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COURT OF APPEALS

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DISTRICT I

Case No. 2015AP2638-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VICTORIA M. WARD,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND
TWO ORDERS DENYING MOTIONS FOR
POSTCONVICTION RELIEF, ALL FILED IN THE
CIRCUIT COURT FOR MILWAUKEE COUNTY, THE
HONORABLE DANIEL L. KONKOL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin (State), requests neither oral argument nor publication.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant-appellant, Victoria M. Ward, appeals a judgment convicting her of possession of heroin with intent to deliver, and maintaining a drug house (25), and orders denying her motion for postconviction relief, and supplemental motion for postconviction relief (32; 52).

Ward was charged after police searched her apartment and discovered heroin in a boot in her bedroom closet. Police were investigating suspected drug activity by Ward's uncle, Anthony Freeman, and her mother, Caroline Miller. (67:29-30.) Through surveillance, police determined that Freeman and Miller were going to Ward's residence before and after drug sales. (67:30.) Officers brought a K-9 unit to the apartment building and the K-9 alerted on the door to Ward's apartment. (67:85, 87.) Two days later, officers returned to Ward's apartment, with the K-9 unit. (67:87.) Officers knocked on the door, and Ward answered and came out into the hallway to speak to them. (67:33; 68:66-67.) Officers asked if there was anything illegal or anything that did not belong to her in the apartment. (67:33.) Ward said that a handgun that belonged to her boyfriend was under her mattress. (67:33; 68:73.) Officers also asked Ward if anyone was keeping drugs in her apartment. (67:34; 68:73-74.) Detective Nick Stachula testified that Ward said that there could possibly be drugs inside the apartment. (67:34.) Ward testified that she told Detective Stachula that there could not be drugs in the apartment. (68:73.)

Officers asked for consent to search the apartment, and Ward gave consent. (67:35; 68:74.) Once they were in the apartment, officers asked Ward where, if drugs were being stored in the apartment, they would be located. (67:38; 68:75.) Detective Stachula testified that Ward said that if there were drugs in the apartment, they likely would be in the closet. (67:38.) Ward testified that she told police that there were no drugs in the apartment, but if there were, they would possibly be in the closet. (68:76-77, 80.)

Corporal Jeffrey Zientek and the K-9 unit searched the bedroom, and the K-9 alerted on the closet. (67:43, 89-91.) Officers discovered heroin in a boot in the closet. (67:43-44, 94.)

Ward was charged with possession of heroin with intent to deliver, and maintaining a drug house. (5.) She moved to suppress her statements to police and evidence found in her apartment. (9.) The circuit court held a hearing on the motion (60; 61), and then denied the motion in an oral decision (61:64-68).

Ward was found guilty of both charges in a jury trial in which she testified. (69:58-61.) The circuit court, the Honorable Daniel L. Konkol, imposed judgment of conviction. (25.) Ward filed a motion for postconviction relief, seeking modification of her sentence to state that she is eligible for the Challenge Incarceration Program or the Earned Release Program. (29.) The circuit court denied the motion in a written decision and order, without an evidentiary hearing. (32.) Ward then filed a supplemental motion for postconviction relief, seeking to vacate her sentence and a new trial. (42.) Ward asserted in her supplemental motion that her trial counsel had provided ineffective assistance by failing to remove a subjectively

biased juror, and by failing to adequately impeach a prosecution witness. (42:2.)

The circuit court denied Ward's supplemental motion for a new trial, in a written decision and order, without holding an evidentiary hearing. (52.) Ward now appeals. (53.) As respondent, the State will provide additional facts as appropriate in the argument section of this brief.

ARGUMENT

I. The circuit court properly entered judgment of conviction and properly denied Ward's motion for postconviction relief.

