STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2016AP260

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANNY L. WILBER,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING
A MOTION FOR A NEW TRIAL ENTERED IN
THE MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE JEFFREY A. WAGNER AND
THE HONORABLE MARY KUHNMUENCH, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED[1]

I. Did the circuit court erroneously exercise its discretion when it denied Wilber's newly discovered evidence claim without a hearing?

The circuit court determined that none of Wilber's evidence raised a reasonable probability of a different result at a new trial.

This Court should affirm the circuit court.

II. Did the circuit court properly deny Wilber's request for postconviction discovery of the crime scene photos?

The circuit court determined that the evidence Wilber sought to produce with the photos was inconsequential.

This Court should affirm the circuit court.

III. Did the circuit court properly deny Wilber's ineffective assistance of postconviction claim without a hearing?

The circuit court determined that the new issues Wilber wanted to raise were procedurally barred because he had not sufficiently alleged ineffective assistance of postconviction counsel.

This Court should affirm the circuit court.

IV. Is Wilber entitled to a new trial in the interests of justice?

This Court should deny Wilber's request for discretionary reversal.

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[1] Because several of Wilber's claims are dependent on the outcome of each other, the State has reorganized them and combined some them into a single issue section. The State addresses Wilber's Issue VII as Issue II, because the circuit court addressed part of Wilber's ineffective assistance claims in its order denying his motion for postconviction discovery. The State also combines Wilber's Issues II to IV in Issue III.

V. Is Wilber's request for reconsideration of this Court's denial of his motion to remand properly raised in his appellate brief?

This Court should hold that Wilber's appeal is from the circuit court's denial of his postconviction motion and refuse to address his improperly raised claim.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case involves only the question of the sufficiency of a postconviction motion to require a hearing, which the briefs will adequately address.

INTRODUCTION

The circuit court properly denied Wilber's Wis. Stat. § 974.06 motion without an evidentiary hearing on any of his claims. Wilber attempts to mischaracterize this case as a "whodunit" and claims he is due a new trial for a litany of reasons, including ineffective assistance of trial and postconviction counsel, insufficient evidence, and purportedly newly discovered evidence. But his only support for his newly discovered evidence claim are uncorroborated, inherently unbelievable affidavits provided by "witnesses" no one ever saw at the scene of the crime, and implicating a dead man who can no longer rebut their allegations as the killer. His other arguments are all meritless, procedurally barred, forfeited, or based on misstatements of the law. This case is not a "whodunit." The jury determined that Wilber, beyond a reasonable doubt, killed David Diaz. This Court affirmed and the supreme court denied review. Wilber has presented nothing in his Wis. Stat. § 974.06 motion that undermines confidence in the jury's verdict. The circuit court properly denied his motion without a hearing and this Court should affirm.

STATEMENT OF THE CASE

Around 3:30 a.m. on January 31, 2004, Milwaukee police were dispatched to investigate a shooting. (2:1.) They found David Diaz dead on a kitchen floor from a gunshot to his head. (2:1.)

Police interviewed multiple people, including Richard Torres ("Vato") and Jeranek Diaz ("Rock").[2] (2:1-2.) Torres and Jeranek both identified Danny Wilber ("Slim") as the shooter. (2:2.) Torres and Jeranek said that Wilber was getting belligerent at an after-hours party. (2:2.) Wilber attacked Jeranek. (2:2.) Torres, Jeranek, and another man, Isaiah, attempted to subdue Wilber and kick him out. (2:2.) Wilber pulled out a handgun and shot David Diaz. (2:2.) Torres and Jeranek heard Wilber's sister, Antonia West, urge him to leave because he had shot someone. (2:2.)

The State charged Wilber with one count of second-degree intentional homicide with use of a dangerous weapon.[3] (2:1.) Wilber pled not guilty.

Eyewitness testimony

Antonia testified that she, Wilber, and several family members went to an after-hours party at a house after leaving a bar the morning of the shooting. (47:67, 75.) Antonia said that while she and Wilber were in the kitchen, Wilber started badgering Oscar Niles ("Jay"), and she tried to calm Wilber down. (47:86, 95.) She said three men approached Wilber, and Wilber began choking one of them. (47:97.) She said Wilber

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[2] Jeranek Diaz is not related to the victim. (2:2.) There are multiple people with the last names West, Diaz, and Wilber involved, therefore the State will refer to them by their first names unless otherwise indicated. The State refers to the defendant as "Wilber."

[3] The charge was later amended to first-degree intentional homicide.

was "completely out of control," and that she was scared. (47:99.) The next thing she remembered was hearing the gunshot and everyone running. (47:101.) She testified she thought the gunshot came from near the front door. (48:21.)

Antonia disavowed nearly all of the inculpatory details in the statements she gave to police, including that she told Wilber "you shot him, get out of here" after the shooting. (47:83; 48:6-26.) Antonia said she had signed the reports without reading them because she had been at the police station a long time and wanted to leave. (47:81.) She did not deny initialing the paragraphs in the report, but said the police had changed some of what she said. (47:83-84; 48:35, 73.)

Donald Jennings, Wilber's cousin, testified that he was also in the kitchen when Wilber got in a fight with Niles. He said that he and Jeranek told Wilber to calm down. (48:124-26.) Wilber grabbed Niles and Jeranek intervened. Wilber and Jeranek then began "tussling." (48:134.) Jennings said Torres, who was also in the kitchen, told Wilber to "chill out" and tried to break up the fight, and then a gunshot went off. (48:136-40.) Jennings said he thought the shot came from the living room. (48:141.) He admitted, though, that no one was being aggressive at the party except Wilber and that he had told police he would "do what [he could] to protect [his] family and defend [his] cousin." (48:142; 49:9.) He also testified that he heard Antonia say in the car that Wilber had shot Diaz, and that he told everyone to stop talking. (48:117-18.)

Niles testified that he was friends with some of Wilber's family members and knew them fairly well. (50:25.) Niles testified that he, Antonia, Jennings, and a woman named Endalia were talking in the kitchen. (50:33, 45-46.) Wilber came in and started accusing Niles of "pumping [his] chest out to him." (50:32.) Wilber grabbed Niles's shirt, pulling off Niles's gold chain necklace. (50:33-35.) Niles said Torres and Jeranek then came in from the living room and told Wilber to

calm down. (50:36-38.) Torres and Jeranek began tussling with Wilber. (50:44.) Niles saw Diaz in the doorway after the tussle began. (50:47.) Niles testified that he was trying to fix his chain when he heard a gunshot and saw Diaz fall. Niles ran out of the house. (50:50-51, 56.) He admitted that he initially lied to police and told them he left before the shooting, but when they talked to him again he was truthful. (50:59-60.) He claimed, however, that he signed the statement to police without correcting any inaccuracies because he wanted out of the interrogation room. (50:75-76, 89.)

