STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP116-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDY A. LAPP,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MEL FLANAGAN, PRESIDING, AND FROM ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

SUMMARY OF ARGUMENT

Randy A. Lapp filed a postconviction motion seeking, among other things, a new trial based on ineffective assistance of trial counsel. (67.) The circuit court denied Lapp's ineffective assistance claims without a *Machner*[1] hearing. (74.) Lapp appeals from his judgment of conviction and from that part of the circuit court order denying his request for a new trial. (75.) On appeal, Lapp re-raises select claims of trial counsel ineffectiveness and asks this Court to grant him a new trial. (Lapp's Br. 15-35.)

As a threshold matter, by requesting that this Court give him a new trial, Lapp fails to focus on the real question in this appeal: whether the circuit court properly denied Lapp's motion without first holding an evidentiary hearing on one or more of his trial counsel ineffectiveness claims. A new trial cannot be granted on an ineffective assistance of counsel claim without an evidentiary hearing. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) ("[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel.").

Lapp's motion is not sufficient to warrant an evidentiary hearing. Lapp presented only conclusory allegations and failed to allege sufficient facts that, if true, demonstrate that trial counsel performed deficiently and

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

that the deficient performance prejudiced the defense. Lapp did not allege how he would prove at an evidentiary hearing, if one were held, that he is entitled to relief. For these reasons, the circuit court properly denied Lapp's ineffective assistance of counsel claims without a hearing.

ARGUMENT

The circuit court properly exercised its discretion when it denied Lapp's ineffective assistance of counsel claims without an evidentiary hearing.

A. Applicable law and standard of review.

The circuit court must hold an evidentiary hearing on a motion for a new trial only when the motion alleges sufficient facts that, if proven true, would establish that the defendant is entitled to relief. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334. Whether a motion alleges sufficient facts on its face is a question of law to be reviewed *de novo* on appeal. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Bentley,* 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). *See State v. Love,* 2005 WI 116, ¶ 26, 284 Wis. 2d 111, 700 N.W.2d 62.

To be sufficient to warrant further evidentiary inquiry, a postconviction motion must allege material facts that are significant or essential to the issues at hand. *Allen*, 274 Wis. 2d 568, ¶ 22. The motion must specifically allege within its four corners material facts answering the questions who, what, when, where, why and how the movant would successfully prove at an evidentiary hearing that he is entitled to a new trial: "the five 'w's' and one 'h'" test. *Id.* ¶ 23. *See Love*, 284 Wis. 2d 111, ¶ 27.

To obtain an evidentiary hearing on an ineffective assistance of counsel claim, the defendant must allege with

factual specificity both deficient performance and prejudice. *Bentley*, 201 Wis. 2d at 312-18. He may not rely on conclusory allegations of deficient performance and prejudice, hoping to supplement them at an evidentiary hearing. *Id.* at 317-18; *Levesque v. State*, 63 Wis. 2d 412, 421-22, 217 N.W.2d 317 (1974). Even when the allegations of deficient performance are specific, the trial court in its discretion may deny the motion without an evidentiary hearing if the allegations of prejudice are only conclusory in nature. *Bentley*, 201 Wis. 2d at 312-18. *See State v. Saunders*, 196 Wis. 2d 45, 49-52, 538 N.W.2d 546 (Ct. App. 1995).

If the motion is facially insufficient, presents only conclusory allegations, or even if it is facially sufficient but the record conclusively shows the defendant is not entitled to relief, the trial court has the discretion to deny the motion without an evidentiary hearing, subject to deferential appellate review. *Allen,* 274 Wis. 2d 568, ¶ 9; *Bentley,* 201 Wis. 2d at 310-11; *Nelson v. State,* 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

B. Failure to request judicial substitution.

As the result of judicial rotation, Judge Mel Flanagan took over Lapp's case shortly before trial. In his postconviction motion, Lapp alleged that he asked trial counsel to file a motion for substitution of Judge Flanagan, but that counsel did not do so. (67:5-6.) Lapp alleged that he "had previously been tried and sentenced by Judge Flanagan in case 2009CF162." (67:6.) According to Lapp's motion, "[h]ad the substitution been properly requested or filed Judge Flanagan would not have been able to preside over Mr. Lapp's trial or sentencing hearing." (67:6.)