On appeal, Ward raises four issues. She argues that the trial court erroneously exercised its discretion in excluding evidence at trial as inadmissible hearsay; her trial counsel was ineffective for not adequately impeaching a witness at trial, Corporal Zientek, about inconsistencies between his testimony at the preliminary hearing and his trial testimony and that she was entitled to an evidentiary hearing on the issue; that the trial court erroneously exercised its discretion in admitting evidence regarding the firearm found under her mattress; and that she is entitled to a new trial in the interest of justice. (Ward's Br. 1-2.) As the State will explain, the circuit court properly rejected Ward's ineffective assistance claim, and properly admitted evidence of the firearm, and Ward is not entitled to a new trial in the interest of justice.

A. The circuit court properly excluded evidence of what Corporal Zientek overheard during a conversation between Detective Stachula and Ward.

In her supplemental motion for postconviction relief, Ward argued that she is entitled to a new trial because the circuit court erroneously excluded evidence at trial as inadmissible hearsay. (42:15-17.) Ward referred to two questions her trial counsel asked on cross-examination of Corporal Zientek. The trial court sustained the State's objections to the questions as hearsay. The exchange was as follows:

Q: That portion of conversation you overheard between Ms. Ward and Detective Stachula, Ms. Ward said that --

[THE PROSECUTOR]: I'm going to object on grounds of hearsay.

[THE COURT]: Sustained.

Q: Did you overhear the conversation between Ms. Ward and the detective?

A: Just bits and pieces.

Q: Did you ever see or hear Ms. Ward say that - -

[THE PROSECUTOR]: Objection, hearsay.

[THE COURT]: Sustained.

[DEFENSE COUNSEL]: Your Honor, it is to impeach the former's officer's testimony.

[THE COURT]: sustained, hearsay.

(68:16.)

In its decision denying Ward's supplemental motion for postconviction relief, the circuit court rejected Ward's claim, concluding that Ward could not show that any error made any difference at trial. (52:4-5.)

On appeal, Ward argues that the trial court erred in sustaining the prosecutor's objections on hearsay grounds. She claims that she was not seeking to admit hearsay, as Ward's statement was not being offered for its truth. She explains that "it did not matter what 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 originally testified), or only inside Ward's apartment (as he later testified)." (Ward's Br. 20-21.) Ward adds that "Zientek's response would have permitted defense counsel to confront the witness with his prior inconsistent testimony." (Ward's Br. 21.)

Ward's argument fails because her defense counsel was not asking Corporal Zientek if he had ever heard a conversation in the hallway or if the only conversation he overheard was in the hallway. Counsel asked Corporal Zientek what he heard Ward tell Detective Stachula in the apartment.

At trial, defense Counsel asked Corporal Zientek, "Did you overhear a conversation from -- between Detective Stachula and Ms. Ward? (68:15.) Corporal Zientek answered, Once we were inside the apartment, yes. (68:15.) Counsel asked, "Where was that conversation taking place?" (68:15.) Corporal Zientek answered, "Inside by her, like, the bedroom area." (68:15.)

In the questions that are at issue on appeal, Ward's trial counsel did not ask Corporal Zientek if he heard Ward

and Detective Stachula talking in the hallway outside her apartment. Counsel did not ask if Corporal Zientek had testified at the preliminary hearing that he overheard a conversation between Ward and Detective Stachula in the hallway. Instead, Ward's counsel asked Corporal Zientek if he overheard the conversation between Ward and Detective Stachula, and then asked what Ward said.

Corporal Zientek's answer to counsel's question would not have had any bearing on whether he heard a conversation in the hallway, because that is not what he was asked. He was asked if he heard a conversation, and he affirmed that he did, inside the apartment. He was then asked what Ward said.

The court properly sustained the prosecutor's objection because the answer Corporal Zientek would have given would have been hearsay.

Because the trial court properly sustained the State's objections to the two questions asked by Ward's trial counsel, this court need not address Ward's argument that the exclusion of the evidence was not harmless error, or her argument that it denied her due process.

