STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015-AP-2638-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

VICTORIA WARD,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION AND ORDERS DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE DANIEL L. KONKOL, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. Was trial counsel's attempted impeachment of a key State witness's contradictory trial testimony erroneously excluded on hearsay grounds where the evidence was not being offered for the truth of the matters asserted and where credibility of the witnesses was the key issue upon which a reasonable doubt turned in this case?

The trial court answered no.

II. Was Ward entitled to an evidentiary hearing on her claims of ineffective assistance of counsel based on her allegations that trial counsel failed adequately to impeach a key State witness's contradictory trial testimony in a case where credibility of the witnesses was the key issue upon which a reasonable doubt turned in this case?

The trial court answered no.

III. Was the admission of evidence of a weapon under Ward's mattress erroneously admitted at trial where any probative value it might have had was substantially outweighed by the danger of unfair prejudice?

The trial court answered no.

IV. Should the judgment of conviction and orders denying postconviction relief be reversed and a new trial ordered pursuant to this Court's broad power of discretionary reversal because the real controversy in

this case has not been fully tried and because justice has miscarried?

The trial court did not address this argument.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The central issues raised by this appeal involve application of established law to the facts of this case, and therefore, publication is not likely necessary. The issues raised in this appeal are likely to be adequately addressed in the briefs submitted by the parties to this action. Therefore, oral argument is not requested.

STATEMENT OF THE CASE

Defendant-Appellant Victoria Ward was convicted following a two-day jury trial on two felony counts: (1) possession of heroin with intent to deliver and (2) keeping a drug house, both as party to a crime. The State's case against Ward depended on the testimony of its law enforcement officer witnesses. Ward testified at trial in her defense. Each party offered very different versions of facts relating to Ward's lack of knowledge of the existence of drugs and drug-related activities in her apartment. As a result, Ward's guilt or innocence depended on which version of the facts the jury believed.

In this "he-said-she-said" case, one of the key State's witnesses gave contradictory testimony on two different occasions (once at the preliminary hearing and once at trial) concerning of his whereabouts during the critical time surrounding a search of Ward's apartment. Because a person cannot be in two places at once, both versions of the officer's

testimony could not have been true, and the officer's propensity for testifying inconsistently should have been brought to the jury's attention.

Notwithstanding, an erroneous evidentiary ruling by the trial court, coupled with Ward's defense attorney's ineffective assistance of counsel, prevented the jury from considering the officer's inconsistent testimony in this case. Additionally, the trial court's erroneous admission of unfairly prejudicial evidence further denied Ward a fair trial. The effect of these errors, either individually or cumulatively, wholly undermines the outcome of this case, making reversal by this Court the appropriate remedy.

A. Law Enforcement Investigation Into Ward's Uncle And Mother Leads To Charges Against Ward.

In February 2013, law enforcement officers were involved in a narcotics investigation of Anthony Freeman and Caroline Miller, who were brother and sister and Ward's uncle and mother. (R.67, App. 207-08 at 29:9-31:6). Law enforcement believed that Mr. Freeman and Ms. Miller were involved in unlawful drug dealing. (*Id*., App. 207 at 29:14-22). Law enforcement believed that Ms. Miller's house was a so-called "target house"—a location from which drugs could be purchased. (*Id.* at 29:23-25). It was also believed that Ward's apartment was a so-called "stash house"—a location where drugs and drug money might be stored. (*Id*., App. 208 at 30:4-31:6).

Although Ward was not the original target of the investigation, on the morning of February 15, 2013, police officers questioned her regarding whether she knew anything about drugs in her apartment. (*Id*., App. 208-09 at 33:4-

34:23). A search of Ward's apartment was also conducted. (*Id*., App. 209 at 35:2-18; R.60, App. 155 at 18:20-24; *Id*., App. 166-68 at 33:11-35:20). During the search, heroin was recovered in Ward's closet, and a firearm was recovered. (R.68, App. 219 at 4:24-5:8). The recovery of these items led to the charges against Ward. (R.4).

B. The State Relies On The Testimony Of Corporal Zientek At The Preliminary Hearing.

The circuit court conducted a preliminary hearing at which the State called Corporal Jeffrey Zientek—a canine handler for the City of West Allis. (R.56, App. 143 at 4:8-12). At the preliminary hearing, Zientek gave the first of two markedly inconsistent versions of facts to which he would testify during these proceedings.

At the preliminary hearing, Zientek testified that he and the other police officers arrived at Ward's apartment building at the same time, met in the lobby of that building, and took the elevator up to the fourth floor. (*Id.*, App. 149 at 10:22-25). Zientek testified that upon arriving at Ward's apartment: "we made contact with the occupants inside that apartment." (*Id.*, App. 144 at 5:2-5). That contact with Ward took place outside her apartment door after she came out of her apartment. (*Id.*, App. 150 at 11:6-9).

Zientek also testified to hearing a conversation between Officer Stachula and Ward during which Ward purportedly gave permission to search her residence. (*Id.*, App. 144-45 at 5:24-6:12). Corporal Zientek testified that, following this conversation:

> We left the hallway because of the – the people in there, and she asked us to step inside due to the neighbors, at which point, Detective Stachula engaged in a conversation with her in her bedroom. And at that point, he requested permission to search her residence with a canine, and she agreed.

(*Id.*, App. 145 at 6:6-12). Before leaving the hallway, Zientek purportedly overheard a conversation between Officer Stachula and Ward in which he claimed Ward stated that if Mr. Freeman "was engaged in drugs, more than likely, they would be hidden in a closet." (*Id.*, App. 147 at 8:5-14).

C. The Trial Court Denies Ward's Motion To Suppress Noting That The Case Turns On Credibility And Finding The Officers' Testimony More Credible.

The circuit court heard a vigorously contested suppression motion arising out of the search of Ward's apartment that followed. At the hearing,[1] both sides offered diametrically opposed versions of the key facts.

1. Law enforcement testifies to a "matter of fact" encounter with Ward.

Officer Stachula contended that an officer knocked on the door of Ward's apartment and that their interaction was "nothing aggressive" and "more matter of fact." (R.60, App. 153 at 16:20-21; *Id.*, App. 157 at 20:3-4). Although one officer had drawn a rifle and another officer had drawn a handgun, according to the police, the firearms were pointed at

[1] The suppression motion was heard on September 25, 2013 and decided by Reserve Judge Michael Skwierawski. (R.60, App. 151; R.61, App. 172).

a downward angle in a "low-ready" position. (*Id.*, App. 158 at 21:4-17).

After conducting a "protective sweep" to look for Anthony Freeman, police officers questioned Ward in the hallway of her apartment. (*Id.*, App. 155 at 18:20-24; *Id*., App. 160-62 at 23:11-25:6). The police contended that Ward indicated that there was a firearm in her apartment that belonged to her boyfriend who was incarcerated. (*Id.*, App. 160 at 23:14-22). Officer Stachula also testified that Ward supposedly indicated that there "could be" some drugs in her apartment. (*Id.*, App. 161 at 24:7-9). Following this conversation, Officer Stachula contended that the police obtained consent for a search from Ward, and that they all "casually" walked into the apartment. (*Id.*, App. 162 at 25:1-3).

Officer Stachula also testified that Corporal Zientek (who had previously testified that he was with Officer Stachula outside Ward's apartment), had remained outside to monitor the balcony. (*Id*., App. 153 at 16:16-19), even though his report reflected that Zientek had been present for the initial contact and made no mention of the balcony. (*Id*., App. 169-71 at 52:14-54:7).

