STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP682-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW RAY TAYLOR,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND FROM AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKE COUNTY, THE HONORABLE STEPHANIE ROTHSTEIN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the trial court properly exercise its discretion in denying Taylor's motion for a new trial based on newly-discovered evidence?

The trial court determined that the "new" evidence proffered by Taylor, in the form of supposedly exculpatory affidavits from two individuals, did not create a reasonable probability of a different outcome.

2. Did Taylor prove that his trial attorney was ineffective for not calling any defense witnesses and for not moving to suppress the out-of-court identifications of him by the two eyewitnesses to the shooting?

The trial court denied Taylor's ineffective assistance challenge without an evidentiary hearing. It ruled that Taylor failed to prove deficient performance and prejudice arising out of counsel's decisions not to call defense witnesses and not to seek suppression of the out-of-court eyewitness identifications.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State agrees with Taylor that this case does not warrant oral argument or publication. It involves the application of established principles of law to the unique facts presented. The briefs of the parties should adequately address the legal and factual issues presented.

STATEMENT OF THE CASE

After a trial held December 2-5, 2013, a Milwaukee County jury found Matthew Ray Taylor guilty as charged of first-degree reckless homicide while using a dangerous weapon, first-degree recklessly endangering safety while using a dangerous weapon and being a felon in possession of

a firearm. (13-15; 71:26-27.) Taylor received an aggregate sentence for the three offenses of thirty years in prison followed by twenty-five years of extended supervision. (73:54.)

Taylor filed a motion for direct postconviction relief October 2, 2015, raising the issues he presents here. (A-App. 13-21.) After the parties supplemented the record with affidavits and documentary evidence, and after they thoroughly briefed the issues (A-App. 22-157), the trial court issued a written Decision and Order denying the motion without an evidentiary hearing March 2, 2016 (56, A-App. 3-12).

The court rejected Taylor's newly-discovered evidence claim. It held that the supposedly exculpatory affidavits Taylor offered in support of his motion did not create a reasonable probability of a different outcome had that new evidence been presented at trial. (56:5-7, A-App. 7-9.)

The court rejected Taylor's challenge to the effectiveness of his trial counsel for not calling defense witnesses. Taylor failed to prove deficient performance or prejudice arising out of counsel's decision not to call several witnesses who would testify that Taylor was not wearing a black hoodie sweatshirt at various points before and after the shooting. The court noted that these witnesses were not present when the shooting occurred so they could not testify to what Taylor wore then. Those who would testify that the wounded Taylor was not wearing a black hoodie sweatshirt when he arrived at the house he ran to after the shooting would be confronted with proof that a black hoodie sweatshirt containing Taylor's fresh blood, and identified by the two eyewitnesses as that worn by the shooter, was later found by police hidden in a corner of the basement. Also, some of these witnesses would admit that Taylor had worn

this particular sweatshirt in the past. (56:8-9, A-App. 10-11.) The court next held that Taylor failed to prove deficient performance and prejudice arising out of counsel's decision not to call Terry Singleton as a defense witness. Counsel strategically decided against calling Singleton because his testimony would likely inculpate Taylor. (56:8, A-App. 10.)

The court rejected Taylor's challenge to the effectiveness of trial counsel for not moving pretrial to suppress the out-of-court identifications made of him by the two eyewitnesses to the shooting. Taylor failed to prove deficient performance and prejudice because there was nothing objectionable about the photo arrays employed by police and counsel thoroughly challenged the credibility and reliability of the eyewitness identifications at trial. (56:9-10, A-App. 11-12.)

Taylor appeals from the judgment of conviction and the order denying direct postconviction relief. (61.)[1]

STATEMENT OF RELEVANT FACTS

At 2:02 a.m. on July 11, 2013, Milwaukee police were dispatched to a shooting at 1512 W. Concordia St. On the way, police found two wounded men lying in the intersection of 15th and Keefe Streets. One was shot in the chest and unconscious. The other was shot in the hip and conscious. The conscious man identified himself as Anthony Bachman. Bachman told police that he and his companion, Gabriel Contreras, were confronted by two African-American men and were shot by a man wearing a black hooded sweatshirt with red writing on the front. The other man wore all white.

[1] The State has chosen not to file a redacted version of this brief. The State believes that the brief is worded in such a way as to not identify anyone who might fear retaliation.

(69:7-11.) Gabriel Contreras died of the gunshot wound to his chest. (70:136-37.)

Bachman and Contreras came to Milwaukee so that Contreras could purchase illegal prescription drugs. Bachman drove and Contreras was in the front passenger seat. Their passenger, Yujawana McClendon, was in the rear seat behind Bachman. The three eventually proceeded to the vicinity of 14th or 15th and Atkinson Streets where they encountered two black men. Contreras tried to negotiate a drug deal with the man in the black hoodie sweatshirt. The deal went bad. The passenger door opened somehow and the man in the hoodie sweatshirt opened fire into the car, killing Contreras and wounding Bachman. The shooter likely fired six shots at the two men using a .9 millimeter pistol. Either or both victims returned fire and struck Taylor in the leg as he fled. (69:16-30, 49-65, 86-88; 70:83-87, 156-60, 162-65.)

Shortly after police arrived, they were dispatched to a reported shooting at 3254 N. 15th St. as they approached, a woman directed police into the house where they found Taylor seated on a chair in the living room, bleeding from a wound to the back of his left leg. (69:107-110.) Blood was on the chair and on the ground near Taylor. A white T-shirt was wrapped around Taylor's wound with a belt. There were six or seven people in the house at the time. (69:116, 118.)