The circuit court summarily rejected the claim on the ground that Lapp failed to allege how he was prejudiced by counsel's failure to ask for judicial substitution:

> Judges are presumed to be fair and impartial "and this presumption must be overcome by proof except in extreme cases of structural error." *State v. Carprue*, 274 Wis. 2d 656 (2004). To show prejudice, he must show that the trial and/or sentencing he received was fundamentally unfair. *State v. Damaske*, 212 Wis. 2d 169 (Ct. App. 1997). The defendant does not show how either proceeding was unfair, only that he lost the chance to request a different judge.
>
> . . . .
>
> The court has reviewed the record and finds that the result of the trial was not rendered unreliable due to trial counsel's failure to request a substitution against Judge Flanagan.

(74:4-5.)

The circuit court correctly rejected Lapp's claim without an evidentiary hearing. To prevail on his claim of ineffective assistance for failing to file a request for judicial substitution, Lapp needed to allege prejudice. *See State v. Damaske*, 212 Wis. 2d 169, 198, 567 N.W.2d 905 (Ct. App. 1997). In this context, the prejudice component of *Strickland* "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Damaske*, 212 Wis. 2d at 198.

Lapp did not allege sufficient facts that, if true, establish that counsel's failure to file a request for judicial substitution prejudiced the defense. He did not allege that Judge Flanagan's handling of his case rendered the proceedings fundamentally unfair, or that Judge Flanagan

had not been impartial. *See Damaske*, 212 Wis. 2d at 199. Absent the allegation of facts that, if true, establish fundamental unfairness or judicial bias, Lapp's ineffective assistance of counsel claim for counsel's failure to file a request for judicial substitution did not merit a *Machner* hearing.

C. Motion to admit *McMorris* and habit evidence.

Prior to trial, defense counsel filed a motion to admit *McMorris* evidence[2] and evidence of habit in support of Lapp's claim of self-defense. (9.) In his supporting brief, counsel asserted that Lapp head-butted the victim in self-defense after she reached into her purse to grab a knife to stab him. (10:1.) Counsel argued that Lapp was entitled to introduce evidence that, on multiple occasions, he had seen the victim carrying the knife in her purse because the evidence was relevant to Lapp's state of mind at the time of the incident. (10:1-4.) Counsel argued that the evidence was admissible under *McMorris* and as evidence of the victim's habit under Wis. Stat. § 904.06. (10:5-6.)

The trial court denied the motion. (85:24-25.) The court concluded that Lapp failed to identify "any prior bad acts" of the victim (85:6) and, thus, the proffered evidence was not admissible under *McMorris* (85:5-11, 21-23). The court further concluded that the proffered evidence did not constitute evidence of "habit" admissible under Wis. Stat. § 904.06. (85:24-25.)

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[2] Evidence of a victim's past violent acts is referred to as *McMorris* evidence, after *McMorris v. State*, 58 Wis. 2d 144, 150, 205 N.W.2d 559 (1973), in which our supreme court ruled that a defendant who had established a "sufficient factual basis to raise the issue of self-defense" could submit evidence of personal knowledge of the victim's prior history of violence.

In his postconviction motion for a new trial, Lapp alleged that defense counsel was ineffective by mishandling the motion. (67:6-8.) Lapp alleged that he told defense counsel of "four incidents involving both the alleged victim and violent behavior," but that counsel failed to include the incidents in his motion and legal brief. (67:6-7.) According to Lapp, "[b]ut for counsel's refusal to include this information the Court would have had sufficient information to grant an evidentiary hearing at which it could be determined whether any of the above information could be presented in conjunction with Mr. Lapp's self-defense argument." (67:7-8.)