Once inside the apartment, Officer Stachula and Ward had a conversation. According to the officer, in response to a question regarding whether there were drugs in the apartment, Ward purportedly made a so-called "target glance" to her bedroom closet. (*Id.*, App. 163-64 at 30:8-31:8). Corporal Zientek conducted a search with the help of his canine partner and recovered heroin in a boot located in the closet of Ward's apartment. (*Id.*, App. 166-68 at 33:11-35:20). A firearm was also found under the mattress of the bed in her apartment. (*Id.*, App. 168 at 35:13-14).

2. Ward testifies to a hostile encounter with law enforcement during which she was forcibly dragged into the hallway at gunpoint and interrogated aggressively.

Ward's version of events differed dramatically from that of the officers. Ward testified that she was in her apartment in her pajamas with her younger brother and sister who were 12 and 11 years old on the morning the search took place. (R.61, App. 175 at 8:2-4). When police officers knocked on her apartment door, she opened the door to find an assault rifle pointed at her head. (*Id*., App. 174-76 at 7:23-9:3). Ward testified that she was pulled out of her apartment by her arm into the hallway, while the other officers went into her apartment. (*Id*., App. 176 at 9:9-12). Ward explained that while she was in the hallway she "was crying the majority of the time…." (*Id*., App. 178-79 at 11:25-12:1). While she admitted that there was a firearm located in her apartment, she told Officer Stachula that there should *not* be any drugs located in her apartment. (*Id*., App. 180 at 15:19-16). During this questioning, Corporal Zientek and Officer Stachula were both present. (*Id*., App. 181 at 16:11-25).

Once inside the apartment, Ward, Officer Stachula, and Corporal Zientek went into Ward's bedroom. (*Id*., App. 183-84 at 18:24-19:4). Ward sat on the bed and responded to Officer Stachula's questions. (*Id*., App. 184-85 at 19:24-20:8). In response to Officer Stachula's questions about whether there were illegal drugs in the apartment, Ward responded that she did *not* know that anything was in her apartment. (*Id*., App. 186 at 21:9-18). When the officer asked "if anyone was to hide anything in your apartment, where would it be," Ward responded "the only hiding spot would be my closet," and then "looked into [her] closet

because it was dirty and [she] knew [the officers] were about to search it." (*Id*., App. 186 at 21:9-18).

After hearing the testimony from Officer Stachula and Ward, the court below acknowledged the "diametrically opposed positions…between the testimony of the defendant and testimony of police officers about what happen[ed] at the scene…." (*Id.*, App. 193 at 64:11-21). The court noted that the outcome depended on "[w]hat version of these facts is believable…." (*Id*. at 64:22-25). The court found Officer Stachula's testimony more credible and, thus, denied the motion to suppress. (*Id.*, App. 194 at 68:15-20).

D. The State's Case At Trial Depends On The Credibility Of Its Law Enforcement Witnesses.

1. The circuit court questions defense counsel's effectiveness in failing to prepare sufficiently for possible impeachment.

With the suppression motion decided, the case proceeded to trial, which began on December 4, 2013 (R.66, App. 201). Prior to the start of *voir dire*, the Court admonished defense counsel for requesting that the State's witnesses remain available for the following day in the event counsel did not receive transcripts of the suppression hearing (over two months earlier) for possible impeachment purposes. (*Id.*, App. 202-03 at 2:10-3:4).

The Court questioned trial counsel's lack of preparation for impeachment, noting on the record that it had "a question right now about effectiveness…" (*Id*., App. 204 at 4:7-8). The court below also admonished that "[e]ffective

representation probably would have had those transcripts in hand by the final pretrial date." (*Id*., App. 203 at 3:16-18).

2. Corporal Zientek changes his trial testimony regarding his whereabouts during the critical time surrounding the search of Ward's apartment.

The State's case at trial again relied on the testimony of law enforcement officers. Officer Stachula (who testified at the suppression motion), testified at trial that he questioned Ward about the presence of illegal drugs in the apartment and contended that Ward said that someone possibly might be hiding drugs inside her apartment. (R.67, App. 209 at 34:8-16). Officer Stachula again testified that Ward made a so-called "target glance" at her closet, which the officer interpreted as a sign that she was hiding something in her closet. (*Id.*, App. 209-10 at 37:6-38:13). Officer Stachula also contended that Ward admitted that drugs "could possibly be in a shoe in the closet." (*Id.*, App. 210 at 38:8-15).

When the State called Corporal Zientek (who had previously testified at the preliminary hearing), the officer offered contradictory trial testimony regarding his whereabouts. Contrary to his earlier testimony (*see, supra,* at B), Zientek testified at trial that he "did *not* make initial contact" with Ward at her apartment on February 15, 2013. (R.67, App. 214 at 87:21-24) (emphasis added). Rather than going up in the elevator with the other officers as he initially testified, Zientek claimed for the first time at trial that he was instead "advised to stand out in the front parking lot to watch the balcony on the fourth floor of [the] apartment in question." (*Id*., App. 214 at 88:2-5; R.68, App. 220 at 15:3-4). Officer Stachula also claimed at trial, as he did at the suppression hearing, that Corporal Zientek was outside

observing the balcony of the apartment building, rather than in the hallway as Zientek had originally testified. (R.67, App. 211 at 43:9-18; R.60, App. 153 at 16:16-19; *Id*., App. 169-71 at 52:14-54:7).

Although he had previously testified to being present and overhearing a conversation between Ward and Officer Stachula in the hallway, at trial Zientek claimed instead that he overheard the conversation "once we were *inside* the apartment…" (R.68, App. 220 at 15:13-15) (emphasis added).

The State elicited extensive testimony from Zientek regarding his qualifications and experience. (R.67, App. 212 at 78:1-80:15). Zientek explained at trial how his canine partner, Sonny, searched both the outside and inside of Ward's apartment and how the dog alerted in Ward's closet. (*Id.*, App. 213-15 at 85:23-91:19). The State also used Zientek to describe the appearance of the inside of Ward's closet, the shoe in which the drugs were purportedly found, and the recovery of the drugs in question. (*Id.*, App. 215-17 at 90:9-99:12). The State used Zientek to authenticate two photographs (Trial Exhibits 6 and 7) supposedly showing the condition of the inside of Ward's closet and of the boot recovered therein. (*Id*., App. 215-16 at 93:5-94:17).

Finally, the State relied on the testimony of Officer Bodo Gajevic. Although Officer Gajevic was not involved in the investigation in this case (R.68, App. 224 at 35:3-6), the officer testified about the quantity of narcotics typically associated with personal or resale use. (*Id.*, App. 221 at 25:1-12; *Id.*, App. 222-23 at 29:18-30:6). Officer Gajevic also testified about the existence of a supposed "mule system" used by traffickers in which some individuals may allow

family members to use their vehicle or residence to sell narcotics. (*Id.*, App. 223 at 33:4-21; *Id.*, App. 225 at 42:19-43:22).

E. The Trial Court Twice Sustained The State's Objection To Defense Counsel's Attempt to Impeach Corporal Zientek.

In light of the stark differences between Corporal Zientek's preliminary hearing testimony and his trial testimony, defense counsel attempted to impeach his testimony to undermine his credibility to the jury. (R.68, App. 220 at 16:16-17). When trial counsel twice attempted to ask what Corporal Zientek heard Ward say, the Court sustained the State's objection on hearsay grounds. (*Id.* at 16:6-18).