A trail of Taylor's blood led from the living room out the front door, onto the front porch, down the stairs and east between the houses toward the alley between 14th and 15th Streets. (69:109-111.) There was no blood leading into the basement. (69:112, 205.) Police later found a black hoodie sweatshirt with the word "Grumpy" spelled out in red and white letters on the front. A large amount of Taylor's fresh blood—and only Taylor's blood—was soaked inside, outside

and on the hood of the sweatshirt. (69:123-24, 127, 189-90; 70:54-57, 65-66, 68-69.)

A trail of Taylor's blood led from the scene of the shooting where police found the spent .9 millimeter shell casings, through the alley between 14th and 15th Streets, and up to the front door of 3254 N. 15th St. (69:173-189; 70:7-9, 52-53.) The blood trail passed a pair of garbage bins behind 3264 N. 15th St. Police found the .9 millimeter handgun used to shoot Contreras and Bachman at the bottom of one of the garbage bins. (69:95-98, 184-85; 70:162-65.)

Both Bachman and McClendon positively identified Taylor in separate police photo arrays as the man in the black hoodie sweatshirt who fired into the car. (69:31-32, 35-36, 67-68, 150-52; 70:78-82.) Both positively identified Taylor at trial as the gunman. (69:39, 65-66.) Both Bachman and McClendon also viewed lineups that included suspected co-actor Terry Singleton as the "target." Neither identified Singleton. (70:114-119.) To date, no one has been charged as Taylor's accomplice. (70:122.)

When police found him with a gunshot wound to the leg and bleeding inside the nearby house, Taylor said he was shot in the next block and did not see who shot him. (69:107-110, 114.) Taylor's trial defense was that he was a "victim" caught in the cross-fire between the two men in the car and their two unknown assailants. (70:235-36; *see* 67:16.) Taylor did not testify at trial (70:188-91), and rested without putting on a defense (70:193).

ARGUMENT

I. The trial court properly exercised its discretion when it denied Taylor's newly-discovered evidence motion.

Taylor presented two affidavits to support his claim that he was entitled to a new trial based on newly-discovered evidence. This challenge is without merit because, as the trial court determined, the affidavits did not create a reasonable probability of a different outcome.

A. The applicable law and standard for review.

The decision whether to grant a new trial based on newly-discovered evidence is left to the trial court's sound discretion. *State v. Plude,* 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 750 N.W.2d 42; *State v. Boyce,* 75 Wis. 2d 452, 457, 249 N.W.2d 758 (1977).

A defendant seeking a new trial based on newly-discovered evidence faces an uphill battle:

> [A] defendant must first prove by clear and convincing evidence that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." State *v. Armstrong*, 2005 WI 119, ¶ 161, 283 Wis. 2d 639, 700 N.W.2d 98, 2005 WL 1618451 (quoting *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997)).
>
> If the defendant makes this showing, then "the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." *Id.* The reasonable probability determination does not have to be established by clear and convincing evidence, as it contains its own burden of proof. A reasonable probability of a different outcome exists if "there is a

> reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt." *McCallum*, 208 Wis. 2d at 474, 561 N.W.2d 707.

State v. Love, 2005 WI 116, ¶¶ 43-44, 284 Wis. 2d 111, 700 N.W.2d 62. *See Plude,* 310 Wis. 2d 28, ¶¶ 32-33; *State v. Jones,* 2010 WI App 133, ¶ 40, 329 Wis. 2d 498, 791 N.W.2d 390.

Even assuming he proved the first four factors by clear and convincing evidence, Taylor faced a high hurdle with respect to the fifth factor because, "the hardest requirement to meet is that the offered evidence in view of the other evidence would have probably resulted in an acquittal." *Lock v. State*, 31 Wis. 2d 110, 117, 142 N.W.2d 183 (1966).

Taylor had to prove a reasonable probability that a trial with the new evidence would result in acquittal. *See State v. Avery*, 213 Wis. 2d 228, 235-41, 570 N.W.2d 573 (Ct. App. 1997). If the new evidence would only serve to impeach the credibility of witnesses who would testify at trial, it is insufficient as a matter of law to warrant a new trial because it does not create a reasonable probability of a different result. *See Simos v. State*, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972); *Greer v. State*, 40 Wis. 2d 72, 78, 161 N.W.2d 255 (1968); *Lock*, 31 Wis. 2d at 117; *State v. Debs*, 217 Wis. 164, 165-66, 258 N.W. 173 (1935); *State v. Kimpel*, 153 Wis. 2d 697, 700-01, 451 N.W.2d 790 (Ct. App. 1989).

B. The two affidavits do not create a reasonable probability of a different outcome had those witnesses testified at trial.

The trial court correctly held that Taylor failed to prove this new evidence would likely have resulted in an acquittal.

1. The first affidavit.

The first affidavit was sworn out September 23, 2015, by someone claiming to be one of the six or seven people who were inside the house where Taylor fled after being shot. The affiant saw Taylor burst into the house bleeding from his leg. Taylor was accompanied by "[a] second individual" who "did not enter the house but stayed on the porch." This second individual told the affiant "that he had just shot someone" and the gun "was in a trash can behind the house." (A-App. 51.) The affiant identified the "second individual" as Terry Singleton. (A-App. 52.) The affiant admitted, however, to not identifying this "second individual" as Singleton when questioned by police "shortly after the incident." (A-App. 51.)

