STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP2058-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PETER J. HANSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A POSTCONVICTION MOTION, BOTH ENTERED IN THE OCONTO COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL T. JUDGE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539
(608) 266-9594 (Fax)
rosenowse@doj.state.wi.us

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ISSUES PRESENTED

1. Did the State comply with Peter Hanson's constitutional right to confrontation when, at trial, it introduced Hanson's testimony from a John Doe hearing?

The circuit court determined that the testimony was not hearsay.

2. Did Hanson fail to establish that his trial counsel provided ineffective assistance by not calling witnesses to testify and by not objecting on *Miranda*[1] grounds to the State's introduction of Hanson's John Doe testimony?

The circuit court determined that counsel was effective.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

INTRODUCTION

Hanson wants this Court to reverse his conviction for first-degree intentional homicide as a party to the crime and grant him a new trial. Chad McLean was murdered in 1998. The murder investigation went cold for years. In 2012, the

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Oconto County Circuit Court held a John Doe hearing on the murder. Hanson testified. The State charged Hanson with the murder in March 2013. Hanson had a jury trial in December 2013. At trial, the State introduced Hanson's John Doe testimony. Hanson objected on confrontation grounds to a portion of the testimony about his wife. The circuit court overruled the objection. Hanson did not call any witnesses to testify. The jury found him guilty as charged.

Hanson is not entitled to a new trial. The State did not violate his right to confrontation at trial by introducing his John Doe testimony about his wife. Alternatively, the alleged error was harmless. Further, Hanson's trial counsel provided effective assistance by not objecting to that testimony on *Miranda* grounds and by not calling witnesses to testify.

STATEMENT OF THE CASE

I. Factual background.

In February 1998, Chad McLean—a slender, blonde-haired, blue-eyed nineteen year old—lived and worked in Green Bay. (R. 43:87, 93–94.) He had a factory job at Wisconsin Converting, which he loved. (R. 43:87, 90.) He had a perfect attendance record, for which he was going to receive a bonus. (R. 43:90, 130, 141.)

McLean did not have a car or driver license because he preferred to walk and bike. (R. 43:91–93, 130, 139.) He sometimes called his roommates and mother for rides, and they were willing to pick him up. (R. 43:95–96, 123–24, 131.) He rode to work with his mother's friend, who worked with him. (R. 43:138.)

Cory Byng met McLean at age 12 or 13 and they became close friends. (R. 43:194.) They eventually grew apart but became reacquainted when they ran into each other at a billiards hall in early 1998. (R. 43:195–96.) They made plans to take a road trip to the Machickanee Forest in Oconto County to go fishing. (R. 43:197.)

On Sunday, February 22, 1998, Byng picked up McLean around noon and they went to the Machickanee Forest. (R. 43:197–98.) They talked to some people who were fishing and drank beer for about an hour. (R. 43:200.) Byng was 22 at the time. (R. 43:196.)

Byng and McLean then made a surprise visit to Byng's aunt and uncle, Debbie and Billy Byng, who lived in the Town of Abrams in Oconto County. (R. 39:240, 243, 245; 43:201.) McLean had never met Debbie and Billy before. (R. 39:243, 279.) McLean and the Byngs talked, drank beer, and ate food. (R. 39:246, 276, 278.)

Later in the day, Peter Hanson and his friend Chuck Mlados—who went by the nickname "Animal"—unexpectedly arrived at Billy and Debbie Byng's house. (R. 39:249, 280–81.) Billy and Hanson had been friends for 25 years. (R. 39:288.) McLean, Hanson, Mlados, and Cory drank beer into the evening. (R. 39:250.)

In the evening, McLean and Cory said that they were going to go home to Green Bay because they had to work the next day. (R. 39:251; 43:218, 267.) When Cory backed his truck down the driveway, he drove into a ditch and got stuck. (R. 39:252; 43:221.) McLean and Cory got out of the truck and wrestled around briefly until Billy broke them up, and nobody got hurt. (R. 39:253; 43:222.) Billy took Cory's keys and refused to let him drive home. (R. 39:253; 43:222–23.) Cory decided to stay the night at Debbie's insistence. (R.

39:254; 43:227–28.) Cory eventually fell asleep on Billy and Debbie's kitchen floor, where he stayed all night. (R. 39:254–55, 258; 43:230.)