Trial counsel explained in an offer of proof that he asked these questions "to impeach the former officer's testimony." (*Id*. at 16:16-17; *Id.*, App. 226 at 52:23-53:6). The court below explained the reason it excluded the testimony, noting that defense counsel had not asked whether Corporal Zientek had previously testified inconsistently, but rather asked him to testify to the contents of a conversation. (*Id*., App. 226-27 at 52:23-54:14). The circuit court clarified, "[y]ou are asserting that somebody else said something else, so that is where the problem comes in; at that point, it is hearsay and it can't be used." (*Id*., App. 226 at 53:14-17).

The trial court did not excuse Zientek following his testimony and noted that he still remained available should the need arise. (*Id*., App. 228 at 59:20-22). Defense counsel made no further attempt to recall Zientek or discredit his contradictory trial testimony.

F. The Defense Case Relies Exclusively On Ward's Testimony.

Victoria Ward was the only witness for the defense. (R.68, App. 228 at 60:1-2). Like at the suppression hearing, Ward's version of events differed greatly from that of the State's law enforcement witnesses.

Ward testified that her uncle Anthony Freeman—who had been the initial target of the investigation—did not have a key to her apartment, and that she would not allow him to do anything illegal in the apartment. (*Id.*, App. 229 at 63:12-64:4). She testified that she did not tell Mr. Freeman or allow him to bring drugs into her apartment. (*Id.*, at 64:9-13).

Ward acknowledged that she told Officer Stachula that a firearm was in her apartment. (*Id*., App. 232-33 at 81:22-82:7). However, she testified that she did *not* tell Officer Stachula that there were drugs in the apartment, nor did she tell him that she suspected that Mr. Freeman had placed drugs in her apartment. (*Id*., App. 230 at 72:11-16). Once she and the officers were inside the apartment, Officer Stachula said that she was a target, and she became concerned about the officers searching her house and her closet. (*Id*., App. 231 at 76:5-9). Ward was concerned because she had her underwear and nightclothes on the floor of the closet. (*Id*. at 76:10-20).

She also explained that her comment about her closet was that she had "such an open apartment" that "the only thing that is really closed off is [her] closet." (*Id*., App. 231 at 76:24-77:4). However, she testified that she did not say that drugs could be hidden within a shoe—only that "if anything would be hidden in my home it could possibly be in

the closet because it's the only closed in place." (*Id*., App. 232 at 80:19-25).

G. The State Argues For The Credibility Of Its Witnesses During Closing Arguments.

During closing arguments, the State acknowledged that Ward's purported knowledge of the drugs and activities in her apartment was "[t]he big issue here…" (R.69, App. 236 at 23:22-23). In making its argument, the State focused extensively on credibility of the witnesses, arguing to the jury that the officers' testimony should be believed because "they have no stake in this case." (R.69, App. 240-41 at 27:8-28:25). In bolstering the credibility of its witnesses, the State cited Zientek's trial testimony regarding his qualifications and experience. (*Id*., App. 241 at 28:8-16).

On the other hand, the State argued that the defendant did purportedly "have an interest in this case," and that her testimony should not be believed. (*Id.* at 28:17-25). In attacking Ward's credibility, the State also relied on Ward's statements about the firearm under the mattress of her bed. (*Id.*, App. 237-38 at 24:22-25:9). The State also argued to the jury that the evidence relating to the supposed appearance of Ward's closet was "the most important reason why Ward knows that these drugs are there and is doing this knowingly…." (*Id*., App. 238 at 25:24-26:1).

After deliberating for approximately 40 minutes, the jury returned guilty verdicts on both counts. (R.19; R.20; R.69, App. 242-44 at 57:10-59:20). The trial court sentenced Ward to concurrent prison sentences totaling eight years—four years of initial confinement and four years of extended supervision. (R.70, App. 246 at 29:8-19). The court below found Ward ineligible for the Challenge Incarceration

Program or the Earned Release/Substance Abuse Program. (*Id*., App. 247 at 30:5-9).

H. Ward Brings A Postconviction Motion And Supplemental Postconviction Motion Which The Circuit Court Denies Without A Hearing.

Following her conviction, Ward filed a timely Notice of Intent to Pursue Postconviction Relief (R.26), and thereafter filed through predecessor counsel[2] a postconviction motion seeking modification of her sentence to allow her to be eligible for the Challenge Incarceration Program and Substance Abuse Program (R.29). The circuit court denied this motion without a hearing, finding that "the full time designated for initial confinement at sentencing is necessary to punish and deter the defendant for her crime and to protect the community." (R.32, App. 105).

On September 17, 2015, Ward filed a supplemental postconviction motion for a new trial. (R.42, App. 106). In her supplemental postconviction motion, Ward alleged, *inter alia*, that she was denied the effective assistance of counsel because trial counsel failed to impeach a key witness on which the State's case relied. Ward showed that these failures were also highly prejudicial given that witness

[2] The State Public Defender (SPD) initially appointed staff counsel to provide postconviction representation of Ward. On March 19, 2015, SPD staff counsel filed a motion with this Court to extend the time in which to file a notice of appeal or supplemental postconviction motion to allow time to have outside counsel appointed in light of a potential conflict of interest (R.35). On March 24, 2015, the Court of Appeals granted that motion (R.36), and the undersigned was appointed on April 9, 2015. (R.37).

credibility was *the* issue on which reasonable doubt turned in this case. (*Id*., App. 117-20). Accordingly, Ward requested an evidentiary hearing pursuant to *State v. Machner*, 92 Wis. 2d 797, 803-04, 285 N.W.2d 905 (Ct. App. 1979) (R.42, App. 115).

Ward further argued that the trial court erred by excluding testimony on hearsay grounds that would have allowed for the impeachment of key State witnesses and by admitting evidence of a firearm found under the mattress in Ward's bedroom. (*Id*., App. 120-22)

The court below ordered briefing on the motion (R.44), following which the circuit denied Ward's supplemental postconviction motion without a hearing (R.52, App. 126). In denying the motion, the trial court dismissed Ward's allegations of ineffective assistance of counsel for trial counsel's failure to impeach Corporal Zientek.[3]

The trial court candidly acknowledged that upon a review of the conflicting testimony, "it is possible that posing further questions to Corporal Zientek about his whereabouts *could have resulted in successful impeachment of his testimony*." (*Id*., App. 128) (emphasis added). However, the court below concluded that further questioning "may not have reflected negatively on his trial testimony." (*Id*.). The trial court concluded that there was "not a reasonable probability of a different result." The court observed that "there is

[3] Ward also raised below an issue regarding trial counsel's failure to remove a juror who appeared to be biased based on a transcript from *voir dire* proceedings filed in this case. Upon the filing of a second transcript by the court reporter of those proceedings, the trial court concluded that there was no evidence that the juror was impartial. (R.52, App. 127).

simply not a reasonable probability the jury would have believed the defendant." (*Id*., App. 129).

The trial court also declined to revisit its evidentiary rulings. With respect to the challenged hearsay ruling, the trial court suggested that the result would not have been different because, in its view, "any showing of inconsistent testimony on the part of Corporal Zientek related to what the defendant said about the possibility of drugs in the apartment…." (*Id.*, App. 130).