The trial court was correct. This affidavit does nothing to disprove Taylor's guilt. The first obvious question is why the affiant waited over two years to identify Singleton if the affiant knew that Taylor was an innocent victim who was caught in the crossfire. The affidavit tends to bolster the credibility of a statement Singleton made to police that he came upon the wounded Taylor lying in the street with a gun next to him, he helped Taylor limp back to the house, and he disposed of the gun in a trash bin as they passed through the alley behind the house. (67:18, A-App. 136.) Singleton's statement puts Taylor with a gun at the scene, defeating Taylor's claim that he was innocently caught in the crossfire. The affidavit also begs the question why a supposedly innocently wounded Taylor would not just remain at the

scene and await the arrival of emergency personnel to attend to his wound rather than skulk bleeding through the alley with Singleton to the house down the street, disposing of the gun along the way. The obvious answer for his flight to the house: Taylor's consciousness of guilt. *See, e.g.*, *State v. Bauer*, 2000 WI App 206, ¶¶ 5-7, 238 Wis. 2d 687, 617 N.W.2d 902 (flight is evidence of consciousness of guilt).

The affidavit also does not account for the two eyewitnesses who identified Taylor as the man in the black hoodie sweatshirt who fired multiple shots into the car at close range. The affidavit does not account for the large amount of Taylor's fresh blood soaked into the black hoodie sweatshirt with the word "Grumpy" written on the front in red and white letters that police found hidden in a corner of the basement of the house where Taylor fled.

At best, this affidavit tends to prove that Singleton *also* may have been a participant in the shootings. It does not diminish the eyewitness identifications of Taylor or the powerful circumstantial evidence of his involvement as a party to the crime. Under Wisconsin's party-to-a-crime statute, whoever is concerned in the commission of a crime is every bit as guilty as the party who actually committed it. Wis. Stat. § 939.05(1). One who aids and abets or conspires with another to commit a crime is guilty not only of the crime actually intended and committed, but also of any other crime which was the natural and probable consequence of the intended crime. *State v. Ivy*, 119 Wis. 2d 591, 596-97, 350 N.W.2d 622 (1984). *See State v. Asfoor,* 75 Wis. 2d 411, 430-31, 249 N.W.2d 529 (1977); *State v. Cydzik*, 60 Wis. 2d 683, 696-97, 211 N.W.2d 421 (1973). Therefore, even if the affiant's testimony would support the theory that Singleton was the primary actor, i.e., the shooter, Taylor would remain guilty as though he were the primary actor if he had any role at all in this botched drug deal and shooting. *See, e.g., State*

v. Hecht, 116 Wis. 2d 605, 624-25, 342 N.W.2d 721 (1984). At a retrial, the state would simply amend the information to charge Taylor as a party to the crime under Wis. Stat. § 939.05, and he would still be found guilty in all reasonable probability regardless of Singleton's role.

Further, the jury already knew that Singleton's fingerprint was found on the gun retrieved from the trash bin. (70:27-28.) The jury also knew, however, that the two eyewitnesses who positively identified Taylor as the shooter did not identify Singleton as the second participant. (70:114-119.) The affiant's testimony may have confirmed that Singleton disposed of the gun and may have convinced the jury that Singleton was indeed one of the crime's two participants, but that would not disprove Taylor's participation with him in this criminal venture.

2. The second affidavit.

The second affidavit was sworn out December 22, 2015, by someone claiming that Singleton told him or her in the fall of 2013 that "he had 'gotten away with' a more serious crime." (A-App. 53.) The affiant added that Singleton "did volunteer that the more serious crime was a shooting," someone was "killed" and someone else "was being or had been prosecuted for the crime." (A-App. 54.)

This affidavit does nothing to disprove Taylor's guilt. Like the other affidavit, the first obvious question is why the affiant waited over two years to report this supposed conversation during which Singleton admitted to a murder for which a supposedly innocent man was prosecuted. As the trial court held, Singleton may have been referring to his participation in a shooting other than the one on July 11, 2013. Even assuming it referred to the shooting in this case, this affidavit, like the first one, only tends to prove that Singleton was a participant with Taylor in the shooting. At

best, it shows that, unlike Taylor, Singleton got away with the shooting that *they both committed as parties to the crime*.

II. The trial court correctly held that Taylor failed to prove his trial attorney's performance was deficient and prejudicial.

Taylor argues that his trial attorney was ineffective for deciding against putting on any defense witnesses. Taylor maintains that counsel should have called several individuals to testify that they did not see him wearing the black hoodie sweatshirt at various points before and after the shootings. Taylor also maintains that counsel should have called Terry Singleton as a defense witness.

Taylor next argues that his trial attorney was ineffective for not moving pretrial to suppress the out-of-court eyewitness identifications of him as the shooter made by Bachman and McClendon.

The trial court properly rejected these challenges without an evidentiary hearing because the record, as supplemented by the documentary evidence and briefs submitted by the parties, conclusively shows that counsel's performance was neither deficient nor prejudicial. Taylor is simply second-guessing counsel's sound strategy, something the law does not allow him to do.

A. The applicable law and standard for review of a challenge to the effectiveness of trial counsel.

1. Review of the trial court's discretionary decision to deny Taylor's postconviction motion without an evidentiary hearing.

The sufficiency of a postconviction motion to require an evidentiary hearing is a question of law to be reviewed by this Court de novo. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

To be sufficient to warrant further evidentiary inquiry, the postconviction motion must allege material facts that are significant or essential to the issues at hand. *State v. Allen*, 2004 WI 106, ¶ 22, 274 Wis. 2d 568, 682 N.W.2d 433. Taylor had to specifically allege within the four corners of his motions material facts that answer the questions who, what, when, where, why and how he would successfully prove at an evidentiary hearing that he is entitled to a new trial based on the ineffective assistance of trial counsel: "the five 'w's' and one 'h'" test. *Allen,* 274 Wis. 2d 568, ¶ 23. *See Balliette,* 336 Wis. 2d 358, ¶ 59; *Love*, 284 Wis. 2d 111, ¶ 27.