McLean planned to ride back to Green Bay with Mlados, who lived near McLean. (R. 39:255–56.) Around 9:30 or 10:00 p.m., McLean, Mlados, and Hanson got into a pickup truck and left the Byng residence. (R. 39:256–57, 279, 282; 43:184, 267.) They headed west toward Hanson's house to get Mlados' pickup truck. (R. 39:283; 43:184, 267.)

One of Hanson's neighbors, Sharon Olson, heard two or three gunshots that same night, shortly after 10:00 p.m. (R. 39:196–98.) The gunshots came from the east. (R. 39:197.) Hanson's house was to the east, immediately adjacent to Olson's house. (R. 39:195.) Olson did not hear any other gunshots that night. (R. 39:198.)

McLean was not at home the next morning, Monday, February 23, when his carpooling coworker arrived. (R. 43:143–46.) Before, McLean had always been ready to leave for work when his carpool arrived. (R. 43:140.) McLean was not home on Tuesday or Wednesday morning either, so his coworker called his mother to see why he had not been at work for three days. (R. 43:144.) McLean had no history of hitchhiking or disappearing for days. (R. 43:96, 126, 133.) McLean's mother reported him missing to the police, and many of his friends and relatives began looking for him but did not see him anywhere. (43:101–03.) McLean's mother and roommates never saw him alive after Sunday, February 22, 1998. (R. 43:100, 125, 134.)

Before McLean disappeared, Hanson had a lot of social activity at his house, including target practice with guns in his backyard. (R. 39:210–12, 302–03.) But after police started investigating McLean's disappearance, "it became

very quiet" at Hanson's household. (R. 39:222.) The gunshots and parties "came to a screeching halt." (R. 39:222; *see also* R. 39:307.) Before McLean went missing, Mlados used to occasionally visit Hanson's house, mainly on weekends. (R. 39:223–24.) But after McLean disappeared, Mlados visited Hanson's house much more often, including weeknights. (R. 39:223–24, 228.)

On Sunday, March 22, 1998, a woman who was walking her dog found McLean's body floating in the Pensaukee River in the Town of Abrams, near the Sandalwood Road bridge. (R. 40:100–04; 43:279–80.) McLean's body was found about a two-minute drive, or 1.3 miles, from Hanson's home. (R. 43:280, 309–10.) The Pensaukee River bordered the end of Hanson's property. (R. 43:281, 310.) When McLean's body was found, he was wearing jeans and a plaid shirt or jacket—the same clothes he was wearing when he disappeared on February 22. (R. 39:8; 40:103–04; 43:125, 217.) McLean had 15 cents on him when his body was found, although he had paychecks waiting for him at work. (R. 39:66; 43:144.)

McLean's head had four gunshot-entrance wounds and one exit wound. (R. 39:71–73.) The entrance wounds were evenly spaced in a straight line. (R. 39:71; 40:214.) The doctor who performed an autopsy on McLean found this gunshot-wound pattern "[e]xtremely atypical." (R. 39:71.) It was "much more consistent" with being shot by a fully-automatic gun.[2] (R. 39:71.) A detective who was present at the autopsy felt the same way. (R. 40:214–15.)

[2] A fully-automatic gun can fire multiple rounds of ammunition (e.g., bullets) by pulling the trigger once and holding it down. (R. 40:217–18.)

The gunshot wounds to McLean's head were consistent with a smaller caliber gun, such as .22 caliber. (R. 39:76–77.) During the autopsy, the doctor recovered three metal fragments from McLean's head. (R. 39:79; 43:288.) Law enforcement provided the fragments to the state crime laboratory. (R. 43:288–89, 296.) The laboratory determined that the fragments were from fired .22 caliber bullets. (R. 40:74–75; *see also* R. 43:296–97.) The doctor was unaware of any .22 caliber weapons that are manufactured to fire fully automatic. (R. 39:80.) The doctor had never worked on any other case where he thought that a fully automatic .22 caliber weapon was involved. (R. 39:81.) Fully-automatic guns are legally restricted and rare outside of the military, and they usually are not .22 caliber. (R. 40:216.)

Although fully-automatic .22 caliber rifles are very rare, Hanson possessed one. Hanson had bragged to Billy Byng "a few times" about modifying his .22 caliber rifle to fire fully automatic. (R. 39:272.) Hanson's neighbor Paul Terry had seen Hanson fire a .22 caliber rifle that Hanson modified to fire fully automatic. (R. 39:215–17.) Hanson admitted to a detective that he used to own a .22 caliber gun and that he had access to a friend's modified, fully-automatic .22 caliber rifle. (R. 43:292.) Police executed a search warrant at Hanson's property, and they recovered an empty box of .22 caliber ammunition from his storage shed as well as spent .22 caliber shell casings and fired .22 caliber bullets from the yard. (R. 43:289, 293–94.)