B. The circuit court properly denied Ward's ineffective assistance of counsel claim without an evidentiary hearing.

In her supplemental motion for postconviction relief, Ward asserted that her trial counsel provided ineffective assistance by not adequately impeaching Corporal Zientek about inconsistencies between his testimony at the preliminary hearing and his testimony at trial. (42:10-14.) The circuit court denied Ward's claim without a hearing,

concluding that even if Ward showed that her trial counsel performed deficiently, she did not prove that the deficient performance caused prejudice. The court concluded that “any effort at impeachment on the part of counsel would not have been reasonably probable to alter the result of the trial.” (52:4.)

On appeal, Ward argues that the circuit court erred in denying her claim without first holding an evidentiary hearing. (Ward’s Br. 29-34.)

As the State will explain, the circuit court properly denied Ward’s claim without an evidentiary hearing, and its decision should be affirmed.

1. Applicable legal principles and standard of review.

To prevail on an ineffective assistance of counsel claim, “[a] defendant must prove both that his or her attorney’s performance was deficient and that the deficient performance was prejudicial.” *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To prove deficient performance, a defendant must prove that counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* (citations omitted).

To prove prejudice, a defendant must show “a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *Id.* (citing *State v. Guerard*, 2004 WI 85, ¶ 43, 273 Wis. 2d 250, 682 N.W.2d 12). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (citations omitted).

The circuit court denied Ward's motion for postconviction relief without holding a hearing. An appellate court reviews a court's decision denying a motion without a hearing under a mixed standard of review. *Allen*, 274 Wis. 2d 568, ¶ 9. A court determines de novo "whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." *Id.* (citing *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996)). "If the motion raises such facts, the circuit court must hold an evidentiary hearing." *Id.* (citing *Bentley*, 201 Wis. 2d at 310, *Nelson v. State*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972)). But "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *Id.* (citing *Bentley*, 201 Wis. 2d at 310-11; *Nelson*, 54 Wis. 2d at 497-98). The court's decision to deny the motion without a hearing is reviewed "under the deferential erroneous is exercise of discretion standard." *Id.* (citations omitted).

2. The circuit court properly denied Ward's ineffective assistance claim without a hearing because the record conclusively demonstrates that she is not entitled to relief.

Ward's ineffective assistance claim is based on her allegation that her trial counsel failed to adequately impeach Corporal Zientek at trial. Ward argued in her supplemental motion for postconviction relief, and now argues on appeal, that Corporal Zientek's testimony at trial was inconsistent with his testimony at the preliminary hearing in regard to whether he was present when Detective Stachula and other officers initially made contact with Ward.

At the preliminary hearing, Corporal Zientek testified that when he and the other officers arrived at Ward's apartment building, they all rode the elevator up to the fourth floor, and that he was present when Detective Stachula conversed with Ward about her uncle, Anthony Freeman, who the target of the investigation. (56:5-6, 10-11.)

At trial, Corporal Zientek testified that when he arrived at the apartment building, he was advised to wait outside and watch the balcony, to observe whether any contraband was thrown out of the apartment. (67:87-88.) He also testified that he did not overhear a conversation between Detective Stachula and Ward until they were all in the apartment. (68:15.)

Ward also argues that Corporal Zientek's testimony differed as to whether he overheard Detective Stachula and Ward have a conversation in which Ward said that if there were drugs in her apartment, they would likely be in her bedroom closet. Ward argues that at the preliminary hearing, Corporal Zientek said that he heard Ward tell Detective Stachula that if her uncle, Anthony Freeman were engaged in drugs, more than likely the drugs would be in her bedroom closet. (Ward's Br. 19.) Ward claims that Corporal Zientek's trial testimony was inconsistent because he said he only overheard a conversation between Detective Stachula and Ward once they were inside the apartment. (Ward's Br. 19.)

In its decision denying Ward's motion for postconviction relief, the circuit court acknowledged the inconsistency in Corporal Zientek's testimony about where he was when contact was initially made with Ward. (52:3-4.) The court concluded that "it is possible that posing further

questions to Corporal Zientek about his whereabouts could have resulted in the successful impeachment of his testimony.” (52:3.) But the court concluded that “even if some amount of impeachment had been pursued or accomplished, there is not a reasonable probability of a different result.” (52:4.) Notably, the court recognized that “[e]ven if Corporal Zientek’s testimony could have been partially discredited about his whereabouts during the early stages of his arrival, he was nevertheless in the apartment at the crucial point with Detective Stachula, his dog Sonny, and the defendant.” (52:4.)