If the motion is insufficient on its face, presents only conclusory allegations, or *even if facially sufficient* the record conclusively shows that Taylor is not entitled to relief, the trial court may in the exercise of its sound discretion deny the motion without an evidentiary hearing, subject to deferential appellate review. *Balliette,* 336 Wis. 2d 358, ¶¶ 50, 56-59; *Allen,* 274 Wis. 2d 568, ¶¶ 9, 12; *State v. Bentley,* 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996); *Nelson v. State,* 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

This specificity requirement promotes "the policy favoring finality, the pleading and proof burdens that have shifted to the defendant in most situations after conviction, and the need to minimize time-consuming postconviction hearings unless there is a clearly articulated justification for them." *Balliette,* 336 Wis. 2d 358, ¶ 58.

2. Taylor's burden to sufficiently allege and prove both deficient performance and prejudice.

Taylor would bear the burden of proving at an evidentiary hearing that the performance of his trial counsel was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

On review of an ineffective assistance of counsel challenge, this Court is presented with a mixed question of law and fact. The trial court's findings of historical fact and credibility determinations will not be disturbed unless they are clearly erroneous. *See* Wis. Stat. § 805.17(2). The ultimate determinations based upon those findings of fact and credibility determinations—whether counsel's performance was constitutionally deficient and prejudicial—are questions of law subject to independent review in this Court. *State v. Trawitzki,* 2001 WI 77, ¶ 19, 244 Wis. 2d 523, 628 N.W.2d 801; *Johnson*, 153 Wis. 2d at 127-28.

To prove deficient performance, Taylor would have to overcome a strong presumption that counsel acted reasonably within professional norms. *Strickland,* 466 U.S. at 690; *Trawitzki,* 244 Wis. 2d 523, ¶ 40; *Johnson*, 153 Wis. 2d at 127. There is a strong presumption that counsel exercised reasonable professional judgment, and that counsel's decisions were based on sound trial strategy. *State*

v. Maloney, 2005 WI 74, ¶ 43, 281 Wis. 2d 595, 698 N.W.2d 583; *State v. Marty*, 137 Wis. 2d 352, 360, 404 N.W.2d 120 (Ct. App. 1987). *See Eckstein v. Kingston,* 460 F.3d 844, 848-49 (7th Cir. 2006). Decisions that fall "squarely within the realm of strategic choice" are not reviewable under *Strickland. United States v. Cieslowski,* 410 F.3d 353, 361 (7th Cir. 2005). *See Knowles v. Mirzayance,* 556 U.S. 111, 124 (2009). "Strategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer,* 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland,* 466 U.S. at 690).

This Court is not to evaluate counsel's conduct in hindsight, but must make every effort to evaluate it from counsel's perspective at the time. *McAfee,* 589 F.3d at 356. Taylor was not entitled to error-free representation. Trial counsel need not even be very good to be deemed constitutionally adequate. *McAfee,* 589 F.3d at 355-56. *See State v. Wright*, 2003 WI App, ¶ 28, 268 Wis. 2d 694, 673 N.W.2d 386. Ordinarily, a defendant does not prevail unless he proves counsel's performance sunk to the level of professional malpractice. *Maloney*, 281 Wis. 2d 595, ¶ 23 n.11.

With regard to the issue of actual prejudice, Taylor would have to prove that counsel's errors were so serious they deprived him of a fair trial, a trial whose result is reliable. *Johnson*, 153 Wis. 2d at 127. He would have to prove a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. *McAfee,* 589 F.3d at 357. *See Trawitzki,* 244 Wis. 2d 523, ¶ 40; *Johnson*, 153 Wis. 2d at 129. Taylor cannot just speculate. He must affirmatively prove prejudice. *Allen*, 274 Wis. 2d 568, ¶ 26. "The likelihood of a different outcome 'must be substantial,

not just conceivable.' [*Harrington v.*] *Richter*, 131 S. Ct. at 792." *Campbell v. Smith*, 770 F.3d 540, 549 (7th Cir. 2014).

Trial counsel is not ineffective for failing to interpose meritless objections or for not pursuing meritless challenges at trial. *See State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987); *State v. Berggren,* 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110.

The court need not address both the deficient performance and prejudice components if Taylor failed to make a sufficient showing as to either one of them. *State v. Mayo,* 2007 WI 78, ¶ 61, 301 Wis. 2d 642, 734 N.W.2d 115.

> "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky,* 559 U.S. 356, 371, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland,* 466 U.S., at 689-90, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one.

Harrington v. Richter, 562 U.S. 86, 105 (2011).

B. Taylor failed to sufficiently allege deficient performance and prejudice regarding trial counsel's decision not to call any witnesses in his defense.

Taylor accuses trial counsel of incompetence for not calling "any witnesses – not a single one" in his defense. (Taylor's Br. 33.) Taylor was certainly free to testify in his own defense that he was shot in the crossfire and did not wear the "Grumpy" sweatshirt that night. He voluntarily

and intelligently decided, however, not to testify. (70:188-91.) Taylor does not challenge counsel's performance regarding his decision not to testify in his own defense.

1. Counsel's decision not to call witnesses who would testify that Taylor did not wear the "Grumpy" sweatshirt before and after the shooting.

Taylor offers the statements of a number of friends and associates to the effect that he was not seen wearing the "Grumpy" hoodie sweatshirt at various times before and after the shooting. (Taylor's Br. 33-34.) He maintains that counsel was incompetent for not calling any of them in his defense.