The lower court also rejected Ward's argument that evidence of the gun recovered under her mattress should have been excluded under Wis. Stat. § 904.03 as unfairly prejudicial. The court stated that it "concurs with the State that evidence of the weapon was relevant" because it "reflected on her credibility." (*Id*.).

This appeal followed. (R.53).

ARGUMENT

I. The Trial Court's Exclusion Of Critical Impeachment Evidence On Hearsay Grounds Was An Erroneous Exercise Of Discretion That Was Highly Prejudicial And Not Harmless Beyond A Reasonable Doubt.

A. Standard Of Review

A circuit court's decision to admit or exclude evidence is reviewed for an erroneous exercise of discretion. *State v. Hunt*, 2014 WI 102, ¶ 20, 360 Wis. 2d 576, 851 N.W.2d 434. A circuit court erroneously exercises its discretion "if it applies an improper legal standard or makes a decision not

reasonably supported by the facts of the record." *Id*. *See also State v. Echols*, 2013 WI App 58, ¶ 14, 348 Wis. 2d 81, 831 N.W.2d 768 (Court of Appeals will uphold evidentiary ruling if, *inter alia*, the trial court examined relevant facts, applied proper standard of law).

Upon a finding that the circuit court erroneously exercised its discretion, this Court must "conduct a harmless error analysis to determine whether the error affected [the defendant's] substantial rights." *Echols*, 2013 WI App 58 at ¶ 15 (internal citation and quotation omitted). *See also Hunt*, 2014 WI 102 at ¶ 21 (erroneous exercise of discretion in evidentiary rulings is subject to the harmless error rule); Wis. Stat. § 901.03(1). In other words, the Court must determine whether "there is a reasonable possibility that the error contributed to the outcome of the case." *Echols*, 2013 WI App 58 at ¶ 15 (internal citation omitted). An error is not harmless "if it undermines [the Court's] confidence in the outcome of the proceeding." *Id*.

Whether a circuit court's erroneous admission or exclusion of evidence was harmless "presents a question of law that this court reviews *de novo*." *Echols*, 2013 WI App 58 at ¶ 15.

B. The Trial Court Should Not Have Excluded Trial Counsel's Proffered Impeachment As Hearsay Because The Testimony Was Not Sought To Prove The Truth Of The Matter Asserted.

Wis. Stat. § 908.01(3) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evidence is not hearsay, however, if it is

offered to prove something other than the truth of the matter asserted. *See, e.g., State v. Amos,* 153 Wis. 2d 257, 276-77, 450 N.W.2d 503 (Ct. App. 1989) (trial court erred in precluding testimony regarding what another person said where testimony was not offered to prove the truth, but rather that the statement was made and defendant's reaction to those statements); *State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 430, 351 N.W.2d 758 (Ct. App. 1984) (out-of-court statement offered, not for truth, but to prove that a statement was made and its effect on the listener was not hearsay). Stated differently, "[t]he hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements." *Dutton v. Evans*, 400 U.S. 74, 88 (1970).

Contrary to the lower court's ruling, not all out-of-court statements are excluded under the hearsay rule. In this case, Corporal Zientek offered dramatically different testimony concerning his whereabouts during the critical moments of his encounter with Ward. Some of the more glaring inconsistencies of Zientek's testimony are summarized below:

Preliminary Hearing Testimony (R.56)	**Jury Trial Testimony (R.67, R.68)**
Upon arriving at Ward's apartment building, the officers "all met in the lobby and took the elevator up." (R.56, App. 149 at 10:22-25)	Upon arriving at Ward's residence, Corporal Zientek was "advised to stand out in the front parking lot to watch the balcony on the fourth floor of [the] apartment in question." (R.67, App. 214 at 88:2-5). *See also* R.68, App. 220 at 15:3-4 ("I was advised

	to stay out by the parking lot to watch the dog")
Upon arriving at Ward's apartment, "we made contact with the occupants inside that apartment." (R.56, App. 144 at 5:2-5).	"I did *not* make initial contact…" with Ward at her apartment. "I seen [sic] her afterward, but contact was *already initiated* when I arrived." (R.67, App. 214 at 87:21-24) (emphases added)
When Corporal Zientek first arrived at Ward's apartment, the first conversation was "outside her apartment door. We knocked on her door, and she came out." (R.56, App. 150 at 11:3-9).	Corporal Zientek only overhead a conversation between Ward and Officer Stachula "[o]nce we were inside the apartment…" (R.68, App. 220 at 15:13-15).
Corporal Zientek claimed to overhear Officer Stachula request and obtain Ward's permission to search the apartment. (R.56, App. 145 at 6:3-12)	Corporal Zientek testified that he overheard a conversation once he had returned and was inside the apartment, and that contact had already been initiated when he arrived. (R.67, App. 214 at 87:21-24; R.68, App. 220 at 15:13-15).
Corporal Zientek claimed to overhear Ward tell Officer Stachula that if Anthony Freeman were "engaged in drugs, more than likely, they would be hidden in a closet." (R.56, App. 147 at 8:5-13)	Corporal Zientek testified that he overheard a conversation once he had returned and was inside the apartment, and that contact had already been initiated when he arrived. (R.67, App. 214 at 87:21-24; R.68, App. 220 at 15:13-15).

At trial, Zientek testified that he overheard "bits and pieces" of a conversation between Ward and Officer Stachula.

(R.68, App. 220 at 16:10-12). Following that statement, trial counsel twice attempted to ask what Zientek allegedly heard Ward say, explaining to the trial court in an offer of proof that he wanted "to impeach the former officer's testimony." (*Id*. at 16:6-18). Nevertheless, the trial court excluded the impeachment on hearsay grounds, explaining that trial counsel was "asserting that somebody else said something else, so that is where the problem comes in; at that point, it is hearsay and it can't be used." (*Id*., App. 226 at 53:14-17).

In this case, the trial court's erroneous exercise of discretion is clear because it applied a plainly incorrect legal standard for hearsay under Wis. Stat. § 908.01(3). *See Hunt*, 2014 WI 102, ¶ 20 (circuit court erroneously exercises discretion "if it applies an improper legal standard"). Rather than applying the language of § 908.01(3) and the well-established rule that evidence *not offered for its truth* is never hearsay, the circuit court held that inadmissible hearsay consists merely of "asserting that somebody else said something else." (R.68, App. 226 at 53:14-17).

The circuit court's ruling is demonstrably an incorrect statement of the law, and therefore the lower court erroneously exercised its discretion. Inquiring whether "somebody else said something else" is not hearsay if (as here), the testimony is not offered to prove the truth of the matter asserted. *Amos,* 153 Wis. 2d at 276-77; *Curbello-Rodriguez*, 119 Wis. 2d at 430.

Here, the record establishes without doubt that trial counsel was not attempting to prove the truth of what Ward purportedly said.[4] Stated differently, it did not matter what

[4] To the contrary, Ward testified at trial that she did *not* say that there could be drugs in the apartment. (R.68, App. 230 at

Ward actually said or did not say. What mattered was whether Corporal Zientek *testified* that he had ever *heard* a conversation in the hallway (as he had originally testified), or only inside Ward's apartment (as he later testified). Zientek's response would have permitted defense counsel to confront the witness with his prior inconsistent testimony.[5] Because the statement was not being offered for its truth, it was not inadmissible hearsay. *Amos,* 153 Wis. 2d at 276-77; *Curbello-Rodriguez*, 119 Wis. 2d at 430.

