.2d 150, 161, 549 N.W.2d 435 (1996). The power to grant a new trial in the interest of justice is to be exercised "infrequently and judiciously." *State v. Ray*, 166 Wis.2d 855, 874, 481 N.W.2d 288 (Ct.App.1992).

State v. Avery, 2013 WI 13, ¶ 38, 345 Wis.2d 407, 826 N.W.2d 60.

For improperly introduced evidence to merit a new trial in the interest of justice, the testimony must "so cloud[ ] a crucial issue that it may be fairly said that the real controversy was not fully tried." *State v. Burns*, 2011 WI 22, ¶ 37, 332 Wis.2d 730, 798 N.W.2d 166 (quoted source omitted).

To meet his heavy burden, Taylor simply repackages his previous arguments, and offers the hyperbolic conclusion that the additional impeachment evidence "would have destroyed" Saffold's credibility (Taylor's brief at 36). Taylor then cites the surveillance video showing that he was at the liquor store prior to the shooting his cousin's assertion that she was driving Taylor's car at the time of the shooting the restrictions on the cross-examination of Saffold and the existence of alternative suspects (*id.*).

The State has addressed all of these points above. The case was indeed fully tried. Taylor and his codefendants had ample opportunity—of which they took full advantage—to assail the credibility of Saffold, which Taylor repeatedly states was "the central issue of the case: Saffold's credibility and the truth of his accusations" (Taylor's brief at 36).

This contrasts sharply with the situation in *State v. Hicks*, 202 Wis.2d 150, 549 N.W.2d 435 (1996), in which the "sole issue" was the identification of the defendant, but "the jury which found *Hicks* guilty did not have an opportunity to hear and evaluate evidence of DNA testing which excluded *Hicks* as the source of one of the four pubic hairs found at the scene. Instead, the jury was presented with evidence and argument that was later found inconsistent with the facts." *Hicks*, 202 Wis.2d at 163.

Accepting Taylor's claim here would create a blanket rule that when credibility is at issue, all possibly impeaching evidence must be admitted. But settled law provides the

contrary: the circuit court may place limits on cumulative impeachment evidence. *See Barreau*, 257 Wis.2d 203, ¶ 53. Taylor cites no authority for the sweeping principle he impliedly advocates.

In sum, this is not the exceptional circumstance in which a controversy was not fully tried. Taylor has not established a right to a new trial.

VII. THERE IS NO REASON TO RESENTENCE TAYLOR.

Taylor claims that the circuit court sentenced him on the basis of inaccurate information (Taylor's brief at 37-39). To show entitlement to resentencing, a defendant must both show that the information at issue was inaccurate and must "establish by clear and convincing evidence that the circuit court actually relied on the inaccurate information." *State v. Travis*, 2013 WI 38, ¶¶ 22-23, 347 Wis.2d 142, 832 N.W.2d 491. Taylor's argument fails under this test.

Taylor first cites the circuit court's statement at sentencing that Taylor supplied the sweatshirt Riley wore when he crossed the street to shoot Cort (Taylor's brief at 38). At sentencing, the circuit court stated:

> Looking at the offense, obviously I've presided over the trial. The testimony at trial speaks for itself. This defendant's involvement has been discussed. He set the ball in motion, and this jury believed that this defendant gave Riley, the shooter, a sweatshirt or hoodie to use to conceal his identity as he ran across the street armed with a weapon, eventually shooting the victim.

(115:39).

Taylor cites no evidence demonstrating that this assertion was incorrect. He ignores the testimony given by Saffold, which certainly justified the conclusion that Taylor had provided the hoodie to Riley:

> Q. ... And did you see at all where Laquan got this hood from as Hopgood went and got the gun?
>
> A. If I'm not mistaken, he got it from George, because we were the only ones out there. And I remember what Donte had on, and it wasn't that sweatshirt. So he would have to have got it from George.
>
> ....
>
> Q. And did you see how Laquan got the hoodie during the time that Hopgood was upstairs?
>
> A. I don't remember.

(109:20).

Saffold's cross-examination by Taylor's counsel revisited the hoodie issue:

> Q. ... What exactly did you see?
>
> A. ... if I'm not mistaken, George hands him a hoodie. He puts on the hoodie. While he's putting on the hoodie, Steven Hopgood is going in his house.

(110:48).

The only "evidence" Taylor offers to support his assertion is not evidence at all, but merely a statement the prosecutor made during an objection to the closing argument of Hopgood's counsel:

> So why then would Mr. Taylor have been wearing a hoodie in the courtyard of this apartment building? ... Does that

> make sense that on this hot day Taylor would have a hoodie?
>
> MR. STINGL: I'm going to object at this time because Paris Saffold never said George Taylor was wearing a hoodie, that he provided a hoodie.

(114:32-33).

Obviously the prosecutor was responding to the misstatement that, according to Saffold, Taylor had been wearing a hoodie. More importantly, statements of counsel during argument are not evidence, as the court instructed the jury (112:11, 15). Taylor's claim thus fails on the first prong of the test.

Taylor also asserts that the prosecutor mistakenly stated during closing argument that the use of the term "whip" by Taylor and Riley in their post-arrest correspondence referred to a gun, as opposed to a car (Taylor's brief at 38-39). But Taylor cannot establish—much less by clear and convincing evidence—that the circuit court relied on this statement, since the court never mentioned it.[13] His claim fails.

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[13] Taylor relies on the State's brief opposing his postconviction motion, which stated that "the trial court paid minimal, if any, attention to what 'whip' meant" (71:20) (Taylor's brief at 39). But Taylor ignores the next sentence of the State's postconviction brief: "The trial court's only commentary on the letter was that it was not thrilled that pre-trial communications between co-defendants occurred" (71:20). Indeed, the only reference by the circuit court to the letter was a passing reference to the fact that the codefendants had corresponded; there was no mention of a "whip" (115:41, 47).

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and the circuit court's order denying Taylor's motion for postconviction relief.

Dated this 4th day of February, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,980 words.

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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 the 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 4th day of February, 2016.

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