Hanson told a detective that Mlados had initially planned to drive McLean home to Green Bay, but they instead decided to drop off McLean at the Hi-Way Restaurant because there was dense fog. (R. 43:266–67.) The Hi-Way Restaurant, which closed in 2005, was located along Highway 41 in the Town of Abrams and consisted of a restaurant and gas station convenience store. (R. 39:104–07,

124, 181.) Hanson told the detective that when he decided to drop off McLean at the Hi-Way Restaurant, he turned around in the first driveway past the Byng house. (R. 43:185.) But Billy Byng remained outside for a couple minutes after Hanson left, and he did not see Hanson's truck turn around. (R. 39:283–84.) Hanson's house was less than a mile and less than a two-minute drive from Billy Byng's house. (R. 43:280, 307–08.)

Hanson also told a detective that he and Mlados did not enter the Hi-Way Restaurant when they dropped off McLean there. (R. 43:267–68.) The detective told Hanson that surveillance-camera footage showed him and Mlados inside of the convenience store buying beer around 9:53 p.m. (R. 43:269.) Hanson changed his story, saying that he must have dropped off McLean around 9:30 and then gone back to the Hi-Way Restaurant shortly before 10:00. (R. 43:269.) But surveillance-camera footage did not show Hanson, Mlados, or McLean at the convenience store around 9:30. (R. 43:269.) Surveillance-camera footage from outside, inside the restaurant, and inside the convenience store did not show McLean at all on February 22, 1998. (R. 39:130–33; 43:247–55.)

II. Procedural background.

The McLean murder investigation went cold for years. In 2009, a detective interviewed Hanson's wife. (R. 1:14.) She said that on February 22, 1998, Hanson got home around 9:30 p.m. (R. 1:14.) She said that later that night, Hanson entered the house with blood on his hands and he was "freaking out." (R. 1:14.)

The Oconto County Circuit Court held a John Doe hearing in 2012. (R. 1:3.) Hanson testified at the hearing in November 2012. (R. 1:10.) The John Doe judge advised

Hanson of his rights but did not say that the State would appoint an attorney for him if he could not afford one. (R. 32:Ex. 54:49–51.). Hanson testified at length. (R. 32:Ex. 54.) During a small part of his testimony, he said that his wife had told police that he killed McLean. (R. 44:82–85.) He also testified that he had told several people that his wife's death was the best thing that ever happened to him. (R. 44:82–85.)

In March 2013, the State charged Hanson with the first-degree intentional homicide, as a party to the crime, of McLean. (R. 1.) Hanson had a six-day jury trial in December 2013. (R. 38; 39; 40; 41; 43; 44.)

At Hanson's trial, the State introduced into evidence Hanson's testimony from the John Doe hearing. (R. 40:221–53; 44:21–69, 83–105.) Just before the State introduced Hanson's John Doe testimony about his wife reporting him to police, Hanson objected on confrontation grounds. (R. 44:71–72.) The State argued that the testimony was admissible to show Hanson's consciousness of guilt. (R. 44:72–77.) The State reasoned that Hanson had rejoiced over his wife's death because it rendered her unable to testify about McLean's murder. (R. 44:72–77.) The circuit court ruled that the testimony was not hearsay. (R. 44:81–82.)

In addition to introducing the facts summarized above, the State presented three witnesses who said that Hanson had confessed to killing McLean. Kenneth Hudson testified that he had met Hanson at work in 1989. (R. 40:143.) In the early- to mid-1990s, Hanson was Hudson's best friend. (R. 40:145.) About two months after McLean's body was found, Hanson told Hudson that he had killed McLean by shooting him and that Chuck Mlados was present at the murder. (R. 40:162–63, 167.) Hanson said that he and Mlados used the pickup truck of Hudson's stepson, Jason Close, to haul McLean's body and dump it into a river. (R. 40:163–64.)

Jason Close was storing his pickup truck on Hanson's property during the winter in early 1998. (R. 40:197.) On the night that McLean disappeared, Hanson and Mlados arrived at Debbie and Billy Byng's house in Jason Close's pickup truck. (R. 39:279–80.)