C. The State Cannot Establish That The Circuit Court's Error Was Harmless Beyond A Reasonable Doubt.

The State, "as the beneficiary of the error, carries the burden of establishing beyond a reasonable doubt that the error…did not contribute to the verdict[] against [the defendant] in any way." *State v. Nieves,* 2016 WI App ___, ___ Wis. 2d ___, ___ N.W.2d ___, 2016 Wisc. App. LEXIS 233, ¶ 30 (recommended for publication) (April 5, 2016).[6] *See also State v. Poh*, 116 Wis. 2d 510, 529, 343 N.W.2d 108 (1984) (State must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained") (internal citation and punctuation omitted).

72:11-16). As such, it would be most unlikely that defense counsel would attempt to prove the *truth* of what Corporal Zientek purportedly heard Ward say because Ward had consistently maintained the contrary.

[5] Nor would Corporal Zientek's own prior inconsistent testimony be hearsay under Wis. Stat. § 908.01(4)(a)1.

[6] This Court recommended *Nieves* for publication in the official reports on April 5, 2016. Pending the Court's order for publication, this decision is cited for its persuasive value pursuant to Wis. Stat. Rule § 809.23(3). (App. 131).

The Supreme Court has articulated several factors to determine whether an error was harmless beyond a reasonable doubt, including "the importance of the erroneously admitted or excluded evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted or excluded evidence; the nature of the defense; the nature of the State's case; and the overall strength of the State's case." *Hunt*, 2014 WI 102 at ¶ 27, *citing State v. Norman*, 2003 WI 72, ¶ 48, 262 Wis. 2d 506, 664 N.W.2d 97. These factors show that the State cannot prove the circuit court's error was harmless beyond a reasonable doubt.

1. The excluded impeachment testimony was critically important because credibility was the key issue in this case.

The importance of the excluded testimony plainly shows that the error was not harmless beyond a reasonable doubt. Credibility was the key issue in this case. Given the parties' conflicting testimony regarding Ward's purported knowledge, the outcome depended on "[w]hat version of these facts is believable…." (R.61, App. 193 at 64:22-25) (comments of suppression court). The State strongly argued in favor of the credibility of its law enforcement officers to the jury. The State purported to bolster Zientek's credibility by citing his experience. (R.69, App. 214 at 28:8-11). The State also argued that its law enforcement officers should be believed because supposedly they "have no stake in this case." (*Id*. at 28:3).

At the same time, the State attacked the defendant's credibility. (*Id.*, App. 240-41 at 27:8-28:25). Yet, when the trial court erroneously prevented impeachment on hearsay grounds, the defense was denied the opportunity to show the

jury why Corporal Zientek's testimony should not be believed. The erroneous exclusion of this evidence cannot be harmless beyond a reasonable doubt. *See, e.g., State v. Hinz*, 121 Wis. 2d 282, 360 N.W.2d 56 (Ct. App. 1984) (erroneous exclusion on hearsay grounds of evidence that went to central issue in case was not harmless).

The importance of the impeachment is also evident given that another key prosecution witness—Officer Stachula—corroborated Corporal Zientek's inconsistent trial testimony. (R.67, App. 211 at 43:9-18). As shown above, Corporal Zientek claimed at trial to be out in the parking lot after arriving at the defendant's apartment building, rather than in the hallway of the defendant's apartment—as he had earlier testified. At trial, Officer Stachula corroborated this later, inconsistent version of events, as he had at the suppression hearing. (*Id.*; R.60, App. 211 at 16:16-19; *Id.*, App. 169-71 at 52:14-54:7) The State relied on Officer Stachula extensively to try to establish, *inter alia*, what the defendant stated relating to a gun in her apartment and what the defendant stated about whether there were drugs in the apartment. (R.67, App. 208-09 at 33:18-34:16). The fact that Officer Stachula corroborated testimony by Corporal Zientek, whose own testimony was flatly contradicted by his prior inconsistent testimony, raises serious questions about Officer Stachula's credibility—particularly when Officer Stachula's testimony had also been undermined by his written report (R.60, App. 169-71 at 52:14-54:7).

Because credibility was so central to this case, and because Officer Stachula purported to corroborate the Corporal's inconsistent testimony, impeachment of the Corporal would not just have undermined his testimony but also that of Officer Stachula.

The State also used Corporal Zientek to testify that two photographs (Trial Exhibits 6 & 7) of the inside of the defendant's closet and of the boot recovered therein were fair and accurate representations of the appearance of those items at the time of the search. (R.67, App. 215-16 at 93:8-94:8). While Ward identified certain photographs of being pictures "of her closet" and of the shelves therein and testified that certain items belonged to her, (R.68, App. 234 at 91:10-92:3), she did not testify that the photos fairly or accurately depicted the appearance of the inside of her closet or of the shelves at the time of the search. Corporal Zientek did, however, give that testimony, and the State relied on this evidence to argue to the jury that the defendant's denial that she did not know that there were drugs in her apartment should not be believed.[7]

During closing arguments, the State even suggested that the evidence relating to the appearance of Ward's closet was "the *most important reason* why Ms. Ward knows that these drugs are there and is doing this knowingly…." (R.69, App. 238-39 at 25:24-26:1) (emphasis added). And, the State showed one of these very photographs to the jury during its closing argument. (*Id.*, App. 239 at 26:12-13). Had Corporal Zientek's propensity for testifying inconsistently been shown to the jury, that impeachment would have undermined the State's argument relating to Ward's supposed knowledge of the existence of drugs in her apartment.

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[7] For example, the State argued that the inside of the defendant's closet was not messy as she claimed. (R.69, App. 239-40 at 26:21-27:7). The State also argued that the position of the boot in her closet undermined her claim that she did not know that drugs were in her closet. *Id*.

2. No other evidence of Corporal Zientek's propensity for testifying inconsistently was presented to the jury.

There was no other evidence of Zientek's propensity to testify inconsistently before the jury, nor would that evidence have "functionally served the same purpose by corroborating [Ward's] version of events." *Hunt*, 2014 WI 102 at ¶ 30. Indeed, a major purpose for impeaching Zientek would have been to show that his testimony should not be believed. Moreover, although trial counsel raised during the suppression hearing that Officer Stachula's report contradicted Corporal Zientek's (and even his own) claims that the Corporal was outside, this impeachment evidence was never presented to the jury. (R.60, App. 169-71 at 52:14-54:7). Indeed, even the trial court acknowledged that "it is possible that posting further questions to Corporal Zientek about his whereabouts could have resulted in successful impeachment of his testimony." (R.52, App. 128).

3. The nature of the State and defense cases depended entirely on the believability of their witnesses.

As shown throughout, credibility was the central issue in this case, as the outcome necessarily depended on which version of events the jury credited—the State's or Ward's. The State's case relied heavily on the testimony of officers Zientek and Stachula. The defense case was built entirely on Ward's own testimony. If one or more of the State's key witnesses was not testifying truthfully—particularly in a case where there was demonstrably inconsistent testimony—the underpinning of the State's case would be seriously compromised.

4. The strength of the State's case would have been severely undermined had the jury been made aware that one or more of the State's witnesses testified inconsistently.