The circuit court did not address Ward’s argument that Corporal Zientek testified inconsistently regarding his overhearing the conversation between Detective Stachula and Ward inside Ward’s apartment. The court seemingly recognized that Corporal Zientek’s trial testimony that he overheard Ward telling Detective Stachula that if there were drugs in the apartment they likely would be in the closet, was not inconsistent with his preliminary hearing testimony.

At the preliminary hearing, Corporal Zientek testified that he, Detective Stachula, and Ward entered Ward’s apartment and went into her bedroom, and that Detective Stachula got Ward’s permission to search the residence. Corporal Zientek testified that Ward told Detective Stachula that there was a gun underneath her mattress, and “if there was any narcotics in the bedroom, they would be located inside her closet.” Corporal Zientek testified that he obtained his canine, who alerted on the closet, and officers recovered “a substantial amount of heroin.” (56:7.)

The prosecutor then asked Corporal Zientek about a conversation he overheard in Ward's bedroom, in following exchange:

Q: Did you overhear a conversation in the bedroom between Detective Stachula and the defendant regarding the target, Antonio Freeman?

A: Yes.

Q: And what was the -- What were the contents of that conversation?

A: Detective Stachula asked her if she allows Anthony Freeman to live with her. She stated, No, that he does come to the house, and she stated that she did not have any knowledge as to any kind of drug activity, but if he was engaged in drugs, more than likely, they would be hidden in a closet.

(56:7-8.)

Ward seems to argue that Corporal Zientek's testimony at trial was inconsistent with this testimony because at the preliminary hearing because at trial he said that he only overheard a conversation between Detective Stachula, and Ward inside the apartment. But Corporal Zientek's trial testimony about overhearing Ward tell Detective Stachula that if there were drugs in the apartment they would likely be in the closet, was not at all inconsistent with his testimony at the preliminary hearing.

At trial, the prosecutor did not ask Corporal Zientek about overhearing the conversation. On cross-examination, Ward's defense counsel asked if he overheard a conversation. Corporal Zientek answered, "Once we were inside the apartment, yes." (68:15.) He added that the conversation occurred "[i]nside by her, like, bedroom area." (68:15.) When defense counsel then asked, "That portion of the

conversation you overheard between Ms. Ward and Detective Stachula, Ms. Ward said that --." (68:16.) After an objection was sustained on hearsay grounds, defense counsel asked, "Did you overhear the conversation between Ms. Ward and the detective," and Corporal Zientek answered, "Just bits and pieces." (68:16.) When defense counsel asked, "Did you ever see or hear Ms. Ward say that--" the court sustained another objection on hearsay grounds. (68:16.)

Corporal Zientek's testimony regarding overhearing the conversation between Detective Stachula and Ward was not at all inconsistent. He testified both times that he overheard the conversation inside the apartment, in or near the bedroom.

As the circuit court recognized, the inconsistent testimony concerned only where Corporal Zientek was when Detective Stachula and other officers initiated contact with Ward. The court acknowledged that defense counsel could have impeached Corporal Zientek with the inconsistency, but it concluded that counsel was not ineffective for failing to do so, because impeachment would not have made a different result reasonably probable.

On appeal, Ward argues that her trial counsel's failure to impeach Corporal Zientek resulted in prejudice. (Ward's Br. 33-34.) He asserts 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." (Ward's Br. 32.)

As explained above, Corporal Zientek's testimony was inconsistent only in regard to where he was when officers first made contact with Ward. His trial testimony was not at all inconsistent with his preliminary hearing testimony in regard to later being in the apartment and overhearing Ward tell Detective Stachula that if drugs were in her apartment, they likely would be in the closet. And at trial, Corporal Zientek was not even asked on direct examination about overhearing Ward's statement. The only testimony from Corporal Zientek that the jury heard that was inconsistent with his preliminary hearing testimony concerned where he was when officers first contacted Ward.