Lea Franceschetti testified that she, too, headed to the after-party with her friend Jaimie Williams. (50:120-21.) She said she was in the front room with "Tim, and Jaimie, and Tony" when "Slim," whom she identified as Wilber, walked up to her and said, "Bitch, I'll slap you." (50:121-23.) Franceschetti testified that a man named Ricky and his girlfriend were also in the living room, but they left to go to a restaurant shortly after she and Williams arrived. (53:7, 10.) Later, Isaiah Arroyo told Franceschetti and Williams to leave because there was going to be "drama." (50:124, 136; 53:10.) Franceschetti and Williams left the house and were warming up her car when Jennings, Antonia, and a girl piled into the back seat. (50:125.) They "were all yelling saying get out of here, just drive." (50:127.) Antonia was also crying and yelling, "I can't believe he did that." (50:127.) Franceschetti said this led her to believe Antonia knew who the shooter was. (50:128.)

Williams testified consistently with Franceschetti about leaving the after-party. (50:133-39.) She said that Niles was also in the car, and that Antonia was saying, "I can't believe he shot him, I can't believe he shot him." (50:139.)

Jeranek testified that he heard a gunshot from close by when he was in the kitchen tussling with Wilber. But inconsistently with his police report, he said he had "no idea" where it came from. (51:116.) Jeranek confirmed that after

Wilber's altercation with Niles, Diaz came into the living room and told Jeranek to get Wilber out of the house. (51:131-33.) He said Wilber threatened him, grabbed him by the neck, and choked him against the wall. (51:133.) He said that he, Wilber, Diaz, Niles, Torres, and Antonia were all in the kitchen. (51:135.) Jeranek testified that someone besides Torres joined in the fight, but could not remember who. (51:139.) He said that if he told police Isaiah was the other person, he did so because he believed it was true. (51:140.)

Torres testified that he saw Wilber with a gun at the time Diaz was shot. (51:220.) Torres heard a commotion in the kitchen and Antonia, Darnell,[4] Niles, Jeranek, and Wilber were there. (51:244.) He saw Wilber arguing with Niles. (51:235-36.) Torres told Wilber to calm down or he would have to leave. (51:237-38.) Torres testified that Diaz told Jeranek to get Wilber out of the house, which angered Wilber. (51:240.) Wilber started choking Jeranek and punched him in the mouth. (51:240, 245.) Torres then grabbed Wilber from behind. (51:246.) Torres said Isaiah Arroyo joined in the fight after Wilber choked Jeranek. (51:223, 253.) Wilber twisted away and punched Torres twice in the face, which caused him to black out for a few seconds. (51:246.)

Torres said he steadied himself against the sink and heard a gunshot from where Wilber was standing. (51:249-50.) Torres looked over and saw Wilber with a semiautomatic black and chrome gun. (51:254-57.) Torres heard someone in the kitchen yell "you shot that guy" and saw Wilber run out. (51:258-59.) Torres gave chase but lost Wilber in the chaos of people running. (51:260.) He testified that he left the house because he had a warrant. (51:261.) Torres turned himself in to the police the next day to tell them what he knew, "[b]ecause nobody else know [sic] what happened besides myself and the people that were in that kitchen that night.

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[4] Wilber's cousin, Darnell Wilber.

And most of them were not my friends." (51:261-62.) Torres's testimony conflicted with Antonia's and Jennings's testimony about whether they said they saw Wilber with a gun or implicated Wilber at the scene. (51:219-83.)

Torres also said that he had seen a man named "Ricky" with a gun that night, but that he did not see Ricky in the kitchen. (51:232-33, 282; 52:30-40.) Torres said there had been some "tension" with a group of people at a different party the previous week, including Ricky, but there was no tension that evening. (51:232.) When asked if there had been "problems" with Ricky before, Torres said no. (52:48.) He explained that the week before, Ricky and Diaz had exchanged "a dirty look" when they brushed by each other in a hallway at the previous party and no one excused himself. (52:49.) Torres said there were no bad looks or bad vibes from Ricky at the party and he was not concerned about Ricky having a gun. (52:46-50.) Torres did not see Ricky after the shooting. (51:232, 264.)

Other evidence

Milwaukee police officer Thomas Casper testified that he created a diagram of the crime scene showing the locations of all the physical evidence. (47:39-40.) Diaz's body was facedown in the kitchen with his head facing north. Bullet fragments were found behind the stove in the northeast corner of the kitchen. (47:25, 49.) Casper said that emergency personnel did not move the body. (47:49.) He also testified that he found the bullet jacket on the kitchen table. (47:51.) During the investigation, the eyewitnesses from the kitchen explained to detectives where everyone had been standing by placing x's with people's names or initials on diagrams of the kitchen. (*See* Ex. 28A, 36A, 38, 39, 51.) They each testified about the diagrams.

Jeffrey Jentzen, the medical examiner for Milwaukee County, testified about Diaz's injuries. (49:49.) He said the

bullet that killed Diaz entered the upper back left portion of his scalp from a gun fired about two or three inches away. (49:53-57.) He said the bullet travelled in a left to right and downward direction, exiting through his front right cheek. (49:48-59.)

Jill Neubecker testified that she lived in the upper portion of a duplex above Wanda Tatum, Wilber's sister. (51:56.) She testified that police came to the house looking for Wilber on February 1, 2004. (51:57.) She told them that the night before, she smelled something on fire and saw smoke coming from an old grill in the back yard. (51:59.) Detective Joseph Erwin found the soles of a pair of shoes burnt in the grill. (51:68.)

The police officers who had interviewed Antonia, Williams, Niles, and Jeranek testified about statements they gave that were inconsistent with their testimony. (52:51-70; 53:16, 22-57; 51:285-18.) And Investigator William Kohl testified about the dimensions of the kitchen. (53:58-70.)

Mark Bernhagen, a shoe store manager, testified for the defense about shoe sizing. (54:9-38.) He testified that Wilber's feet were size 14 1/2. (54:10.) The soles of the burnt shoes found in the grill were size 12, which was smaller than the shoes Wilber was currently wearing. (54:19, 38.)

The defense rested, and the parties prepared for instructions and closing arguments to begin in the afternoon. (54:38-65.)

Defense's Motion to Adjourn and Reopen the Case

When the trial resumed in the afternoon, Wilber asked for an adjournment to investigate an additional defense. (55:3.) Defense counsel, Michael Chernin, claimed that during the break, someone told him that "an eyewitness to the homicide came forward to a person who now has told me that the eyewitness says that he observed another person shooting the shot that struck the head of David Diaz." (55:6.) Chernin

said he was "quite shocked" that he "wasn't told about this earlier," but now he needed an adjournment to explore this defense. (55:4.)

The court asked why Chernin did not have this information until now, and he replied, "[T]he person who had the information didn't come forward to the person who told me until recently. And I would not have -- Mr. Wilber did not make this information known to me." (55:5.) When asked why not, Chernin replied, "I don't believe he knew that until I told him just now." (55:5.) The court allowed the defense to make an offer of proof with testimony from the person who came forth with the information. (55:5-8.)

Chernin called Wanda Tatum. (55:10.) She testified that six days after the trial began, her sister Monique West told her that "if my brother was found guilty this person was supposed to give a confession saying he did it." (55:14.) She then testified that unnamed sources told her that if Wilber was found guilty, someone else was going to confess to the shooting. (55:14-15.) Tatum claimed this story came from Roberto Gonzalez, Monique West's boyfriend, who had been banned from court earlier in the week. (55:16, 53.) Tatum said she learned this from Monique, not Gonzalez. (55:17.)