None of those people witnessed the shooting. They did not know what Taylor was wearing *at the moment he shot Contreras and Bachman.* Their statements do nothing to soften the severe blow of the undisputed evidence that someone hid the "Grumpy" sweatshirt soaked in Taylor's fresh blood in the corner of the basement of the house where he sought refuge. Those who were at the house after the shooting and treated Taylor did not see him in the blood-soaked sweatshirt likely because he took it off as he entered the front door and someone hid it for him in the basement.

Taylor argues that the sweatshirt "had no evidentiary value in its own right" because the presence of Taylor's blood on it "merely proves that Taylor was shot." (Taylor's Br. 34.) If so, then his argument is much ado about nothing. If the jury believed that Taylor was an innocent bystander caught in the crossfire, he was not guilty regardless of whether he wore the sweatshirt, another sweatshirt, a T-shirt, or no shirt.

But, obviously, the sweatshirt had great evidentiary significance. Taylor's hindsight criticism of trial counsel's strategy fails to account for the two eyewitnesses who testified that the shooter wore this or a similar sweatshirt, or for the person who hid the "Grumpy" sweatshirt in the basement of the house away from the other bloody clothing found in the living room upstairs where Taylor was receiving first aid.[2] Bachman identified the "Grumpy" sweatshirt found in the basement and introduced at trial as "exactly like" the one worn by the shooter. (69:59-60.)

Taylor claims that the sweatshirt may have been inside the house when he arrived and was used by the others to treat his wounds. (Taylor's Br. 35.) But none of his witnesses were prepared to so testify. His theory does not explain why someone (perhaps Singleton) would hide the bloody sweatshirt in the basement, while the other clothing used to treat his wounds remained in the living room upstairs. Moreover, a cumbersome sweatshirt would make for a bad tourniquet or bandage.

The State also would have turned these supposedly exculpatory statements of his friends and associates against Taylor at trial. It would have pointed out that several said they saw Taylor wearing the "Grumpy" sweatshirt on various occasions before the shooting. One person who was at the house when Taylor burst in after the shooting had seen the "Grumpy" sweatshirt in the house a day or two earlier, first saw it months before, and "has also seen TAYLOR wearing that same sweatshirt in the past as well."

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[2] Taylor gave police two different accounts of his "cross-fire" story. At first, Taylor said he did not see who shot him. Later, Taylor told police he saw two men wearing black hoodies approach a car, say something about pills and fire into the car. (*See* A-App. 59.)

(60, Ex. D:2.) Another person present in the house told police Taylor was known "to wear a black hooded sweatshirt with the 'Grumpy' logo design" and the person last saw Taylor wearing it "approximately one week ago." (60, Ex. F:2.) This witness also admitted to possibly hiding the sweatshirt for Taylor, but could not recall for sure. (*Id.*)

Counsel wisely steered clear of putting on such dubious evidence. Five of the people in the house said Taylor was shirtless and wearing white shorts when he burst into the house wounded. (60, Ex. C:2, Ex. E:2, Ex. F:2, Ex. G:1, Ex. H:2, Ex. I:2.) No one described the two assailants as shirtless, but Bachman told police that the shooter wore white shorts. (60, Ex. Q:2, Ex. T:4, Ex. U:3.) Taylor likely entered the house shirtless because he pulled off the bloody sweatshirt as he entered the house and told someone to hide it. There is no reasonable probability of an acquittal had these people been called to testify that they did not see Taylor wearing the "Grumpy" sweatshirt before or after the shooting, but he was known to wear it on other occasions, and he wore white shorts that night just as Bachman said the shooter wore.

2. Counsel's decision not to call State's witness Terry Singleton as a defense witness.

Terry Singleton was listed as a witness for the State. (68:4.) Singleton gave a statement to police to the effect that he heard shots and came upon the wounded Taylor lying in the street with a gun next to him. Singleton said he helped Taylor through the alley to the nearby house, disposing of Taylor's gun in a trash bin along the way. (60, Ex. N:1-2; 67:18.) The State did not call Singleton. Taylor claims that his attorney was incompetent for not calling Singleton as a defense witness. Taylor did not in his motion proffer

anything from Singleton as to what his testimony (if any) would have been.

Taylor apparently believes that, if called in the defense case, Singleton would have admitted his own guilt and exonerated Taylor. Taylor does not explain why, if called for that purpose, Singleton would not have exercised his Fifth Amendment privilege against self-incrimination. Taylor indeed concedes in his brief that "as expected" Singleton would likely refuse to testify. (Taylor's Br. 24.)

If Singleton for some reason decided to confess to murder, his testimony would presumably have been similar to his pretrial statement placing the wounded Taylor at the scene with a gun lying next to him, and helping Taylor flee through the alley where Singleton disposed of Taylor's gun in the trash bin. That testimony would have inculpated Taylor as a party to the crime with Singleton.

In the unlikely event that Singleton would take the stand and confess that he fired the shots, his testimony would still not disprove Taylor's participation as a party to the shootings. Two men accosted the victims. One wore a black hoodie sweatshirt with red and white writing on the front. Taylor was at the scene and was shot as he tried to flee. The black hoodie sweatshirt with "Grumpy" in red and white letters on the front and soaked with Taylor's blood was found shortly thereafter hidden in the basement of the house where he and Singleton fled. The prosecutor would have brought out on cross-examination Singleton's statement to police that he found a gun in the street next to the wounded Taylor, making it likely that *both men were armed* when they confronted the victims and both may have fired at them. Indeed, eyewitness Bachman testified at trial that both assailants brandished guns and fired shots. (69:72-74; *see* 60, Ex. Q:2.) Singleton's confession to being the shooter,

or one of the two shooters, would not have helped Taylor. In the unlikely event he decided to testify, Singleton would likely have pointed the finger away from himself and at Taylor, naming him as either the shooter or his cohort in the shooting.