Ward does not explain why, if her trial counsel had impeached Corporal Zientek about that inconsistency, the jury would have disbelieved all of Corporal Zientek's testimony—including his testimony about his canine partner searching the closet and finding heroin in a boot.

Ward also does not explain why if her trial counsel had impeached Corporal Zientek with his inconsistent testimony regarding where he was when officers first made contact with Ward, the jury would have disbelieved the testimony of Detective Stachula.

Ward argues that “[b]ecause 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.” (Ward's Br. 23.)

But Ward does not point to any instance of Detective Stachula “purport[ing] to corroborate” Corporal Zientek's “inconsistent testimony.” Detective Stachula testified at trial that Corporal Zientek was outside when he

initially spoke to Ward, but that he later entered the apartment. (67:43.) He said that he spoke to Ward when she was in her bedroom, and Corporal Zientek was present. (67:36.)

Detective Stachula's testimony was consistent with his testimony at the suppression hearing. At the suppression hearing, Ward's trial counsel asked Detective Stachula if Corporal Zientek was in the hallway when officers first made contact with Ward, and he said Corporal Zientek was not there. (60:46.) Ward's defense counsel asked Detective Stachula about Corporal Zientek testifying at the preliminary hearing that he was present when officers first made contact with Ward in the hallway. (60:47.) Detective Stachula made clear that Corporal Zientek was not present at that time. (60:47.) But when defense counsel asked Detective Stachula if that meant that Corporal Zientek was not present when Detective Stachula spoke to Ward in her bedroom, Detective Stachula said, "He could have been up there by that time." He added, "She's in the bedroom. I'm standing facing her so I would be facing east. So if he's behind me, he's up there. By then he could have been there." (60:49.)

Ward points to no discrepancies in Detective Stachula's testimony regarding Corporal Zientek's whereabouts, and does not explain why the jury would not have believed Detective Stachula's testimony if defense counsel had pointed out Corporal Zientek had previously said he was present when officers first made contact with Ward.

And even if the jury had questioned part of Corporal Zientek's testimony, there is no reason to believe the jury would have disbelieved all of his testimony. After all, most of Corporal Zientek's testimony—including whether

he was present when Detective Stachula spoke to Ward inside the apartment—was undisputed. At the suppression hearing, Ward testified that when she began to speak to Detective Stachula in her bedroom, Corporal Zientek was present. (61:19.) She was asked, “Was anybody else in the bedroom with you and Detective Stachula at the time that Detective Stachula was questioning you?” (61:24.) She answered, “Zientek was for a little while before he went down to get the K-9.” (61:24.)

The jury would have had no reason to disbelieve Detective Stachula’s testimony, because it was consistent with Ward’s version of events. The jury would have learned that Corporal Zientek’s testimony at the preliminary hearing was inconsistent with his testimony at trial, and with Detective Stachula’s testimony at trial and at the suppression hearing, but only in regard to whether he was present when officers first encountered Ward. The jury would have no reason to disbelieve the remainder of Corporal Zientek’s testimony about what happened after he, Detective Stachula, and Ward entered the apartment, because his trial testimony was consistent with their testimony, and with his testimony at the preliminary hearing.

The circuit court, which presided over Ward’s trial, and heard the testimony at trial, the preliminary hearing, and the suppression hearing, recognized that the inconsistencies that defense counsel could have impeached Corporal Zientek simply would have made no difference at trial. The court explained:

Upon review of the two transcripts, it is possible that posing further questions to Corporal Zientek about his whereabouts could have resulted in the successful

impeachment of his testimony. However, it also could have resulted in clarification of his actual contact with the defendant's apartment that may not have reflected negatively on his trial testimony. The fact is that he and his canine partner were ultimately summoned to search the apartment, whereupon the dog alerted to the boot in the closet that held heroin. Even if Corporal Zientek's testimony could have been partially discredited about his whereabouts during the early stages of his arrival, he was nevertheless in the apartment at the crucial point with Detective Stachula, his dog Sonny, and the defendant.