According to Tatum, Gonzalez told Monique that he and Isaiah were at the party that night. Gonzalez said that he heard Diaz tell his girlfriend to go get a gun, and, in response, *Isaiah* pulled out a gun that went off and hit Diaz. (55:22-24.) Tatum said she first learned that Gonzalez claimed to be at the house "a while ago," but she did not tell Chernin because she did not "know that that was relevant." (55:26.)

On cross-examination, Tatum confirmed that everything she claimed to know was third- or fourth-hand information, but said, "I know that my brother didn't do it and because the way the streets are you hear things." (55:38.) The State asked, "So when you say everybody's lying, you're just

guessing, you're assuming?" (55:63.) Tatum answered, "Just like everyone here is, yes." (55:63.)

Chernin then called Monique West. (55:64.) Monique testified that Gonzalez was her boyfriend and recently told her that he was at the after-party and saw Isaiah shoot Diaz. (55:64-65.) Monique said she told Tatum about this conversation on the fourth day of trial. (55:65.) When asked why she did not tell anyone this when she knew her brother Wilber was on trial for the murder, Monique replied, "I don't know." (55:65-66.) She also testified that Gonzalez never said he was at the house until "[a] couple days ago," after he had been thrown out of the courtroom. (55:69-70.)

When asked whether she heard of the plan for someone else to confess if Wilber was convicted, Monique said she heard it from Tatum. (55:74.) The State asked, "So the notion or the idea or the fact that Isaiah's going to confess to this came from Wanda to Monique, not from Monique to Wanda?" Monique answered, "Right." (55:76-77.) She also admitted all the people who testified knew Gonzalez and none of them ever said he was at the party. (55:77.) The defense requested further time to allow an investigator to interview Gonzalez. (55:83.) The court denied the request. (55:84-85.)

After argument from both parties the court denied the request for an adjournment. (55:89.) It found the story about Gonzalez "wholly preposterous" and "a blatant attempt to manipulate the proceedings." (55:89, 91.) It further noted that Tatum's testimony did not match Monique's, explaining, "So there's not even corroborative evidence in terms of the offer of proof." (55:92.) Additionally, the court found

> there is absolutely no corroborative evidence in this record of either of their positions. That is, all of the witnesses . . . nowhere in any of their testimony or in the evidence that was presented to this court or to the jury, is there a reference of other individuals,

> particularly Isaiah and Roberto Gonzalez, being present in the kitchen[5] or in the home for that matter.
>
> But it's clearly no one implicating Mr. Gonzalez being present or . . . Mr. Isaiah being present but being the shooter.

(55:92-94.) The court found the offer of proof "inherently unbelievable for the reasons that I have stated" and continued the trial. (55:98.)

In closing argument, Chernin focused on the physical evidence, arguing that it did not match up with someone shooting from where Wilber indisputably was standing in the kitchen. (55:160-71.) He emphasized that witnesses saw Ricky Muniz in the living room with a gun. (55:160-71.)

The jury found Wilber guilty of first-degree intentional homicide with use of a dangerous weapon. (56:9.) At sentencing, the court found Wilber completely remorseless, and sentenced him to life imprisonment with the possibility of release to extended supervision after 40 years. (57:23, 27.)

Postconviction proceedings

Wilber moved for a new trial, claiming the circuit court erroneously exercised its discretion when it: (1) permitted the State to present the burned shoe evidence, which Wilber argued was irrelevant and unduly prejudicial, and (2) allowed the jury to see Wilber shackled in a wheelchair during closing arguments after Wilber repeatedly became belligerent and increasingly violent with the bailiffs. (63:5, 9.) The circuit court denied the motion and this Court affirmed. (69.) The Wisconsin Supreme Court denied Wilber's petition for review. (70.)

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[5] The State reminded the court that there was testimony that Isaiah may have been present in the kitchen, but no testimony about him having a gun and no testimony from anyone that Gonzalez was present at the house. (55:93-94.)

On March 17, 2014, Wilber, pro se, filed a Wis. Stat. § 974.06 motion seeking postconviction discovery of physical and digital copies of the crime scene photographs. (92:1.) He also raised a claim of newly discovered evidence, and alleged that trial counsel was ineffective for failing to reconstruct a to-scale diagram of the kitchen and have the photographs evaluated by an expert. (92:13, 17.) He claimed that his sufficient reason for failing to raise ineffective assistance of trial counsel on direct appeal was that his postconviction attorneys were also ineffective. (92:13.) Because some of Wilber's claims depended on the discovery he sought, the circuit court considered Wilber's postconviction discovery claim separately from the other issues he raised. (77.)

The circuit court denied the motion for postconviction discovery. It concluded that a to-scale diagram and expert testimony on the photos would not have rebutted the eyewitness testimony or impeachment evidence presented by the State, and therefore there was not a reasonable probability that a better depiction of the crime scene would have altered the outcome of the trial. (86:5.) It held its decision on the other issues until after further briefing.[6] (86:3.)

As relevant here, Wilber's amended motion claimed that: (1) there was insufficient evidence to sustain his conviction due to the "physical facts rule" (98:8); (2) trial counsel was ineffective for failing to investigate and subpoena Gonzalez, failing to consult forensic and crime-scene

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[6] The court allowed Wilber to withdraw his original Wis. Stat. § 974.06 motion and file an amended one through counsel. (86:13.) Wilber withdrew his pro se motion, (87), but his new attorney never filed an amended motion due to chronic health issues (93). Wilber retained new counsel, Thomas Kurzynski, who filed an amended motion on June 5, 2015, but the court rejected it for failure to comply with local rules. (96, 97.) Kurzynski filed a compliant amended motion on September 29, 2015. (98.)

reconstruction experts, and failing to introduce an accurate scale crime scene diagram, (98:11-17); (3) postconviction counsel was ineffective for failing to raise ineffective assistance of trial counsel, (98:11-17); (4) there was newly discovered evidence entitling Wilber to a new trial, namely, an affidavit from Jonathan Martin stating that Ricky Muniz, now deceased, had admitted to murdering Diaz, and an affidavit by Gonzalez, who now claimed that he observed Ricky shoot Diaz, (98:15, 18); and (5) he was entitled to a new trial in the interest of justice (98:20).

The circuit court denied the motion without a hearing. (99.) It rejected Wilber's newly discovered evidence claims on the ground that his affidavits "do nothing to satisfy any of the *Denny* requirements" to admit third-party perpetrator evidence at trial. (99:10.) It found that Jonathan Martin's affidavit was hearsay. (99:10.) And though Gonzalez's affidavit "at first blush appears hearing-worthy," the circuit court determined it was not. (99:11.) The court stated that,

> [T]he defendant's current "newly discovered evidence" claim does not warrant a hearing for two important reasons.
>
> First, given that there is no corroboration for Gonzalez's statement that he was present at the scene of the shooting other than his self-serving statement that he was, there is also no explanation as to why his current statement as set forth in his September 13, 2013 affidavit differs from what he purportedly told his girlfriend, Monique West, at the time of trial, i.e. that he had seen *Isaiah* shoot David Diaz. Why did it change to Ricky? Nothing is offered which establishes any consistency with what was previously presented to the court concerning a third party defense for the defendant. Gonazlez simply picks a different person, someone who is now dead and can't be brought to court to defend himself. The affidavit is neither sufficient nor sufficiently credible or reliable to raise a reasonable doubt about the outcome of the verdict. . . .