Lapp alleged that the omitted incidents were (1) that Lapp asked the victim why she carried a knife in her purse, and she replied "'for cutting a motherfucker's balls off'" and said that she would not allow any man to hit her again; (2) that when asked why [the victim] left a man in Pennsylvania leaving behind her personal belongings, she said, "'It got violent, I left;'" (3) that [the victim] frequently verbally abused her adult son, "in a disproportionate, aggressive and antagonistic manner;" and (4) that after the victim moved into the defendant's apartment, she said she was concerned about an ex-boyfriend who was recently released from prison and that he might stalk her or beat her because she had some of his property. (67:6-7.)

The circuit court rejected Lapp's ineffective assistance claim. (74:5-7.) The court found that nothing about the four omitted incidents would have caused the court to admit Lapp's proffered evidence:

> There is *nothing* about the facts in *any* of these scenarios that show the victim was physically violent, responded with physical violence with a knife, or that it was *she* who was the violent one. In each of the situations concerning other men, there is the complete opposite possibility that it was her

> former male partner who was the violent one. These four incidents would not have caused the court to allow evidence of this nature under ***McMorris***. Counsel was not ineffective for failing to bring them to the court's attention.

(74:7.)

On appeal, Lapp argues that the circuit court erred by refusing to hold a *Machner* hearing on his ineffective assistance of counsel claim. (Lapp's Br. 19-20.) He contends that, at a *Machner* hearing, he could have made a full record of the circumstances surrounding the matters omitted from defense counsel's motion and brief. (Lapp's Br. 19.)

The circuit court was absolutely right to deny Lapp's claim without a *Machner* hearing. The law strongly presumes that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). A defendant's motion needs to demonstrate *how* he intends to rebut that presumption if he is to be given the chance at an evidentiary hearing. The evidentiary hearing is not a fishing expedition to discover ineffective assistance; it is a forum to prove ineffective assistance. Both the court and the State are entitled to know *what* is expected to happen at the hearing and *what* the defendant intends to prove. *Balliette*, 336 Wis. 2d 358, ¶ 68.

If there are "surrounding circumstances" under which Lapp is entitled to relief, Lapp's duty was to allege them in his motion. Lapp may not rely on conclusory allegations of deficient performance, hoping to supplement them at an evidentiary hearing. *Bentley*, 201 Wis. 2d at 317-18; *Levesque*, 63 Wis. 2d at 421-22. Lapp's postconviction motion was not adequate because, as he seems to concede (Lapp's Br. 19), he did not allege what he would need to prove at an

evidentiary hearing in order to demonstrate that he is entitled to relief. A defendant cannot overcome the presumption that defense counsel exercised reasonable professional judgment absent an offer of proof to the contrary. *See Strickland*, 466 U.S. at 690.

D. Failure to request Jury Instruction 314 and to object to unnecessary security measures during trial.

Lapp alleged that he was leg-shackled when he testified at trial and that "the sounds caused by any small movement of Mr. Lapp during his testimony would have made such shackling obvious." (67:10.) He did not allege that the shackles were visible to the jury at any time. (*Id.*) According to Lapp, his counsel was ineffective because he did not ask the court to instruct the jury under Wis. JI-Criminal 314 that, "[t]he defendant has appeared in court wearing a restraining device. This must not be considered by you in any way and must not influence your verdict in any manner." (67:10.) *See* Wis. JI-Criminal 314 (2012).

Lapp also alleged that counsel was ineffective for failing to object to the use of "conspicuous and armed security personnel . . . positioned around Mr. Lapp at key moments and within full view of the jury." (67:8.)

The court rejected Lapp's claims as "entirely speculative." (74:7.) The court added that "given that the [restraining] device was hidden from the jurors, giving the instruction would only have called attention to it." (*Id.*)

The court did not err. Lapp can only speculate that the presence of shackles and security personnel "create[d] in the minds of the jury the highly prejudicial idea that Mr. Lapp was dangerous or untrustworthy." (67:9.) Lapp must "offer more than rank speculation to satisfy the prejudice prong."