(52:4.)

The court also recognized that Detective Stachula's testimony was the key to the case, and it concluded that "[a]s between Detective Stachula and the defendant, however, there is simply not a reasonable probability the jury would have believed the defendant." (52:4.) The court pointed out that Ward initially lied about the gun belonging to her boyfriend, and that Anthony Freeman had been in her apartment the morning the heroin was found in her apartment. (52:4.) The court concluded that Ward's testimony "was not as credible as Detective Stachula's," and that "[h]aving observed the witnesses, the court is satisfied that any effort at impeachment on the part of counsel would not have been reasonably probable to alter the result of the trial." (52:4.)

On appeal, Ward argues that the circuit court erred by not holding an evidentiary hearing before denying her ineffective assistance of counsel claim. She asserts that she properly adequately alleged both that her trial counsel performed deficiently, and that she suffered prejudice as a result. (Ward's Br. 29-34.)

But Ward does not point to any evidence that she would have presented at an evidentiary hearing. Her trial

counsel could have testified at a *Machner* hearing, but that would only relate to counsel's reasons for not impeaching Corporal Zientek's testimony. Counsel's testimony would have had no bearing on whether Ward suffered prejudice. Ward points to no other evidence that she could have offered. An evidentiary hearing would have been pointless.

While in general a circuit court is required to hold an evidentiary hearing when a motion for postconviction relief is properly plead, a court need not do so when the record conclusively demonstrates that the defendant is not entitled to relief. *Allen*, 274 Wis. 2d 568, ¶ 9.

The circuit court in this case properly denied Ward's motion without an evidentiary hearing because it determined that even if Ward's trial counsel had impeached Corporal Zientek's testimony as she now claims counsel should have done, it would have made no difference. There was no need to hold a meaningless hearing when the record demonstrated to the circuit court that Ward could not show prejudice.

C. The trial court properly admitted evidence that a firearm was found under Ward's mattress.

Ward moved before trial for an order excluding evidence relating to the firearm found under her mattress. (16.) The trial court denied the motion as untimely. (65:3.) At trial, Ward's defense counsel objected to questioning of Detective Stachula regarding Ward's telling police about the gun and explaining why she possessed it. (67:39-41.) The court overruled the objection, concluding that the Ward's statement to police about the gun was relevant to her credibility. (67:41.)

In her motion for postconviction relief Ward argued that the circuit court erroneously exercised its discretion by admitting evidence that a firearm was found under her mattress. (42:18-19.)

The circuit court rejected Ward's claim, concluding that "[t]he court concurs with the State that evidence of the weapon was relevant, either with respect to the defendant's association with Anthony Freeman and his drug-dealing activities or with respect to her conflicting statements about how she came to have the weapon. Both reflected on her credibility." (52:5.)

On appeal, Ward argues that the circuit court erred in admitting evidence regarding the gun, and in denying her postconviction claim that the court erred in admitting the evidence. (Ward's Br. 34-38.) Ward acknowledges that evidence regarding the gun was relevant. (Ward's Br. 37.) But she argues that she had a constitutional right to possess the gun, and that "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." (Ward's Br. 36.) Ward adds that "[a]t trial, the State repeatedly referred to evidence of the gun found under Ward's mattress." (Ward's Br. 36.)

Ward does not explain why the jury would find her guilty of possession of heroin and maintaining a drug house because she was exercising her constitutional right to have a firearm. And in support of her assertion that the State "repeatedly referred to evidence of the gun," Ward cites only one reference on two pages of transcript. (Ward's Br. 36; 69:24-25.) The single reference is from the States' closing argument. The prosecutor said nothing about how Ward's

possession of the gun showed that she was involved in drug activity. The prosecutor instead pointed out that Ward lied to police about the gun. The prosecutor said that Ward:

[G]ave a number of statements regarding the handgun, admits when Detective Stachula originally was talking to her about the investigation she said it belongs to my boyfriend, a convicted felon for possession of a firearm. She testified, yeah, that was a lie, and I made up that lie because I had this firearm for my protection and I didn't know that -- it was better than I got it from my friend Charles Brown that it is for my friend a convicted felon.