> Second, even assuming the jury had heard Gonzalez's current statement that Ricky was there and he saw *Ricky* shoot Diaz, there is not a reasonable probability the jury would have acquitted the defendant given the particular evidence presented, i.e. Jeranek had originally told police that Wilber had shot David Diaz; Torres testified that he saw Wilber crouching with a gun out immediately after the shooting; and everyone testified that Wilber was completely out of control and engaging in violent and aggressive behavior just prior to the shooting. Moreover, there is not a reasonable probability the jury would have acquitted the defendant given that no one else identified Gonzalez in the home at the time of the shooting and that he had never come forward previously, not to mention that Gonzalez was the boyfriend of the defendant's sister, Monique West.

(99:15-16.) The court found that none of the other issues presented in Wilber's motion were clearly stronger than the issues raised by postconviction counsel during Wilber's direct appeal. (99:6, 17-19.) Wilber appeals.

ARGUMENT

I. The circuit court properly denied Wilber a hearing on his newly discovered evidence claim.

A. Standard of review

The sufficiency of a postconviction motion to entitle a defendant to an evidentiary hearing is evaluated under a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges sufficient material facts that, if true, would entitle the defendant to relief is a question of law reviewed de novo. *Id.* If the motion does not raise sufficient facts, or presents only conclusory allegations, or the record conclusively demonstrates that the defendant is due no relief, this Court reviews the circuit court's decision to deny the motion without a hearing for an erroneous exercise of discretion. *Id.*

This Court reviews a circuit court's ruling on the first four prongs of the newly discovered evidence test for an erroneous exercise of discretion. *State v. Vollbrecht*, 2012 WI App 90, ¶ 18, 344 Wis. 2d 69, 820 N.W.2d 443. This Court independently reviews the fifth prong: whether there is a reasonable probability that the new evidence would have affected the result of the trial. *Id.*

B. Relevant law

Postconviction, a defendant is entitled to an evidentiary hearing only if his postconviction motion alleges sufficient material facts that, if proven true at an evidentiary hearing, would entitle the defendant to relief. *Allen*, 274 Wis. 2d 568, ¶ 14. A defendant must allege facts using the "five 'w's' and one 'h'" method—who, what, when, where, why, and how. *Id.* ¶ 23; *see also State v. Romero-Georgana*, 2014 WI 83, ¶¶ 58, 49, 360 Wis. 2d 522, 849 N.W.2d 668.

If the defendant's "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." *State v. Sulla*, 2016 WI 46, ¶ 23, 369 Wis. 2d 225, 880 N.W.2d 659 (citations omitted). In other words, "a circuit court has the discretion to deny a defendant's motion—even a properly pled motion . . . without holding an evidentiary hearing if the record conclusively demonstrates that the defendant is not entitled to relief." *Id.* ¶ 30.[7]

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[7] As *Sulla* and the numerous cases in it explain, Wilber's assertion that the circuit court *must* accept all of his allegations as true unless the court holds an evidentiary hearing is objectively wrong. (Wilber's Br. 9-10). The circuit court must accept his allegations as true and hold an evidentiary hearing only if the

Where a defendant seeks a new trial based on newly discovered evidence, he must show, "by clear and convincing evidence, that (1) the evidence was discovered after conviction, (2) the defendant was not negligent in seeking to discover it, (3) the evidence is material to an issue in the case, and (4) the evidence is not merely cumulative." *Vollbrecht*, 344 Wis. 2d 69, ¶ 18. If the defendant satisfies all four criteria, "then 'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" *State v. Avery*, 2013 WI 13, ¶ 25, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted).

"A reasonable probability of a different result exists if there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt." *Id.* "While the court must consider the new evidence as well as the evidence presented at trial, the court is not to base its decision solely on the credibility of the newly discovered evidence, unless it finds the new evidence to be incredible." *Id.*

"If the newly discovered evidence fails to satisfy any one of these five requirements, it is not sufficient to warrant a new trial." *State v. Eckert*, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996).

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record does not conclusively show he is due no relief. *State v. Sulla*, 2016 WI 46, ¶ 30, 369 Wis. 2d 225, 880 N.W.2d 659. *See also, e.g.*, *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996); *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Howell*, 2007 WI 75, 301 Wis. 2d 350, 734 N.W.2d 48. In other words, if the record conclusively shows that Wilber's allegations are false, or that they are true but irrelevant or unpersuasive to undermine confidence in the outcome of the proceeding in light of the other evidence, the circuit court need not hold an evidentiary hearing before denying his motion.

C. The circuit court properly denied Wilber's newly discovered evidence claim without a hearing because it fails multiple prongs of the test.

The circuit court properly denied Wilber's newly-discovered evidence claim without a hearing. Wilber's Wis. Stat. § 974.06 motion presented largely conclusory allegations. Additionally, the proffered testimony fails multiple prongs of the newly discovered evidence analysis, and neither Gonzalez's nor Martin's evidence raises a reasonable probability that a jury would have a reasonable doubt about Wilber's guilt.

1. Martin's proffered testimony consists of inadmissible hearsay, and therefore is not newly discovered evidence.

It is black-letter law that evidence that would be inadmissible at trial does not constitute newly discovered evidence. *State v. Bembenek*, 140 Wis. 2d 248, 252-57, 409 N.W.2d 432 (Ct. App. 1987). Here, Martin's affidavit states that Ricky Muniz came to his house on the night of the shooting stating that he needed a change of clothes. (98:314.) He claims Ricky told him that "some shit went down" at a party with someone he had an altercation with a few weeks earlier. (98:314.) Martin says Ricky then handed him his gun and told him to "get rid of it." (98:314.) He claims that Ricky later that evening "admitted to me that he shot a Mexican guy by the name of 'GORDO' in the head and that he was paranoid because there was a lot of people in the living room when he did it." (98:314.)

The circuit court rejected this evidence as inadmissible hearsay. And pursuant to Wis. Stat. § 908.045(4), the circuit court is correct.

Wisconsin Stat. § 908.045(4) provides that a statement against interest is not excluded by the hearsay rule if the

declarant is unavailable as a witness. There is no dispute that Muniz's purported statements would qualify as statements against his interest,[8] or that Muniz is deceased and therefore unavailable as a witness. However, the last sentence of Wis. Stat. § 908.045(4) states, "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated."