State v. Erickson, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999).

Lapp ignores another problem with the prejudice component of his claim. The jury did not reach guilty verdicts on all counts charged. (22; 23; 24; 25.) Lapp was acquitted on the strangulation charge. (24.) If counsel's alleged errors left jurors with a "highly prejudicial" impression of Lapp as "dangerous and untrustworthy," the jury presumably would have convicted on all four counts. Thus, while the presence of shackles can be prejudicial in some cases, the jury's decision to acquit Lapp on the strangulation charge causes his prejudice argument to fail.

E. Evidence of Lapp's flight and avoidance of police.

Lapp took the position at trial that the victim was the aggressor and that he was acting in self-defense when he inflicted her injuries. (90:19-22, 24-35.) Lapp did not call police to report either incident, however. Rather, he left the scene both times. (90:22-23, 35.)

At the time of the crimes, there was a bench warrant for Lapp's arrest for the failure to pay child support. (86:20-21.) Before trial, defense counsel moved to exclude evidence of the bench warrant and, after the State did not oppose the motion, the court implicitly granted it. (86:2-21.)

In his postconviction motion, Lapp alleged that trial counsel was ineffective for not also moving to exclude evidence of Lapp's flight and/or avoidance of police. (67:10-13.) Evidence of flight is probative of guilt because flight is "circumstantial evidence of consciousness of guilt and thus of guilt itself." *State v. Quiroz*, 2009 WI App 120, ¶ 18, 320 Wis. 2d 706, 772 N.W.2d 710. But "when a defendant points to an unrelated crime to explain flight, the trial court must,

as it must with all evidence, determine whether to admit the flight evidence by weighing the risk of unfair prejudice with its probative value." *Id.* ¶ 27.

Lapp alleged that he sought to avoid the police not because of guilt, but because of the outstanding warrant for his arrest. (67:12.) He contends that, had defense counsel not erred, the court would have excluded not only the bench warrant, but also any evidence of Lapp's flight and/or avoidance of police. (67:12-13.)

The circuit court did not err by denying Lapp's ineffective assistance claim without an evidentiary hearing. The court correctly rejected the claim on the ground that any attempt to exclude evidence that Lapp fled and/or avoided police would have been denied. (74:8.) The prejudicial effect of evidence that Lapp avoided police to avoid arrest for an unrelated crime is not so great that it requires the exclusion of the evidence that he fled and/or attempted to avoid police. *See State v. Miller*, 231 Wis. 2d 447, ¶ 22, 605 N.W.2d 567 (1999) ("[s]uch rebuttal evidence would not have represented an independent reason for flight that could not be explained to the jury due to its prejudicial effect"). As a result, any attempt to exclude evidence of Lapp's avoidance of police would have failed. Defense counsel was not prejudicially deficient for failing to seek exclusion of the evidence. *See State v. Maloney*, 2005 WI 74, ¶ 37, 281 Wis. 2d 595, 698 N.W.2d 583 (failure to make or pursue a meritless course of action does not constitute deficient performance).

F. Photograph of camouflage knife.

Lapp alleged that trial counsel was ineffective by failing to object to admission of a photograph depicting a camouflage colored knife. (67:13-15.) At trial, the victim testified that she believed that the knife depicted in the photograph was the knife that Lapp "was trying to get after"

from "on top of the TV." (88:33.) Lapp alleged that counsel's error resulted in admission of evidence "without a proper foundation." (67:15.)

The record conclusively shows that Lapp is not entitled to relief. As the circuit court correctly found, a proper foundation was made and, thus, trial counsel was not prejudicially deficient for failing to object. (74:8-9.) Based on personal knowledge, the victim testified that the photograph depicted the knife that she believed Lapp used to threaten her. (88:33.) More is not required to lay foundation. Counsel's failure to raise a meritless foundation objection was not deficient performance. *Maloney*, 281 Wis. 2d 595, ¶ 37.