Whether the State's case was strong or weak depends in large measure on whether its witnesses were believable. As shown throughout, one of its key witnesses gave two opposing versions of his testimony, claiming to be in different places at the same time. Only one—but not both—of these versions can be true. Had the jury rejected the testimony of the State's law enforcement witnesses, the result in this case would likely have been different.

5. The trial court's acknowledgment of the possible success of impeachment coupled with its own weighing of the evidence confirms that the error was not harmless beyond a reasonable doubt.

Any possible question about the prejudicial effect of the lower court's error in excluding the impeachment testimony is resolved by reviewing the court's own decision denying Ward's supplemental postconviction motion. While the trial court admitted that further questioning "*could* have resulted in the successful impeachment of [Zientek's] testimony" (R.52, App. 128), it also suggested that it "*may* not have reflected negatively on his trial testimony." (*Id*.) (emphases added). The court below engaged in its own weighing of the evidence, concluding that "[a]s between Detective Stachula and the defendant, there is simply not a reasonable probability the jury would have believed the defendant." (*Id*., App. 129).

The lower court's comments about the respective credibility of the parties' witnesses shows why this weighing should have been left to the jury and not the trial court. Indeed, "the credibility of all witnesses…and the weight assigned to their testimony are matters for the *jury's* judgment." *State v. Honig*, 2016 WI App 10, ¶ 42, 366 Wis. 2d 681, 874 N.W.2d 589 (emphasis added).

As such, it was up to the *jury* (not the trial court) to determine whether the State's witnesses were being truthful. *See, e.g., State v. Anderson*, 141 Wis. 2d 653, 665, 416 N.W.2d 276 (1987) (noting the importance of maintaining "the jury's role of assessing credibility and determining weight while properly limiting the judge's role to a threshold admissibility determination….")

Yet, because the trial court improperly excluded this testimony, the jury was not given the opportunity to hear important testimony that bore on an important issue in the case—namely, whether the officers on which the State relied extensively at trial were testifying truthfully and should be believed. *Echols*, 2013 WI App 58, ¶ 21.

D. The Circuit Court's Erroneous Exclusion Of Impeachment Testimony Denied Ward Due Process Of Law.

The prejudice of the trial court's erroneous exclusion of this impeachment testimony is further shown by the resulting violation of Ward's due process rights. In *Myers v. State*, 60 Wis. 2d 248, 263-64, 208 N.W.2d 311 (1973), the Supreme Court admonished that a trial court's failure "to allow the defendant at trial 'access to' and the 'right to use'

prior inconsistent statements for 'impeachment purposes' is a violation of his constitutional right to due process of law."

In *Myers*, a key State witness in a burglary case had testified during John Doe proceedings that she had not gone to a sports shop with the defendant when he had burglarized that building, nor had she seen any guns stolen from that building. However, at trial, the same witness changed her testimony and said that she *was* with the defendant and that she *did* see the defendant put guns into the trunk of the car in which she was sitting. *Id*. at 265.

The *Myers* court concluded that "[t]he guilt or innocence of the defendant actually turned upon the credibility of the witnesses." *Id*. at 266. Accordingly, the Supreme Court concluded that "[t]o deny the defendant the right of access and use of the John Doe testimony for impeachment purposes is a denial of due process of law and in this case prejudicial to the rights of the defendant." *Id*.

The same result obtains here. As in *Myers*, the outcome of this case depends on the credibility of Ward's testimony and that of the State's witnesses. And, like *Myers*, the trial court's erroneous ruling denied Ward the ability to use the officer's prior inconsistent statement to show his lack of credibility. The resulting violation of Ward's due process rights further confirms the substantial prejudice from the lower court's erroneous ruling.

II. The Circuit Court Erred In Denying Ward's Postconviction Motion Without A Hearing Because She Alleged Sufficient Material Facts Entitling Her To Relief On Her Claim Of Ineffective Assistance Of Counsel.

A. Standard Of Review

Whether a defendant's postconviction motion alleges sufficient facts to entitle her to a hearing for the relief requested presents a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief is a question of law this Court reviews *de novo*. *Id*. *See also State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Under *de novo* review, the decision of the circuit court is not entitled to deference. *State v. Vanmanivong*, 2003 WI 41, ¶ 17, 261 Wis. 2d 202, 661 N.W.2d 76.

When sufficient facts are alleged, "the circuit court has no discretion and *must* hold an evidentiary hearing." *Bentley*, 201 Wis. 2d at 310. *See also Allen,* 2004 WI 106 at ¶ 9. Even "[i]f the facts in the motion are assumed to be true, yet seem to be questionable in their believability, the circuit court must hold a hearing." *Allen*, 2004 WI 106 ¶ 12 n.6, *citing State v. Leitner*, 2001 WI App 172, ¶ 34, 247 Wis. 2d 195, 633 N.W.2d 207 (noting that where credibility is an issue, such issues are best resolved by live testimony).

B. Ward Sufficiently Alleged That Trial Counsel's Failure Adequately To Impeach A Key State Witness Constituted Ineffective Assistance Of Counsel.

The U.S. Constitution and the Wisconsin Constitution guarantee criminal defendants the right to effective assistance of counsel. *State v. Shata*, 2015 WI 74, ¶ 32, 364 Wis. 2d 63, 868 N.W.2d 93, *citing Strickland v. Washington*, 466 U.S. 668, 686 (1984). *See also* U.S. Const. Amend VI, Wis. Const. Art. I § 7.

A defendant establishes that she was denied effective assistance of counsel by showing that (1) her trial attorney performed deficiently, and (2) the deficient performance caused prejudice to her defense. *Shata*, 2015 WI 74 at ¶ 33. Deficient performance is performance that falls "below an objective standard of reasonableness considering all the circumstances." *State v. Jenkins*, 2014 WI 59, ¶ 36, 355 Wis. 2d 180, 848 N.W.2d 786. Deficient performance is prejudicial if there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* ¶ 37. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

It is well-settled that the failure of trial counsel adequately to impeach key witnesses of the State can constitute ineffective assistance of counsel. *See, e.g., State v. Jenkins*, 2014 WI 59, 355 Wis. 2d 180, 848 N.W.2d 786 (failure of defense counsel to use witness testimony to impeach evidence upon which State's case relied constituted deficient performance prejudicial to the defense); *State v. Thiel*, 2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305

(same); *State v. Jeannie M. P.*, 2005 WI App 183, 286 Wis. 2d 721, 703 N.W.2d 694 (same).

The resulting prejudice of such failures is particularly evident in cases where credibility of the witnesses is "paramount to the case." *Thiel*, 2003 WI 111, ¶ 46. Indeed, where the State and defendant offer competing versions of key events, a case presents "a classic instance of the 'he-said-she-said' dilemma." *Id*. *See also, Jeannie M.P.*, 2005 WI App 183, ¶ 11. In such cases, a failure adequately to impeach can constitute both deficient performance and prejudice. *Thiel*, 2003 WI 111, ¶ 81; *Jeannie M.P.*, 2005 WI App 183, ¶ 35. *Cf. State v. Pitsch*, 124 Wis. 2d 628, 645-46, 369 N.W.2d 711 (1985) (trial counsel's errors that allowed defendant's credibility to be undermined where "credibility was the central issue in [the] case" constituted deficient performance and prejudice).

For the reasons shown in detail above in Part I-B, Ward has shown that she was entitled—at very least—to an evidentiary hearing on her claims of ineffective assistance of counsel.