Wilber's motion offered nothing corroborating Muniz's supposed statements. (98:19-20.) In his appellate brief, he claims that his affidavit is self-corroborating. (Wilber's Br. 16.) That does not make sense, and he cites no law to support the claim. (Wilber's Br. 14-16.) His only offer of corroboration is that Ricky was seen with a gun that evening. But the only certain testimony about Muniz's whereabouts *during the shooting* came from Lea Franceschetti, who said that Muniz left long before the shooting even occurred. The circuit court properly determined that Martin's affidavit does not constitute newly discovered evidence.

2. Gonzalez's testimony is not newly discovered because Wilber learned about it before conviction and was negligent in seeking an affidavit from Gonzalez.

The trial testimony shows that Wilber discovered Gonzalez's purportedly exculpatory testimony before conviction, or at the least, Wilber was negligent in seeking it.

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[8] Wilber claims that Muniz asking for clean clothing and to dispose of a gun "assert no facts and thus are not statements offered for their truth and are not hearsay." (Wilber's Br. 14.) Wilber has misunderstood the hearsay rule. Statements are hearsay if they are offered "to prove the truth of *the matter asserted*." Wis. Stat. § 908.01(3). Wilber is offering Muniz's out of court statements to prove that Muniz asked for clean clothes and to dispose of a gun. They are therefore offered to prove the matters asserted.

His claims that this evidence is newly discovered therefore fail before even reaching the circuit court's analysis that the evidence would not have changed the result of trial.

Wilber claims in his affidavit that he "informed Chernin that Roberto Gonzalez . . . was also at the house party" and asked him to investigate what he knew. (98:345.) Assuming that this statement is true, Wilber obviously knew that Gonzalez had potentially exculpatory information before trial and simply did not seek it. And on the last day of testimony, Wilber asked the circuit court to adjourn the trial because he had received information that Gonzalez was now supposedly present at the party and saw someone else shoot Diaz. (55:4-6.) The court allowed Wilber's sisters to testify as to what they heard about Gonzalez's involvement. Wilber's family clearly knew that Gonzalez had potentially exculpatory evidence before Wilber's conviction, and even if Wilber is lying in his affidavit, he learned this information at trial. Wilber's claim that he "didn't learn of . . . Gonzalez's (2013) evidence until long after trial" is therefore disproven by the record. Wilber knew about Gonzalez's exculpatory tale before conviction.

And Wilber wholly failed to make sufficient allegations regarding the second prong of the test—that he was not negligent in seeking the testimony from Gonzalez. (98:19.) Wilber claims that he was not negligent in seeking this evidence because "he didn't know what either witness knew." (98:19.) But Wilber did not offer any reason why he waited nearly a decade to get Gonzalez's story when the trial record clearly shows that he knew Gonzalez was willing to exculpate him. (Wilber's Br. 11; 98:19.) Gonzalez's affidavit expressly states that he "was willing and available to testify at Danny Wilber's trial and I am still willing to be interviewed, take a lie detector test, and/or testify in court as to what I witnessed" (98:319.) And because the record makes clear that Wilber knew that Gonzalez was going to tell an exculpatory story as early as the day before his conviction, the record conclusively

demonstrates that Wilber was negligent in waiting almost ten years to seek Gonzalez's affidavit.

D. The circuit court properly determined that none of Wilber's proffered evidence raises a probability of a different result at trial.

The circuit court also properly denied Wilber's newly discovered evidence claim without a hearing because there is no possibility that there would have been a different outcome at trial based on this evidence. (99:10.) First, as the circuit court noted, none of this evidence would have been admissible because it did not satisfy the requirements to introduce third-party perpetrator evidence at trial. *See State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (1984). This requires a defendant to establish that the third person had motive and opportunity, and there is some evidence to directly connect the person to the crime. *Id.* at 624.

Wilber has never presented any evidence establishing Muniz had a motive to shoot Diaz. He claims only that the two had "a dispute in the recent past." (Wilber's Br. 13.) But Torres did not say that there was a dispute. Instead, there was a "dirty look" in a hallway a week before when the two bumped into each other and did not excuse themselves. (52:49; 51:232.) Torres claimed that there was no "bad vibe" the night of the shooting. (52:49–50.) And simply stating there was "a dispute" is insufficient to show motive to kill Diaz. Consequently, nothing Wilber presented about Muniz would be admissible at a second trial, and it is not newly discovered evidence. *Bembenek*, 140 Wis. 2d 248, 252-57.

Even if the evidence could be admitted, the court was correct that there is not a reasonable probability of a different result. There was extremely strong eyewitness testimony from Torres that he heard a gunshot come from his right, where Wilber was standing, and that he saw Wilber in the kitchen with a gun immediately after the shooting. Every

witness testified that Wilber was angry, aggressive, and out of control that night. No eyewitness testimony implicated Muniz. Not a single person ever saw Gonzalez at the party at all. Gonzalez did not tell anyone that he was supposedly there—even Wilber's family—until the last day of Wilber's trial. And as the circuit court noted, Gonzalez's new story contradicts what he purportedly told Wilber's sisters about the shooting, which they relayed on the record. There is no possibility that a jury hearing all of the eyewitness testimony, particularly Torres's, along with the State's impeachment evidence, the statements Antonia West made telling Wilber, "You shot him, get out of here" (47:83; 48:6-26), and hearing the circumstances in which Gonzalez's belated statement arose would have a reasonable doubt about Wilber's guilt at a new trial. The circuit court properly denied Wilber's motion without an evidentiary hearing.

II. The circuit court properly denied Wilber's postconviction discovery request.

A. Standard of review

This Court reviews a circuit court's denial of postconviction discovery for an erroneous exercise of discretion. *State v. Ziebart*, 2003 WI App 258, ¶ 33, 268 Wis. 2d 468, 673 N.W.2d 369.

B. Relevant law

A defendant may seek postconviction discovery. *See State v. O'Brien*, 223 Wis. 2d 303, 320, 588 N.W.2d 8 (1999). Wilber has a due process right to the postconviction discovery he seeks if the desired evidence is relevant to an issue of consequence. *Id.* Evidence is relevant to an issue of consequence,

> only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A

> 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Evidence that is of consequence then is evidence that probably would have changed the outcome of the trial. "The mere possibility that an item of undisclosed information might have helped the defense . . . does not establish '[a consequential fact]' in the constitutional sense."

Id. at 320-21 (alterations in original) (citations omitted).

C. The circuit court appropriately exercised its discretion to deny Wilber's request for postconviction discovery.

The circuit court properly denied Wilber's motion for postconviction discovery of the crime scene photographs. Wilber sought the photographs to create a to-scale diagram of the kitchen and have the photos and diagram evaluated by experts. The circuit court gave a comprehensive recitation of the trial testimony and found,

> [t]he testimony of eyewitness Richard Torres was very strong, and the impeachment of other testimony from witnesses hostile to the State persuades the court that there is not a reasonable probability that the jury would have embraced the defendant's physical evidence theory and acquitted him, no matter how accurate the drawing was. The jury clearly rejected the physical evidence that existed based on the testimony of the witnesses who were present at the scene of the homicide. The court concludes that a completely accurate depiction of the crime scene would not have altered the outcome of the trial in that a reading of the trial testimony demonstrates that no other outcome would have been reasonably probable to occur.