In the likely event that Singleton would not testify, the hearsay account of his admission to the second affiant would be inadmissible because it would not exculpate Taylor as a party to the crime, as the trial court held. (56:6-7, A-App. 8-9.) Wis. Stat. § 908.045(4) (self-inculpatory hearsay statements by an unavailable declarant such as Singleton are admissible if they expose the declarant to criminal liability, are corroborated and are "offered to exculpate the accused"). *See State v. Guerard,* 2004 WI 85, ¶¶ 33, 36-39, 273 Wis. 2d 250, 682 N.W.2d 12 (Guerard testified that he was not present during a home invasion and assault committed by his brother, Daniel. In separate detailed hearsay statements Daniel told his sister and a defense investigator that he (Daniel) committed the crimes and Guerard was not involved at all.). *See id.* ¶ 36 ("[W]e conclude that Daniel's out-of-court statements inculpating himself *and exculpating Guerard* in the commission of the charged offenses are corroborated and therefore admissible.") (emphasis added).

Defense counsel had plenty with which to deflect blame away from his client and onto the absent Singleton without venturing into the unknown by calling Singleton as a witness. Counsel used the undisputed proof that only Singleton's fingerprint was recovered from the gun (70:12-17, 27-28), to argue that the uncharged Singleton was the culprit (68:150-51; 70:228, 233-34). Counsel did so while adroitly keeping out Singleton's statement inculpating Taylor. (67:18.) Counsel performed admirably in trying to deflect blame onto Singleton. There is no reasonable

probability of a different outcome had counsel called Singleton as a defense witness to either plead the Fifth or point his finger at Taylor, whether or not Singleton admitted his own guilt.

Finally, as the trial court noted, Taylor offered nothing from Singleton to show what his testimony would have been either at a postconviction hearing or at a trial. "No affidavit from Terry Singleton has been filed taking responsibility for the shootings. Without an affidavit from Terry Singleton, the court is presented with nothing but hearsay." (56:6, A-App. 8.) Taylor can only speculate. Taylor is not entitled to a postconviction evidentiary "fishing expedition" to call Singleton and find out whether his speculation is correct. "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 (emphasis in original). The trial court properly held that Taylor's motion was insufficient to merit an evidentiary hearing.

C. Taylor failed to prove deficient performance and prejudice arising out of trial counsel's decision not to move to suppress the out-of-court identifications of him made by the two eyewitnesses.

Taylor claims trial counsel was incompetent for not filing a pretrial motion to suppress the eyewitness identifications of him made in separate police photo arrays by the two eyewitnesses, Bachman and McClendon.

1. The relevant facts.

McClendon positively identified Taylor in a "double blind" six-person police photo array with two additional

blank folders later the day of the shootings, July 11, 2013. (48, Ex. 12:1; 69:31-32, 35-36; 70:72-82.) She also positively identified Taylor in court as the shooter who wore the black hoodie sweatshirt with writing on the front. (69:39.) Anthony Bachman positively identified Taylor in another police photo array the day after the shootings (July 12) while in the hospital recuperating from his wound. He identified Taylor's photo as that of the shooter who wore the black hoodie sweatshirt with red writing on it. This, too, was a "double blind" six-person photo array with two additional blank folders. (60, Ex. A; 69:67-68, 141-152.) Bachman also positively identified Taylor in court as the shooter who wore the hoodie sweatshirt. (69:65-66.)

2. The law regarding the admissibility of eyewitness identifications made during police-initiated identification procedures.

Any time photos are shown to witnesses; there is necessarily some suggestion that police believe the perpetrator is one of the persons arrayed. *See State v. Isham,* 70 Wis. 2d 718, 725-26, 235 N.W.2d 506 (1975); *Fells v. State,* 65 Wis. 2d 525, 538, 223 N.W.2d 507 (1974). *See also Stovall v. Denno*, 388 U.S. 293 (1967) (upholding a one-man photo lineup). Cross-examination—not exclusion—is generally the tool for challenging a photo array on the ground that the procedure was suggestive. *Simmons v. United States,* 390 U.S. 377, 384 (1968).

To have Bachman's and McClendon's photo identifications excluded from evidence, Taylor would have to prove at a suppression hearing that the out-of-court identification procedures were "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons,* 390 U.S. at 384; *Gregory-Bey v. Hanks*, 332 F.3d 1036, 1044 (7th Cir. 2003). *See State v.*

Benton, 2001 WI App 81, ¶ 5, 243 Wis. 2d 54, 625 N.W.2d 923. When considering a due process challenge to the admissibility of the identification evidence, the court considers the totality of the circumstances surrounding the eyewitness identification procedure. *Stovall*, 388 U.S. at 302.

Taylor would have to prove at a suppression hearing that the police procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Simmons,* 390 U.S. at 384 (1968). Even if Taylor proves impermissible suggestiveness, he does not automatically prevail. The burden would then shift to the state to demonstrate that the identification was reliable under the totality of the circumstances even assuming the procedure was suggestive. *Manson v. Brathwaite*, 432 U.S. 98, 106 (1977), citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972). In assessing whether the identification was reliable despite a suggestive procedure, the court considers the following factors:

> (1) the opportunity of the witness to view the criminal at the time of the crime,
>
> (2) the witness' degree of attention,
>
> (3) the accuracy of his prior description of the criminal,
>
> (4) the level of certainty demonstrated at the confrontation, and
>
> (5) the time between the crime and the confrontation.