Barry O'Connor testified that he had been casual friends with Hanson since as early as 2005 until about 2009 or 2010. (R. 40:53, 57.) Sometime between 2008 and 2010, Hanson and O'Connor were in an Oconto bar when Hanson admitted that he and his friend Chuck had accidentally killed a "guy" in a shed near Hanson's house about ten years earlier. (R. 40:24–26.) Hanson said that he had shot the guy. (R. 40:26, 28.) Hanson said that he had gone into his house, his wife had freaked out because he had blood on his hands, and he and Chuck had gotten rid of the body by dumping it in a river near his house. (R. 40:25, 28.)

O'Connor later saw Hanson in the Oconto County Jail in August or September 2013. (R. 40:12.) Hanson told O'Connor that he had confessed to the murder only to his wife, O'Connor, and a man from Marinette.[3] (R. 40:29.) Hanson was not concerned about his wife testifying against him because she was dead. (R. 40:30.) Hanson told O'Connor that he had better not tell anyone about Hanson's confession or else the "same thing" could happen to O'Connor. (R. 40:18–19.) O'Connor reported Hanson's confession and threat to jail officials. (R. 40:30–32.)

Jeremy Dey testified that he had met Hanson in the Oconto County Jail in the fall of 2013. (R. 40:108–09, 114.) Hanson told him that he had shot McLean in his garage. (R. 40:114.) Hanson said that he and his friend Chuck had put

[3] Kenneth Hudson lived in Marinette since 1995. (R. 40:140.)

the body in a river and that it floated toward Hanson's home. (R. 40:114.) Hanson said that he had been at a party and was supposed to give McLean a ride to the Hi-Way Restaurant. (R. 40:116.) Hanson said that his wife had given a statement against him to police about the murder. (R. 40:117.)

O'Connor and Dey never asked to receive and were not offered any benefit for testifying at Hanson's trial. (R. 40:31–32, 61, 123, 125, 132.) Similarly, Hudson testified that law enforcement did not promise him any benefits in his pending criminal matter for testifying at Hanson's trial. (R. 40:176.) Hudson thought that he might benefit in his pending case by testifying honestly. (R. 40:176–77.)

The State spent the vast majority of its closing argument—which spanned more than 50 pages—talking about the strong evidence of Hanson's guilt and only briefly discussed Hanson's John Doe testimony. (R. 41:19–67, 86–94.) The State argued that Hanson's rejoicing over his wife's death showed his consciousness of guilt. (R. 41:56–57.) The circuit court gave the jury a general instruction about consciousness of guilt. (R. 41:12.)

While deliberating, the jury asked to see any exhibits about Hanson's wife's statements to police. (R. 41:99.) The circuit court rejected that request because no such exhibits existed. (R. 41:99.) The jury found Hanson guilty as charged. (R. 47.) The circuit court sentenced him to life imprisonment without the possibility of parole. (R. 47.)

III. Postconviction litigation.

In November 2015, Hanson filed a motion for postconviction relief in which he argued, as relevant on appeal, that his trial counsel Jeffrey Jazgar provided

ineffective assistance in two respects. First, Attorney Jazgar did not call several particular witnesses—Lila Hetrick, Pamela Smith (Madison), Beatrice Ambrosius (Treichel), Angelia Snow, Susan Patton, and Jerome Chicocki—to testify.[4] (R. 77:1–9.) Second, Attorney Jazgar did not object on *Miranda* grounds to the State's introduction at trial of Hanson's John Doe testimony about his wife reporting him to police. (R. 77:9–11.)

Lila Hetrick. In May 2001, Lila Hetrick told Oconto County investigators that McLean had called her from the Hi-Way Restaurant truck stop and asked her for a ride. (R. 77:15.) Hetrick said that McLean was scared and she gave investigators the impression that people were at the truck stop waiting for him. (R. 77:15.) Hetrick did not pick up McLean from the truck stop. (R. 77:15.)

Pamela Smith and Beatrice Ambrosius. Pamela Smith and Beatrice Ambrosius worked as waitresses at a truck stop in De Pere. (R. 77:17.) On March 1, 1998, they told a Green Bay police officer that they saw someone who fit McLean's description in the truck stop restaurant on February 28, 1998—six days after McLean disappeared. (R. 77:17.) When an officer showed a photo of McLean to them, they said that he looked like the man they had seen the day before. (R. 77:17.) In July 2014, Ambrosius met with a defense investigator and said she could not recall what the man in the restaurant looked like. (R. 77:20.) Smith met with a defense investigator that same month and said she had "no doubt" that the man she had seen on March 1, 1998, was McLean. (R. 77:18.)