(86:5.) The circuit court applied the correct law to the facts and found that there was not a reasonable probability that a to-scale diagram and expert testimony would have changed the outcome of the trial. It did not erroneously exercise its discretion when it denied Wilber's motion.

Wilber does not discuss the circuit court's rationale for denying his motion. (Wilber's Br. 38-40.) Instead, Wilber attempts to evade the high threshold for obtaining postconviction discovery by claiming that what he seeks is not *truly* postconviction discovery. (Wilber's Br. 38-39.) This is so, he says, because Chernin had a copy of the photographs at one time, therefore Wilber was not actually attempting to *discover* them. (Wilber's Br. 39.) He then claims, with no evidentiary or legal support, by refusing to make copies the State is "concealing" the photos and violating the prosecutor's obligation to seek justice. (Wilber's Br. 39.) Finally, he makes the irrelevant observation that Wis. Stat. § 906.11 allows the circuit court to exercise control over the presentation of evidence at trial, and claims that the circuit court therefore erroneously exercised its discretion when it denied his motion. (Wilber's Br. 39.)

All parts of Wilber's argument are misplaced.

First, as Wilber admits, he has raised this argument for the first time on appeal. (*See* Wilber's Br. 38.) It is therefore forfeited. *See State v. Rogers*, 196 Wis. 2d 817, 927, 539 N.W.2d 897 (Ct. App. 1995) ("We will not . . . blindside trial courts with reversals based on theories which did not originate in their forum.").

Second, his claim is indeed seeking postconviction discovery. Wilber is asking to remove evidence from the State's file, and he is doing so postconviction. That is postconviction discovery.[9] *See O'Brien*, 223 Wis. 2d at 313, 319

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[9] Under Wilber's theory of "concealment," the State is required to reproduce all of the trial evidence on the demand of a defendant simply because it previously disclosed it and it is not privileged. (Wilber's Br. 38-39.) Wilber cites no law for this proposition, and the State is unable to find any case that supports it. He also fails to explain how the State can conceal something that it disclosed, and fails to explain why he did not seek the photographs from trial or postconviction counsel.

("The second issue that we consider is whether the defendant was entitled to . . . the opportunity to remove exhibits, post conviction, for scientific testing. Our focus here is on the defendant's right to post-conviction discovery."). Wilber focuses on the fact that the photographs are not "previously undisclosed." (Wilber's Br. 38.) But the photos do not have to be previously undisclosed to be subject to the test for postconviction discovery. *O'Brien*, 223 Wis. 2d at 321. "[A] defendant has a right to post-conviction discovery when the sought-after evidence is relevant to an issue of consequence." *Id.* But the "sought-after evidence" in this context is not the items sought from the State, but the evidence the defendant hopes to produce with it. *Id.* Here, that is the to-scale diagram and the expert opinions.

O'Brien illustrates why Wilber's focus on the photographs themselves is faulty. In *O'Brien*, the defendant committed two acts of sexual assault on a man helping him plant some trees. *O'Brien*, 223 Wis. 2d at 309. The victim escaped and went to the hospital. *Id.* Blood samples, hair samples, semen samples, and anal and penile swabs and smears were taken from the victim and sent to the crime lab. *Id.* The defendant testified that the two had consensual oral sex, and that no act of anal intercourse ever occurred. *Id.* at 311-12. A detective read the lab report at trial, which found no semen from the defendant on any of the samples. *Id.* The jury convicted the defendant of two counts of third-degree sexual assault. *Id.*

Postconviction, the defendant filed a motion to remove the samples from the State's file for further scientific testing. *Id.* at 313. He claimed this testing would "help to prove the victim's consent as to the fellatio charge and support [the defendant's] denial of anal intercourse." *Id.* The circuit court denied the motion, concluding that the defendant was not entitled to the samples because the result of the trial would not have been different had the samples been tested. *Id.* at

321. The supreme court affirmed, concluding "that the sought-after evidence"—the testing—was not consequential because it "probably would [not] have changed the outcome of the trial." *Id.*

Like the defendant in *O'Brien*, Wilber wanted the photographs to produce new evidence: the diagram and the expert reports. *See O'Brien*, 223 Wis. 2d at 321-22. To be entitled to postconviction discovery of the photographs, then, Wilber had to show that the diagram and the reports "probably would have changed the outcome of the trial." *Id.* at 321. And as the circuit court correctly determined, Wilber cannot meet that burden. That the photographs were previously disclosed is irrelevant to the analysis. And since Wilber has made no attempt to refute the circuit court's conclusion, his claim must fail.

III. Wilber's ineffective assistance of postconviction counsel claim fails because his insufficient evidence and ineffective assistance of trial counsel claims are meritless; therefore those claims are procedurally barred and the circuit court properly denied them all without a hearing.

A. Standard of review

"A claim of ineffective assistance of counsel is a mixed question of fact and law." *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695. A reviewing court "will uphold the circuit court's findings of fact unless they are clearly erroneous." *Id.* "However, the ultimate determination of whether counsel's assistance was ineffective is a question of law, which [a court] review[s] de novo." *Id.*

Whether a claim is barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994) and whether a motion alleges a sufficient reason for failing to bring available claims earlier are questions of law that an appellate court reviews de novo. *Romero-Georgana*, 360

Wis. 2d 522, ¶ 30 (citation omitted); *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

B. Relevant law

A defendant may seek postconviction relief under Wis. Stat. § 974.06 after the time for the direct-appeal process under section 974.02 has ended. *Romero-Georgana*, 360 Wis. 2d 522, ¶ 32. "But if the defendant [filed] a motion under § 974.02 or a direct appeal or a previous motion under § 974.06, the defendant is barred from making a claim that could have been raised previously unless he shows a sufficient reason for not making the claim earlier." *Id.* ¶ 35; *see generally Escalona-Naranjo*, 185 Wis. 2d 168.

"In some instances, ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise an available claim in an earlier motion or on direct appeal." *Romero-Georgana*, 360 Wis. 2d 522, ¶ 36. A defendant who asserts ineffective assistance of postconviction counsel must demonstrate that postconviction counsel performed deficiently and the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). It is well-established in Wisconsin that an evidentiary hearing is a prerequisite for consideration of an ineffective assistance of counsel claim on appeal. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). This is so because without counsel's testimony, there is no way to "determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies." *Id.* Additionally, whether a defendant has been prejudiced by counsel's deficient performance "is necessarily fact-dependent." *State v. Jenkins*, 2014 WI 59, 355 Wis. 2d 180, ¶ 50, 848 N.W.2d 786.

But defendants are not granted a *Machner* hearing simply because they ask for one. *See Allen*, 274 Wis. 2d 568, ¶ 10. "]A] circuit court has the discretion to deny a defendant's

motion—even a properly pled motion— . . . without holding an evidentiary hearing if the record conclusively demonstrates that the defendant is not entitled to relief." *Sulla,* 369 Wis. 2d 225, ¶ 30. Consequently, where the circuit court denies a motion alleging ineffective assistance of counsel without holding a hearing, the issue on appeal is the sufficiency of the motion to entitle the defendant to a hearing, not the ultimate merits of the underlying claim. *State v. Sholar*, 2018 WI 53, ¶ 47.