1. Ward adequately alleged deficient performance by her trial attorney in failing to impeach Corporal Zientek.

For the reasons shown above in Part I, the trial court's erroneous hearsay ruling constitutes reversible error. The trial court did, however, make clear that Corporal Zientek had not been excused following the conclusion of his testimony and was available should the need arise. (R.68, App. 228 at 59:20-22). Ward's trial counsel did not pursue the issue further.

Ward's supplemental postconviction motion sufficiently alleged that her trial attorney's performance was deficient in failing adequately to impeach Corporal Zientek. Indeed, even the circuit court raised on the record "a question right now about effectiveness…" based on trial counsel's failure to prepare adequately for possible impeachment. (R.66, App. 204 at 4:7-8).

The trial court's concern was well-founded. In this case, Ward's supplemental postconviction motion clearly alleged (R.42, App. 117-20) that Corporal Zientek's trial testimony differed dramatically from his preliminary hearing testimony concerning, *inter alia*, his whereabouts during the moments surrounding Ward's interactions with law enforcement. Because Corporal Zientek could not be in two places at the same time, both versions of his sworn testimony could not possibly be true. Those inconsistencies were alleged in Ward's motion and summarized above in Part I-B, and even the circuit court acknowledged that "posing further questions to Corporal Zientek about his whereabouts could have resulted in the successful impeachment of his testimony." (R.52, App. 128).

Furthermore, trial counsel was well aware of the inconsistent testimony on this issue. At the suppression hearing, trial counsel cross-examined Officer Stachula about the discrepancy between his own testimony that Zientek was outside the apartment, and his police report that said Zientek was present in the hallway (as Zientek himself had previously testified). (R.61, App. 181 at 16:16-19; *Id.*, App. 190-92 at 52:14-54:17). Trial counsel also noted that this testimony conflicted with Corporal Zientek's testimony. (*Id.*, App. 187-89 at 47:4-49:22). Yet, trial counsel failed to impeach Zientek's testimony on this issue before the jury at trial.

In this "he-said-she-said" case, *see Thiel*, 2003 WI 111 at ¶ 46, where credibility of the witnesses was so important and in which one of the key State's witnesses testified inconsistently, Ward sufficiently alleged that trial counsel's failure adequately to impeach that testimony constituted deficient performance. *Jenkins*, 2014 WI 59 at ¶ 59; *Thiel*, 2003 WI 111 at ¶ 81; *Jeannie M.P.*, 2005 WI App 183 at ¶ 11.

2. Ward adequately alleged that her trial counsel's deficient performance resulted in prejudice.

Ward also adequately alleged prejudice. Her motion alleged that her trial counsel's failure to impeach Corporal Zientek severely prejudiced her defense for all of the reasons explained above in Part I(C), including that (1) credibility was the key issue in the case because the outcome depended on the jury's view of the parties' competing versions of the key facts—particularly on critical question of Ward's purported knowledge, (2) the State vouched for its witnesses' credibility and argued that Ward should not be believed, (3) the other key witness (Officer Stachula) purported to vouch for Corporal Zientek's inconsistent testimony, which would have undermined his own testimony had trial counsel adequately impeached it; and (4) the State relied heavily on Corporal Zientek's testimony to establish, *inter alia*, the appearance of the inside of Ward's closet, which (according to the State) purportedly showed her knowledge of drugs in the apartment.

For the reasons shown above and throughout, these allegations show that the impeachment of Corporal Zientek's inconsistent trial testimony would have undermined critical

parts of the State's case had those inconsistencies been brought before the jury.

Ultimately, it would have been up to the jury "to determine the weight and credibility to assign" to this evidence. *State v. Guerard*, 2004 WI 85, ¶ 49, 273 Wis. 2d 250, 682 N.W.2d 12. *See also Honig*, 2016 WI App 10 at ¶ 42 ("the credibility of all witnesses…and the weight assigned to their testimony are matters for the jury's judgment.") But in this case, because of trial counsel's failure to impeach Corporal Zientek, the jury was deprived of the opportunity to weigh his inconsistent testimony and determine the impact of his lack of credibility on the outcome of this case.

For these reasons, Ward sufficiently alleged below that there is a high probability of a different result at trial had this impeachment material been presented, and it was error for the lower court to deny her motion without a hearing.

III. The Trial Court's Admission Of Evidence Of A Firearm Under Ward's Mattress Was An Erroneous Exercise Of Discretion That Was Not Harmless Beyond A Reasonable Doubt.

A. Standard of Review

As shown above in Part I(A) and I(C), A circuit court's decision to admit or exclude evidence is reviewed for an erroneous exercise of discretion. *State v. Hunt*, 2014 WI 102 at ¶ 20. If the lower court erroneously exercised its discretion, this Court must perform a harmless error analysis. *Echols*, 2013 WI App 58 at ¶ 15.

B. The Trial Court Erroneously Exercised Its Discretion Because It Failed To Apply The Correct Legal Standard.

Wis. Stat. § 904.03 permits a Court to exclude relevant evidence from the trial "if its probative value is substantially outweighed by the danger of unfair prejudice…." To be excludable under Wis. Stat. § 904.03, "the evidence must be unfairly prejudicial." *State v. Alexander*, 214 Wis. 2d 628, 642, 571 N.W.2d 662 (1997). Unfair prejudice "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Id.*, *citing Old Chief v. United States*, 519 U.S. 172, 180 (1997).

In *State v. Albright*, 98 Wis. 2d 663, 298 N.W.2d 196 (Ct. App. 1980), the Court of Appeals held that trial testimony from a police officer that a chain and knife had been confiscated from a defendant should have been excluded because "[t]he testimony created unfair prejudice which substantially outweighed any probative value." *Albright*, 98 Wis. 2d at 675. The Court explained:

> While a chain or knife does not necessarily constitute a weapon, removal by an officer infers that they were in this case. The resulting prejudice to [the defendant] is that the jury might unjustifiably conclude on the basis of this confiscation that [the defendant] was engaged in violent and unlawful activity and therefore it would convict him on the basis of these uncharged "crimes."

Id. at 676.

In this case, defense counsel filed a motion *in limine* to exclude evidence of the weapon found under Ward's

mattress. The Court denied the motion as untimely.[8] At trial, however, defense counsel renewed his objection to the State's reference to the gun found under Ward's mattress. (R.67, App. 210 at 39:6-41:10). The court overruled the objection, holding that "the statement by the officer regarding the gun goes to her credibility" and "as to whether or not she has knowledge…." (*Id*. at 41:6-9).

As of the time of the trial, Ward was not a convicted felon and was not prohibited by law from possessing a firearm. *See* Wis. Stat. § 941.29(2)(a). Furthermore, her possession of a firearm was a protected constitutional right under the United States and Wisconsin constitutions. *See* U.S. Const. Amend II, Wis. Const. Art. I § 25. In this case, there was a risk of unfair prejudice to the defendant that the jury might convict Ward on the basis that she was supposedly engaged in violent or unlawful activity arising merely from the fact of her possession of a firearm. At trial, the State repeatedly referred to evidence of the gun found under Ward's mattress, which was unfairly prejudicial to the defendant. (R.69, App. 237-38 at 24:12-25:9).