Manson, 432 U.S. at 114, citing *Neil*, 409 U.S. at 199-200. *See State v. Dubose,* 2005 WI 126, ¶ 24, 285 Wis. 2d 143, 699 N.W.2d 582.

Even when a defendant proves unnecessary suggestiveness, and even if the State then fails to meet its burden of proving that the out-of-court identification was nonetheless reliable under the totality of the circumstances, the identifications of the perpetrator made by the witnesses at trial may still stand if the state proves that the in-court identifications were independent and free of any taint from the unconstitutional out-of-court identification procedure. *Dubose,* 285 Wis. 2d 143, ¶ 38; *United States v. Wade*, 388 U.S. 218, 240-42 (1967); *United States v. Crews*, 445 U.S. 463, 473 (1980).

3. There was no basis to challenge the photo arrays because Taylor cannot prove they were impermissibly suggestive, the State would have proven the out-of-court identifications were reliable despite any suggestiveness in the procedure, and the in-court identifications were independent of any taint caused by the out-of-court procedures.

a. The photo arrays were not impermissibly suggestive.

It was reasonable for trial counsel to decide against filing a pretrial motion to suppress the photo identification testimony because it would have failed. The photo arrays shown to Bachman and McClendon simply did not "'give rise to a very substantial likelihood of irreparable misidentification.'" *Dubose,* 285 Wis. 2d 143, ¶ 22 (quoting *Simmons,* 390 U.S. at 384). Taylor has not sufficiently alleged, and he would not have proven at a suppression hearing, that the photo arrays were impermissibly suggestive. Police went out of their way to make sure they did not suggest Taylor's identity to the eyewitnesses.

Milwaukee Detectives Mueller and Villarreal showed the array to Bachman at Froedtert Hospital one day after the shooting, July 12, 2013. Although Taylor's photo was included because he was the "target" of the array, his photo was placed inside a folder, as were the photos of five "filler" but similar-appearing men chosen by a computer program. Two more blank folders were added at the end in what is called a "double blind" array. The six folders with the photos of Taylor and the five "fillers" were then shuffled so that the officers did not know where in the order Taylor's photo would appear. The two blank folders were placed at the end. (69:143-147.) Bachman had a physiological reaction when he came to folder four and said, "This looks like the guy that was out there" closest to the car. Taylor's photo was inside folder four. Bachman then circled four as his assailant underneath Taylor's photo on the Milwaukee Police Department standard form. (69:150-52.)

Milwaukee Detective Goldberg showed a photo array to McClendon later the day of the shooting, again with Taylor as the "target." This was another "double blind" array consisting of one folder containing Taylor's photo, five folders containing the photos of similar-appearing "fillers," and two blank folders at the end. The six folders containing actual photos were shuffled so that no one knew where in the order Taylor's photo would appear. (70:72-75, 77-78.)

Detective Goldberg described McClendon as distracted and reluctant to view the array. She seemed frightened. (70:76, 110.) McClendon nonetheless went through the array twice. The first time, she stopped at photo two and said he "kind of resembled" the person who shot into the car. She stopped at photo five and said the same thing. McClendon did not the first time through circle either "yes" or "no" under photo two or five. (70:79.)

At her request, McClendon was allowed to view the array a second time. Again, she stopped at photo two and said he resembled the shooter. (70:79.) Goldberg denied McClendon's request to view the array a third time. (70:79-80.) She then circled "yes" under two identifying that man as the shooter, and circled "no" under five. Goldberg said he did not know whose photo was inside folder two. It was Taylor's photo. (70:81-82.) Goldberg testified on cross-examination that he told McClendon the second time she viewed the array that if she was not sure as to either two or five, she should circle "no" underneath them. (70:93, 107.)

Both Bachman and McClendon later viewed live police lineups with Singleton as the "target" to determine whether he was the second assailant. Both failed to positively identify Singleton. (70:114-119.)

"A lineup or photo array is generally fairer than a showup because it distributes the probability of identification among the number of persons arrayed, thus reducing the risk of a misidentification." *Dubose,* 285 Wis. 2d 143, ¶ 33.

Taylor does not argue that the six photos were in themselves suggestive of his identification. The photo identification procedure employed by police was also not suggestive. It is in fact the recommended best practice for police investigators to avoid misidentification. *See Model Policy and Procedure for Eyewitness Identification,* Wisconsin Department of Justice Bureau of Training and Standard for Criminal Justice (2010), available at https://www.doj.state.wi.us/sites/default/files/2009news/eyewitness-public-20091105.pdf, at 2-17 (last visited Sept. 16, 2016). The photo arrays were also recorded, enabling judicial

review to ensure that proper non-suggestive procedures were followed. (48, Ex. 12; 60, Ex. A.)[3]

b. The out-of-court identifications were reliable.

Even assuming some impermissible suggestiveness, the photo arrays produced identifications of Taylor that were reliable under the totality of the circumstances. (*See* A-App. 75-76.) *See Manson,* 432 U.S. at 114; *Dubose,* 285 Wis. 2d 143, ¶ 24. Application of the five factors adopted by the Court in *Manson* proves the reliability of their out-of-court identifications:

1. Both Bachman and McClendon, seated respectively in the driver's seat and the rear seat, had ample opportunity to observe the slender, clean shaven man in the black hoodie sweatshirt at close range on this "well lit" city street for an extended period of time as Contreras and the man negotiated the drug deal through the passenger window for several minutes before shots rang out. (69:23-28, 42-43, 54-62, *see* A-App. 86.)