To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

Additionally, "a defendant who alleges in a § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought." *Romero-Georgana*, 360 Wis. 2d 522, ¶ 4 (citing *State v. Starks*, 2013 WI 69, ¶ 6, 349 Wis. 2d 274, 833 N.W.2d 146).[10] This "clearly

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[10] The case law is clear that the "clearly stronger" standard applies to claims of ineffective assistance of postconviction counsel. *State v. Romero-Georgana*, 2014 WI 83, ¶ 4, 360 Wis. 2d 522, 849 N.W.2d 668. Wilber's claim that this standard is "more restrictive than the controlling federal standard for assessing ineffectiveness claims" is false. (Wilber's Br. 31 n.17.) The clearly stronger standard *is* the federal standard, which the Wisconsin Supreme Court adopted from the United States Supreme Court's decision in *Smith v. Robbins*, 528 U.S. 259 (2000). *State v. Starks*, 2013 WI 69, ¶¶ 59-60, 349 Wis. 2d 274, 833 N.W.2d 146.

stronger" pleading standard is part of the deficient performance prong of the *Strickland* test. *Romero-Georgana*, 360 Wis. 2d 522, ¶¶ 45, 58.

"The defendant may not presume the second element, prejudice to the defense, simply because certain decisions or actions of counsel were made in error." *State v. Balliette*, 2011 WI 79, ¶ 24, 336 Wis. 2d 358, 805 N.W.2d 334. To prove prejudice, "the defendant must show that [counsel's deficient performance] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

"The defendant has the burden of proof on both components" of the *Strickland* test. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citing *Strickland*, 466 U.S. at 688). If a defendant fails to prove one prong of the *Strickland* test, a court need not consider the other prong. *Strickland*, 466 U.S. at 697.

C. Wilber's insufficient evidence claim is procedurally barred and meritless; therefore postconviction counsel was not ineffective for failing to raise it.

It is well-settled that, like every other constitutional claim, a defendant is procedurally barred from raising a sufficiency of the evidence claim in a Wis. Stat. § 974.06 motion unless the defendant shows a sufficient reason for failing to raise it earlier. *State v. Kaster*, 2006 WI App 72, ¶ 9, 292 Wis. 2d 252, 714 N.W.2d 238. At no point in his postconviction motion did Wilber argue that postconviction

counsel was deficient for failing to raise insufficiency of the evidence. (98:2-18.) Nor did he argue that insufficient evidence was a clearly stronger claim than those postconviction counsel raised. (98:2-18.) His claim is therefore procedurally barred by *Escalona-Naranjo*. *Escalona-Naranjo*, 185 Wis. 2d at 185.

Wilber argues his insufficient evidence claim as though he does not need a sufficient reason for failing to raise it on direct appeal, and then, in a footnote, impliedly admits that is not the law in Wisconsin. (Wilber's Br. 21 n.11.) He then claims that because petitioners may sometimes show a sufficient reason to excuse a procedural default in federal habeas corpus cases, insufficient evidence should never be subject to the procedural bar in Wisconsin. (Wilber's Br. 21 n.11.) But this Court cannot overrule the cases stating that insufficient evidence is subject to the procedural bar. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Wilber has wholly failed to suggest a sufficient reason for failing to raise this claim earlier, therefore it is barred.

Furthermore, his claim is meritless. When determining whether evidence at trial was sufficient to support a conviction, an appellate court "consider[s] the evidence in the light most favorable to the State and reverse[s] the conviction only where the evidence 'is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). "Therefore, this court will uphold the conviction if there is any reasonable hypothesis that supports it." *Id.*

"In reviewing the sufficiency of circumstantial evidence to support a conviction, an appellate court need not concern itself in any way with evidence which might support other theories of the crime." *Poellinger*, 153 Wis. 2d at 507-08. But Wilber exclusively discusses what he believes is evidence

purportedly consistent with his theory that someone in the living room shot Diaz. (Wilber's Br. 20-23.) He ignores all of the officer testimony and police reports used to impeach the witnesses' testimony equivocating about implicating Wilber. He ignores all the expert testimony that the bullet fragments could easily have landed in unexpected places, and that Diaz's wounds and positioning were consistent with him having been shot from where Wilber was in the kitchen. (Wilber's Br. 20-23.) That is the opposite of how this Court evaluates the sufficiency of the evidence postconviction. *Poellinger*, 153 Wis. 2d at 507-08. This testimony is also sufficient to defeat Wilber's "undisputed physical evidence" argument. (Wilber's Br. 22.) Under no objective view of the facts can Wilber's theory of what the physical evidence shows be labeled "undisputed."

Consequently, postconviction counsel cannot have rendered deficient performance by failing to raise this claim. Counsel is not deficient for failing to raise meritless claims. *State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441. Nor can Wilber show prejudice: the outcome of Wilber's postconviction proceedings would not have been different had counsel raised a meritless claim because the claim would have failed. And because Wilber cannot show that postconviction counsel was ineffective for failing to raise this claim, he has not shown "any sufficient reason why a court should now entertain that same claim in a sec. 974.06 motion." *Escalona-Naranjo*, 185 Wis. 2d at 184 (emphasis omitted).

D. Wilber's ineffective assistance of trial counsel claim is meritless; therefore postconviction counsel was not ineffective for failing to raise it and it is procedurally barred.

Wilber claims that his trial counsel rendered ineffective assistance by failing to investigate Gonzalez before trial and

failing to obtain experts to reconstruct the crime scene and rebut the State's physical evidence. (Wilber's Br. 26-27.) He is wrong.

First, Chernin was not deficient in failing to seek out and interview Gonzalez before trial. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. That does not mean, however, that counsel must investigate every conceivable avenue of defense. It is well-settled law that "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.*

Wilber's claim that Chernin knew this information is supported only by his own self-serving statement (98:345), which is conclusively disproven by the record. The record makes clear that *not a single witness* ever suggested during the police investigation or at trial that Gonzalez attended the party. Indeed, when the court asked Chernin why he waited until after the close of evidence to investigate whether Gonzalez was an eyewitness with purportedly exculpatory information, he told the court, "It was a matter that I swear that I was totally unaware of until we broke this afternoon. . . . Mr. Wilber did not make this information known to me." (55:3-5.) When asked why not, Chernin replied, "I don't believe he knew that until I told him just now." (55:5.) Wilber also makes no claim that Chernin had any reason to know about, let alone speak to, Martin. (Wilber's Br. 26-29.) And because Wilber's self-serving statement that he told Chernin before trial about Gonzalez's allegedly witnessing the murder is conclusively disproven by the record, the circuit court properly denied Wilber's ineffective assistance claim on this ground without a hearing. *Sulla*, 369 Wis. 2d 225, ¶ 30.

Wilber also cannot show prejudice from Chernin failing to consult experts about the crime scene. (Wilber's Br. 27-29.)