(69:24-25.)

In the defense closing argument, Ward's defense counsel told the jury that Ward "shouldn't have lied to the police," but that her lie "does not make her guilty of this crime" (69:38.)

Those two references, one by the prosecutor and one by defense counsel, were the only references to the gun during closing arguments. Ward's argument that the State repeatedly referred to the gun is simply untrue. The State referred to the gun because Ward lied about it. And Ward's counsel understood why the State referred to the gun, and argued that possession the gun did not make her guilty of the charged crimes.

In sum, Ward acknowledges that evidence regarding the gun was relevant and she fails to show any danger of unfair prejudice. Because she has not shown that the probative value of evidence regarding the gun was substantially outweighed by danger of unfair prejudice, the circuit court did not err by admitting the evidence.

The court also did not err in denying Ward's postconviction claim. The court did not explicitly conclude

that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence, but because there was no appreciable danger of unfair prejudice, the court's finding that evidence of the gun was relevant was sufficient for the court to properly deny Ward's claim.

II. Ward is not entitled to a new trial in the interest of justice.

Ward argues on appeal that she is entitled to a new trial in the interest of justice. (Ward's Br. 38-41.) She argues that the real controversy was not fully tried and justice has miscarried because her trial counsel did not cross-examine Corporal Zientek about inconsistencies between his trial testimony and his testimony at the preliminary hearing. (Ward's Br. 39-41.)

The court of appeals is authorized to reverse a judgment and order a new trial "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Wis. Stat. § 752.35. The purpose of § 752.35 is to allow the court of appeals to review otherwise waived error in the interest of justice. *See Vollmer v. Luety*, 156 Wis. 2d 1, 17-19, 456 N.W.2d 797 (1990). To grant a new trial because the real controversy was not fully tried, "it is unnecessary for an appellate court to first conclude that the outcome would be different on retrial." *Id.* at 19. Accordingly, the power of discretionary reversal is to be used "sparingly and with great caution." *State v. Watkins*, 2002 WI 101, ¶ 79, 255 Wis. 2d 265, 647 N.W.2d 244 (citing *Graff v. Roop*, 7 Wis. 2d 603, 606, 97 N.W.2d 393 (1959)).

This court should decline to order a new trial because Ward is simply repackaging her ineffective assistance claim,

which the circuit court denied because Ward could not prove prejudice. The use of this court's power of discretionary reversal is inappropriate under these circumstances.

In *State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115, the Wisconsin Supreme Court held that, where a defendant “argues that he is entitled to a new trial because his counsel’s deficiencies prevented the real controversy from being fully tried . . . the *Strickland* test is the proper test to apply.” In *Mayo*, the defendant argued that trial counsel was ineffective under *Strickland* and that this ineffectiveness prevented the real controversy from being tried. *Id.* The *Mayo* court concluded that trial counsel performed deficiently but that his deficiency did not prejudice the defense. *Id.* The court declined to separately analyze whether the real controversy was not fully tried, holding that the defendant was confined to *Strickland* because his theory of error was based on counsel’s ineffectiveness. *Id.* ¶¶ 60-64.

The same is true in this case. Ward has not shown that any deficient performance by her trial counsel in not cross-examining Corporal Zientek caused her prejudice. She also cannot show that the same alleged deficiency resulted in the real controversy not being fully tried, or in justice miscarrying. The jury heard evidence proving Ward guilty of possession of heroin with intent to deliver, and maintaining a drug house. The real controversy was fully and fairly tried, and justice did not miscarry, and Ward is not entitled to a new trial in the interest of justice.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court affirm the judgment of conviction and the circuit court's order denying Ward's motion for postconviction relief.

Dated this 5th day of August, 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 5,393 words.

MICHAEL C. SANDERS
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

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

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 5th day of August, 2016.

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