G. Preparation and use of exhibits.

Lapp alleged that trial counsel was ineffective for failing to produce a professional diagram of the interior layout of the crime scene to better assist the jury in understanding Lapp's testimony. (67:15-16.) The circuit court did not err when it summarily rejected the claim under *Strickland's* prejudice prong:

> The defendant submits that trial counsel failed to prepare a professional diagram of the scene for display to the jury such as the one he drafted in prison. Except for a few changes, however, the victim averred that the drawing trial counsel drew and presented of the scene was accurate. The court rejects this argument. The focus of the testimony was on the victim's injuries, what had happened in the bedroom when the injuries were caused, and how those injuries were caused. There is not a reasonable probability that a more professional diagram would have altered the verdict in any respect.

(74:9 (record citation omitted).)

On appeal, Lapp argues that the circuit court erred and that the defense was "adversely affected" by counsel's alleged error. According to Lapp, "[t]he degree to which this failure to prepare affected the verdict is unknown, but the impact, when considered cumulatively amongst the other failures is sufficient to establish that Defense Counsel was ineffective in representing Mr. Lapp." (Lapp's Br. 29.)

Lapp is wrong. The circuit court did not err by summarily rejecting Lapp's claim for lack of prejudice in light of the totality of the evidence. The principle facts in the case stem from events in the victim's bedroom: what injuries were inflicted and what caused them. Lapp wholly failed to allege how it is reasonably probable that a better drafted diagram would have resulted in reasonable doubt over Lapp's guilt.

In any case, Lapp failed to allege sufficient facts that, if true, overcome the strong presumption that counsel rendered adequate assistance. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. 668, 689-90 (citation omitted). Lapp failed to allege how he would prove that defense counsel's use of exhibits fell "outside the wide range of professionally competent assistance." *Id.* at 690.

H. Failure to object to description of victim's injuries.

The victim was covered in blood when she ran to the downstairs neighbor's door, screaming hysterically. (89:11-12.) The prosecutor asked the neighbor at trial whether the victim appeared to be angry. The witness answered, "[n]o," adding that "[s]he looked like a dog that was beaten with a stick for hours." (89:12.) During his closing argument, the

prosecutor repeated that portion of the neighbor's testimony. (91:31.)

In his postconviction motion, Lapp alleged that defense counsel was ineffective for failing to object to the neighbor's graphic description of the victim's injuries because the failure to object "allowed that image to remain in the minds of the jury throughout the remainder of testimony and again at closing arguments." (67:16.)

Lapp failed to allege sufficient facts that, if true, prove that defense counsel was ineffective for failing to object when the victim's downstairs neighbor testified to the victim's appearance and when the prosecutor repeated that description in closing argument. As the circuit court found, the jury could make its own assessment of the victim's appearance based on the other evidence before it because the jury heard testimony about the victim's injuries from multiple witnesses and saw pictures of the injuries. (74:9-10.) On the basis of this record, Lapp cannot show that, but for counsel's failure to object, there is a reasonable probability that the outcome would have been different.

I. Misstatement during defense counsel's closing argument.

During closing argument, defense counsel summed up by saying, "'[r]eturn a verdict of guilty – I'm sorry. Return a verdict of not guilty to all the charges in this case.'" (91:98.) In his postconviction motion, Lapp alleged that defense counsel's statement, although quickly corrected, was clearly prejudicial because it could be seen as the "functional equivalent to a guilty plea." (67:16-17.)

Lapp failed to alleged sufficient facts that, if true, demonstrate that defense counsel performed deficiently or that he prejudiced the defense. As the circuit court found,

"[i]t was a simple slip of the tongue which counsel corrected immediately" and which the jury could not reasonably have misunderstood as an admission of guilt. (74:10.)