The circuit court found that "failing to call an expert or present a more accurate scene diagram" would not have made a difference. (86:5.) It concluded that "[t]he testimony of eyewitness Richard Torres was very strong," and that the State was able to persuasively impeach all of the eyewitnesses who changed their story on the stand. (86:5.) Chernin extensively cross-examined the forensic experts and presented the theory that someone else must have shot Diaz from the living room. "The jury clearly rejected the physical evidence that existed based on the testimony of the witnesses who were present at the scene of the homicide." (86:5.) The circuit court was therefore correct that even with experts and a completely accurate diagram, "the trial testimony demonstrates that no other outcome would have been reasonably probable to occur." (86:5.)

Wilber has not attempted to refute this finding. (Wilber's Br. 28-29.) Instead, he focuses on his claim that failing to investigate Gonzalez was prejudicial. (Wilber's Br. 26.) He then inserts a wholly unsupported claim that failure to investigate Martin was prejudicial when he never claimed Chernin had any reason to know about Martin or argued that it was deficient performance. (Wilber's Br. 28-29.) Finally, he claims he has shown prejudice because the circuit court "improperly arrogated to itself the jury's role of assessing credibility and weight . . . while ignoring all of the contrary evidence that a jury could reasonably credit instead." (Wilber's B 29.) But that is not the test for prejudice. Based on Wilber's citation to *Thiel*, 264 Wis. 2d 571, ¶¶ 59-60, the State assumes that Wilber meant to argue that he was cumulatively prejudiced by counsel's errors. (*See* Wilber's Br. 28-29.) But only actual errors are counted toward cumulative prejudice, and Wilber has not presented a cogent argument as to how Chernin could be deficient for failing to secure Gonzalez's and Martin's testimony or why the outcome of the proceeding would have been different. He has failed to meet

his burden to show cumulative prejudice or any other prejudice from Chernin's actions. *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

Consequently, Wilber again cannot show that postconviction counsel performed deficiently for failing to raise this claim, or that he was prejudiced by that failure. *Wheat*, 256 Wis. 2d 270, ¶ 14. Accordingly, this claim is barred by *Escalona-Naranjo*, and the circuit court properly denied both his ineffective assistance of trial counsel and his ineffective assistance of postconviction counsel claims without a *Machner* hearing.

IV. Wilber is not due a new trial in the interests of justice.

A. Relevant law

"The court of appeals has the discretionary power to reverse a conviction in the interest of justice." *Avery*, 345 Wis. 2d 407, ¶ 23. This Court may order a new trial under Wis. Stat. § 752.35 if it appears that: "(1) the real controversy has not been fully tried, or; (2) it is probable that justice has for any reason miscarried." *State v. Jones*, 2010 WI App 133, ¶ 43, 329 Wis. 2d 498, 791 N.W.2d 390. This Court only exercises its discretionary reversal power "in exceptional cases." *See State v. Kucharski*, 2015 WI 64, ¶ 23, 363 Wis. 2d 658, 866 N.W.2d 697. This discretionary reversal power "should be exercised sparingly and with great caution." *State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719.

Wilber argues that the real controversy was not fully tried and that justice has miscarried. (Wilber's Br. 35-37.) There are two primary situations in which a real controversy was not fully tried: "[W]hen the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and when the jury had

before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." *In re Commitment of Smalley*, 2007 WI App 219, ¶ 7, 305 Wis. 2d 709, 741 N.W.2d 286 (citation omitted). Justice has miscarried under Wis. Stat. § 752.35 "if there is a substantial probability that a new trial would produce a different result." *Kucharski*, 363 Wis. 2d 658, ¶ 5.

B. The real controversy was fully tried and there was no miscarriage of justice.

For the reasons explained, Wilber is not due a new trial in the interests of justice. The real controversy was fully tried. There was an eight-day jury trial with over 15 witnesses, seven of whom were at the party and five of whom were indisputably in the kitchen when Diaz was shot. Zero witnesses reported ever seeing Gonzalez at the house, and he waited until the end of trial to claim that he was there and saw someone else commit the murder. His inconsistent, uncorroborated, after-the-fact claims cannot reasonably be characterized as "important testimony" that the jury should have heard. Rather, as the trial court aptly found, Gonzalez's eleventh-hour revelations are nothing more than "a blatant attempt to manipulate the proceedings." (55:91.)

Nor can Wilber show that justice has miscarried. There is not a substantial probability that a new trial would produce a different result. Wilber admits that "the jury heard that Ricky Muniz previously had a dispute with Diaz and was in the living room with a gun shortly before the shooting." (Wilber's Br. 35.) Chernin cross-examined every one of the State's pertinent witnesses about the location and physics behind the physical evidence and the location of each person in the house. (*See, e.g.*, 47:39-56; 49:69-77, 98-103; 51:191, 205-13.) Chernin argued extensively that the physical evidence did not align with Wilber having been the shooter.

(55:160-70.) Jonathan Martin's testimony is inadmissible hearsay. And Gonzalez's testimony is uncorroborated and belied by the other eyewitness testimony about who was at the party. It is thus inherently unworthy of belief, and for both reasons inadmissible. But even if it were admissible, there is not a substantial likelihood that a new trial would produce a different result due to the eyewitness testimony, the State's impeachment evidence, the expert testimony explaining that the physical evidence was not inconsistent with Wilber committing the shooting, and the nature and circumstances of Gonzalez's shifting, eleventh-hour story. There was no miscarriage of justice.

Finally, the only thing exceptional about this case is Wilber's continued attempts to manipulate the courts and the jury with the specious and uncorroborated story that Gonzalez was at the party and has claimed to have seen two different shooters—one now conveniently dead—commit the crime. (*See* 55:11-80.)

V. Wilber's argument that this Court erroneously denied his motion for remand is not properly before this Court and it is meritless.

While this appeal was pending, Wilber asked this Court to stay proceedings and remand the case to the circuit court so he could reargue his Wis. Stat. § 974.06 motion. (Motion for Remand and to Stay Proceedings on Appeal, 9/11/17.) This Court denied the motion because "the question before the court is whether the circuit court erred when it denied Wilber's motion without a hearing . . . and the motion itself indicates that the circuit court's purported errors could be addressed on direct appeal." (Order Denying Motion for Stay and Remand, 10/3/17.) Wilber now argues that this Court erroneously exercised its discretion in denying his request to remand this case. (Wilber's Br. 32-34.)

His request for this Court to reconsider its decision denying remand is inappropriately raised in his appellate brief. Wilber's appeal is from the circuit court's order denying his postconviction motion without a hearing. Wis. Stat. § 808.03(1); Wis. Stat. § (Rule) 809.30(1)(a) ("'Final adjudication' means the entry of a final judgment or order by the circuit court . . . in a criminal case . . . ."). He is appealing the order of the circuit court, not this Court's denial of his motion for remand.

Additionally, Wilber presents nothing new and merely rehashes his motion for remand. (Wilber's Br. 32-34.) Essentially, Wilber just again posits that he should have been allowed to return to the circuit court to reargue his § 974.06 motion. That is insufficient to show that this Court erroneously exercised its discretion.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the circuit court.

Dated this 15th day of June, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,565 words.

Dated this 15th day of June, 2018.

_____
LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 15th day of June, 2018.

_____
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