[3] Allowing McClendon to review the array a second time *at her request* was not impermissible. *See Model Policy and Procedure for Eyewitness Identification,* at 11 ("Only upon request of the witness, the witness may view one or more of the photos again after the first photo procedure has been completed."). The involvement of investigating officers in presenting the array is not ideal, but does not render it suggestive. *See id.* at 13 (in those situations where "it may be difficult to have an independent administrator conduct the array. . . . the investigating officer may conduct the array, but only with safeguards to ensure that he/she is not in a position to unintentionally influence the witness's selection."). In all other respects, the recommended best practices were followed in both arrays almost to the letter here. *See id.* at 13-16.

2. Their attention was focused sharply on the negotiations between Contreras and the man in the sweatshirt, especially as the two men began to argue back and forth about whether the man should show Contreras the pills before Contreras would give him the $300 that Contreras held in his hand.

3. Their prior descriptions to police of the assailant were not perfect, but both Bachman and McClendon described in detail the black hoodie sweatshirt with red and white writing on it worn by the shooter. Bachman gave an accurate general description of Taylor. His height and weight description of the gunman approximated Taylor's height and weight.[4] Bachman also accurately described Taylor as clean shaven with short, natural hair. McClendon's height and weight description was less accurate, but she accurately described him as slender with short hair. Both accurately described the gunman's sweatshirt with red and white writing on it. Finally, any discrepancies in their descriptions of the gunman's height and weight do not render the photo identifications unreliable

[4] According to a police report, "BACHMAN was able to provide a description of the subjects. Subject #1 was described as a black male, unknown age, medium complexion with a skinny build. He further stated he was about 6'00, and weighed approximately 130-140 lbs. He stated that he had clean-cut short hair and not facial hair. He described the subject as wearing a black pullover hooded sweatshirt with red writing on it, and white shorts. He further stated that this subject was armed with an unknown type of handgun. Subject #2 was described as a black male, unknown age, light complexion with a medium build. He further stated he was about 5'10 and weighed approximately 160 lbs. He stated that this subject had braids that possibly went past his ears. He described him as wearing a plain white t-shirt and plain white shorts. He also stated that this subject was also armed with an unknown type of handgun." (60, Ex Q:2.)

because the photo arrays showed only the faces of Taylor and the five fillers, not their full bodies.

4. Their identifications of the shooter during the arrays were quite certain. Both Bachman and McClendon were certain that two men were involved and the shooter who approached the car wore a black hoodie sweatshirt with writing on it. Bachman immediately said that Taylor's photo "looks like the shooter." McClendon was reluctant to view the array and seemed distracted, but once she focused on the task at hand, McClendon picked out Taylor's photo (folder two) as resembling the shooter in the sweatshirt not once but twice. When told by the detective to circle "no" unless she was sure, McClendon circled "yes" under Taylor's photo, and "no" under the other photo that initially gave her pause (folder five).

5. The identifications were made by both witnesses while the events were still fresh in their minds. McClendon viewed the array the same day as the shooting and Bachman viewed his array the next day.

c. The in-court identifications of Taylor at trial were free of any taint of suggestive out-of-court identification procedures.

Even assuming some impermissible suggestiveness in the arrays, the in-court testimony under oath by both Bachman and McClendon identifying Taylor at trial as the shooter was independent of any taint.

As discussed above, both Bachman and McClendon had ample opportunity from inside the car to view the gunman in the black hoodie sweatshirt as he negotiated with Contreras at the passenger window for several minutes. The gunman left ostensibly to get the pills, but returned only to

argue with Contreras about the drug deal before opening fire into the car. Their attention was drawn to Taylor for the entire time he and Contreras discussed the deal, especially once they began to argue. They accurately described his slender build, clean shaven appearance and short hair. They accurately described the hoodie sweatshirt he wore. There was no hesitation in their identifications of Taylor at trial. Those in-court identifications of Taylor as the shooter were rooted in the traumatic July 11 incident and were not tainted by the photo arrays shown to them later that day (McClendon) or the next (Bachman).

Taylor complains that his attorney was incompetent in not moving to suppress the out-of-court identifications because discrepancies in Bachman's and McClendon's descriptions of the shooter's height and weight (especially McClendon's) rendered their out-of-court identifications inadmissible as a matter of law. He is wrong.

The way to handle allegedly unreliable evidence such as this is not to exclude it, but to use the tools of the adversary system such as the assistance of defense counsel, confrontation and cross-examination, compulsory process, the presentation of evidence, and the presumption of innocence. *Perry v. New Hampshire,* 132 S. Ct. 716, 726-30 (2012); *United States v. Correa-Osorio,* 784 F.3d 11, 20 (1st Cir. 2015). The identification evidence is only to be excluded when its admission "is so extremely unfair that its admission violates fundamental conceptions of justice." *Perry,* 132 S. Ct. at 723 (quoted source omitted), quoted in *Lee v. Foster,* 750 F.3d 687, 691 (7th Cir. 2014). As the Seventh Circuit Court of Appeals explained in *Lee,* 750 F.3d at 691-92, assessing the accuracy and reliability of eyewitness identification testimony is a matter within the province of the jury. "Certainly [Bachman's and McClendon's] testimony was not received without some

flaws, as is most evidence that is properly examined, but these are issues for the jury to decide in weighing any questionable discrepancies." *Id.* at 692, citing *Manson,* 432 U.S. at 116.

The identification evidence, both in-court and out-of-court, was reliable and admissible. Trial counsel was not ineffective for deciding against filing what would have been a meritless suppression motion.

CONCLUSION

Therefore, the State of Wisconsin requests that the judgment of conviction and order denying postconviction relief be affirmed.

Dated: September 26, 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 8,295 words.

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

I hereby certify that:

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

I further certify that:

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: September 26, 2016.

_____
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