In denying Ward's supplemental postconviction motion, the trial court again concluded that "evidence of the weapon was *relevant*, either with respect to the defendant's association with Anthony Freeman…or with respect to her conflicting statements about how she came to have the weapon." (R.52, App. 130) (emphasis added). However, the

[8] Paragraph 5(h) of the Court's July 18, 2013 required any motions *in limine* to be filed no later than 48 hours prior to the final pretrial hearing. (R.8). Pursuant to this order, the defense motion *in limine* was due by 9:30 a.m. on November 25, 2013, but it was not filed until after 4:00 p.m. on November 26, 2013. (R.65, App. 197 at 3:21-24).

trial court did not address the unfair prejudice of this evidence as required under Wis. Stat. § 904.03.

The trial court's conclusion that the evidence was admissible merely because it had some relevance shows that the lower court applied the wrong standard. Indeed, *no* evidence that is entirely *irrelevant* can be admitted at all. *See* Wis. Stat. § 904.02 ("[e]vidence which is not relevant is not admissible"). Ward did not argue in her postconviction motions that the evidence was entirely irrelevant, but rather that whatever limited probative value it might have had was substantially outweighed by the danger of *unfair prejudice*—namely the risk that this evidence might "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Alexander*, 214 Wis. 2d at 642.

Because the trial court applied the incorrect legal standard, it erroneously exercised its discretion. *State v. Daniels*, 160 Wis. 2d 85, 100, 465 N.W.2d 633 (1991) ("[i]f the circuit court applied the wrong legal standard, that is, if the circuit court based its decision on an error of law, [the reviewing court] will reverse the circuit court's decision as an abuse of discretion.")

C. The Trial Court's Error Was Not Harmless Beyond A Reasonable Doubt.

In order to establish that the trial court's error was harmless, the State must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained…." *State v. Poh*, 116 Wis. 2d 510, 529-30, 343 N.W.2d 108 (1984).

There is little question that the State cannot sustain its burden of showing that the evidence of the gun under the

mattress "did not contribute to the verdict obtained." *Id*. Indeed, the State emphasized this very evidence to the jury during its closing arguments, suggesting that the firearm purportedly showed Ward's knowledge of the existence of drugs in the apartment. (R.69, App. 236-37 at 23:22-24:24). Having relied on and argued this evidence to obtain the conviction, the State cannot show that the admission of this evidence played no role in the jury's verdict.

The erroneous admission of this evidence is therefore not harmless beyond a reasonable doubt, and Ward's conviction should be reversed for this additional reason.

IV. This Court Should Exercise Its Broad Authority Of Discretionary Reversal Because The Real Controversy Has Not Been Fully Tried And Because Justice Has Miscarried.

This Court possesses a broad power of discretionary reversal under Wis. Stat. § 732.35. *See also State v. Davis*, 2011 WI App 147, ¶ 16, 337 Wis. 2d 688, 808 N.W.2d 130.[9] As such, "a new trial may be ordered in either of two ways: (1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has for any reason miscarried." *State v. Hicks*, 202 Wis. 2d 150, 159-60, 549 N.W.2d 435 (1996). *See also State v. Maloney*, 2006 WI 15, ¶ 14 n.4, 288 Wis. 2d 551, 709 N.W.2d 436 (separate grounds for discretionary reversal are distinctive).

[9] While this Court and the Supreme Court "may set aside a conviction through the use of [its] discretionary reversal powers…the circuit court does not have such discretionary powers." *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60. Accordingly, the court below did not address (nor could it) Ward's argument in this regard.

The real controversy has not been fully tried "if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case…." *Davis*, 2011 WI App 147, ¶ 16, *citing Maloney*, 2006 WI 15, ¶ 14 n.4. In order to grant a discretionary reversal because it is probable that justice has for any reason miscarried, "there must be a substantial probability of a different result on retrial."[10] *Maloney*, 2006 WI 15, ¶ 14 n.4.

Although this Court's power of discretion is used judiciously and only in exceptional cases, *see State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60, this power is nonetheless designed "to achieve justice in individual cases." *Davis*, 2011 WI App 147 at ¶ 16. *See also Vollmer v. Leuty*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990) ("[t]his broad statutory authority provides the court of appeals with power to achieve justice in its discretion in the individual case.")

A. The Real Controversy Has Not Been Fully Tried Because The Jury Was Prevented From Considering Key Credibility Evidence That Would Have Undermined The State's Case.

As shown throughout, through a combination of erroneous trial court rulings and ineffective assistance of trial counsel, the jury was prevented from hearing critical impeachment of Corporal Zientek, which impeachment would have undermined not only his credibility, but the credibility

[10] The Court "may exercise [its] power of discretionary reversal…without finding the probability of a different result on retrial [if it concludes] that the real controversy has not been fully tried." *Davis*, 2011 WI App 147 at ¶ 16 (citation omitted).

of Officer Stachula—two of the pillars upon which the State's case was built. For all of the reasons shown above in Part I-C and II-B, because the jury was erroneously deprived of the opportunity to consider this key evidence, the real controversy in this case—namely the credibility of the State's key law enforcement witnesses and Ward's supposed knowledge about drugs and activities in her apartment—has not been fully tried.

In *State v. Culyer*, 110 Wis. 2d 133, 327 N.W.2d 662 (1983), the Supreme Court exercised its discretionary power of reversal in a case where—like here—the "trial was a credibility battle…." *Culyer*, 110 Wis. 2d at 665. In *Culyer*, the Supreme Court reversed because the circuit court's erroneous exclusion of certain evidence "resulted in the loss of testimony favorable to the defendant on the issue of his credibility." *Id*.

Like *Culyer*, the absence of adequate impeachment of Corporal Zientek resulted in the "loss of testimony favorable to [Ward]" on the key issue of credibility. *Id*. This Court should therefore reverse.

B. Justice Has Miscarried In This Case Because There Is A Likelihood Of A Different Result On Retrial But For The Errors Below.

For many of the reasons discussed throughout, this Court should also reverse for a miscarriage of justice because there is a strong probability of a different result on retrial. In Parts I-C and II-B, Ward showed that there was a likelihood of a different result had adequate impeachment of Corporal Zientek occurred given that the result of this case depended so heavily on the respective credibility of both parties' witnesses. Had the jury been given the opportunity to

consider the serious credibility problems with Corporal Zientek's testimony—which would have undermined not just his own testimony, but that of Officer Stachula as well—the evidence would have predominated in Ward's favor, making it highly probable that a different result would obtain on retrial.

Similarly, in Part III-B, Ward showed that the erroneous admission of the evidence of the firearm under Ward's mattress likely contributed to the jury's verdict. Without that unfairly prejudicial evidence before the jury, there is a substantial likelihood of a different result because the evidence would predominate in favor of Ward.

As such, this Court should also reverse for a miscarriage of justice. *See, e.g., State v. Murdock*, 2000 WI App 170, 238 Wis. 2d 301, 617 N.W.2d 175 (reversing for a miscarriage of justice and finding a substantial probability of a different result on retrial where evidence "predominated" in favor of defendant); *Kemp v. State*, 61 Wis. 2d 125, 211 N.W.2d 793 (1973) (same).

CONCLUSION

For all of the reasons herein, this Court should reverse the judgment of conviction and the orders denying postconviction relief and remand this matter for a new trial. Alternatively, this Court should reverse and remand to the trial court with instructions to hold a *Machner* hearing on Ward's claims of ineffective assistance of counsel.

Dated this 27th day of April, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,337 words.

Dated this 27th day of April, 2016.

Signed:

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CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 27th day of April, 2016.

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