On appeal, Lapp argues that, "[w]e do not know the effect the mistake had on the Jury." (Lapp's Br. 32.) Lapp ignores the *Strickland* two-prong standard for ineffective assistance of counsel. He must show both deficient performance and a reasonable probability that, but for counsel's alleged error, the outcome would have been different. *Strickland*, 466 U.S. at 694. Even assuming deficient performance, Lapp's motion fails to warrant an evidentiary hearing because he relies on rank speculation to satisfy the prejudice prong. This he cannot do. *Erickson*, 227 Wis. 2d 758, 774.

J. Failure to object to the State's vouching for the victim's credibility during closing argument.

Lapp alleged that counsel was ineffective by failing to object to the following portion of the State's closing argument:

> That's [the victim's] testimony. You heard from the Court that you can find her believable and credible and find the defendant guilty of all those charges, just based on that table top.

(91:51.)

Lapp alleged that the statement "improperly bolstered and vouched for the credibility of the alleged victim in the case." (67:17.)

The circuit court correctly denied the claim on the ground that, even if the statement were "inartfully phrased," Lapp was not prejudiced. (74:10.) The victim testified that

Lapp strangled her during the second attack. (88:23-25.) Yet the jury acquitted Lapp of the strangulation charge. (24.) The court reasoned that Lapp was not prejudiced because "the jury did *not* believe [the victim]" with respect to that charge. (74:10.)

Lapp is not entitled to an evidentiary hearing, much less a new trial, on the basis of his claim. The jury is presumed to follow the court's instructions that closing statements are not evidence and that it is the jury's responsibility to determine witness credibility. *See State v. Delgado*, 2002 WI App 38, ¶¶ 16-17, 250 Wis. 2d 689, 641 N.W.2d 490.

Here, the court instructed the jury "to decide the case solely on the evidence offered and received at trial." (91:22.) The court instructed the jury that the evidence consists of the sworn testimony of witnesses and the exhibits received (91:22), and that the "[r]emarks of the attorneys are not evidence" (91:23). Lapp failed to allege facts that, if true, overcome the presumption that the jury followed the court's instructions.

Moreover, the record conclusively shows that jurors sifted through and weighed the victim's testimony in this case because they did not convict Lapp of the strangulation and suffocation charge. Lapp alleged no facts that, if true, could cause his prejudice argument to succeed.

K. Cumulative prejudice.

Finally, Lapp is not entitled to a new trial on the basis of the cumulative effect of counsel's alleged errors before and during trial. Lapp fails to allege facts that, if true, demonstrate that counsel's alleged errors resulted in prejudice in even one respect. *See* Sections B-I. Merely multiplying the number of allegations of prejudice does not

make up for a lack of prejudice in any of the individual claims. *See State v. Thiel*, 2003 WI 111, ¶ 61, 264 Wis. 2d 571, 665 N.W.2d 305. There could not be any cumulative prejudice when there are no individual instances of prejudice to accumulate. *Estate of Hegarty v. Beauchaine*, 2006 WI App 248, ¶ 248, 297 Wis. 2d 70, 727 N.W.2d 857; *State v. Williams*, 2006 WI App 212, ¶ 34, 296 Wis. 2d 834, 723 N.W.2d 719. *See Thiel*, 264 Wis. 2d 571, ¶¶ 59, 62. "'Zero plus zero equals zero.'" *Hegarty*, 297 Wis. 2d 70, ¶ 248 (quoting *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976)).

Defense counsel "is not expected to be flawless," and, indeed, is "strong[ly] presum[ed]" to have performed reasonably. *Thiel*, 264 Wis. 2d 571, ¶ 61. "[I]n most cases[,] errors, even unreasonable errors, will *not* have a cumulative impact sufficient to undermine confidence in the outcome of the trial[.]" *Id.* (emphasis added). The alleged errors in this case do not undermine confidence in the outcome and do not warrant a new trial.

CONCLUSION

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

Dated: July 21, 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), (c) for a brief produced with a proportional serif font. The length of this brief is 4,342 words.

_____
SANDRA L, TARVER
Assistant Attorney General

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: July 21, 2016.

_____
SANDRA L. TARVER
Assistant Attorney General