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[4] Hanson also argued that Attorney Jazgar should have called Gina Vandenlangenberg to testify, but he does not renew that argument on appeal. (*See* Hanson Br. 7 n.3.)

Angelia Snow. On March 25, 1998, Angelia Snow told the Oconto County Sheriff's Department that she went to the Hi-Way Restaurant around midnight on Sunday, February 22, 1998, and saw two men sitting on the steps outside. (R. 77:21.) She said that one of the men "might have been Chad McLean." (R. 77:21.)

Susan Patton. Susan Patton spoke to Oconto County investigators in March 1998 and a defense investigator in June 2014. (R. 77:22–24.) Patton said that she had seen a man walking on the side of the road when she was heading home on the night of February 22, 1998. (R. 77:23.) She thought that the man was walking away from the Hi-Way Restaurant. (R. 77:24.) She returned home around 9:40 or 9:45 p.m. (R. 77:22.)

Jerome Chicocki. Jerome Chicocki spoke to Green Bay police on March 2, 1998. (R. 77:25.) He said that on February 28, 1998, he and his wife had seen a man walking on Highway 41 in Green Bay, but they had not seen any stalled vehicles. (R. 77:25.) Chicocki's wife later drove by the same spot and saw a cardboard sign with "Milwaukee" written on it, but she did not see the man who had been walking there earlier. (R. 77:27.)

Tina Krake. In December 2004, an anonymous person called 9-1-1 and told the Oconto County dispatch center that Tina Krake had information about a four-year-old unsolved homicide case involving "Chad." (R. 77:29.) An Oconto County officer spoke with Krake later that day. (R. 77:29.) Krake said that about five years earlier she was at a bar with her boyfriend David Athey, Mike Georgia, and Cory Byng. (R. 77:29–30.) She said that Georgia pulled her aside and said that Byng had killed someone with a gun "in the woods up north" when Byng "was 'coked' up." (R. 77:30) Georgia "was drunk and using cocaine" and "paranoid" when

he told Krake about the murder. (R. 77:30.) Georgia did not mention the victim's name. (R. 77:30.) Later that night, Byng talked to Krake outside of a bar and said that he had killed someone by shooting him with a gun. (R. 77:30.) Krake told police that Byng, Georgia, and the victim would "go up north partying" where they played hide and seek. (R. 77:31) Athey told the officer that Krake had used cocaine "back then" and hung around with drug users. (R. 77:31.)

The circuit court held a *Machner*[5] hearing on July 13, 2016. (R. 102.) Attorney Jazgar testified that he believed that *Miranda* warnings were not required at a John Doe hearing. (R. 102:26.) Attorney Jazgar further testified that he had reviewed every discovery document and outlined it all, including the discovery about all of the possible defense witnesses. (R. 102:27, 30–31.) The theory of defense was that the State did not prove Hanson's guilt beyond a reasonable doubt because there was no physical evidence linking Hanson to the murder. (R. 102:8, 38.) Attorney Jazgar did not specifically recall any of the potential defense witnesses because the trial occurred about three years before the *Machner* hearing. (R. 102:10–16, 30.) But Attorney Jazgar's general philosophy is that an insufficient-evidence defense is undermined when a defendant produces witnesses or makes an unconvincing argument that someone else was the real perpetrator. (R. 102:18, 37.)

In October 2016, the circuit court entered a written order denying the postconviction motion. (R. 106.) The court determined that Attorney Jazgar's strategic decision not to call any witnesses to testify was reasonable. (R. 106:2–4.) It further determined that this strategic decision did not

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

prejudice the defense. (R. 106:4.) The court emphasized that Hanson had "basically confessed to the homicide of McLean to three separate individuals." (R. 106:4.) It found those three witnesses' testimony "compelling," "reliable," and "detailed and credible." (R. 106:4.) The court next concluded that Attorney Jazgar was justified in declining to make a *Miranda* objection to the State's use of Hanson's John Doe testimony. (R. 106:4–7.)

Hanson appeals his judgment of conviction and the circuit court's order denying his postconviction motion. (R. 108.)

SUMMARY OF ARGUMENT

I. Hanson's Confrontation Clause claim does not entitle him to a new trial, for two reasons.

A. First, the State did not violate Hanson's confrontation right at trial by introducing his John Doe testimony about his wife telling police that he killed McLean. The Confrontation Clause does not apply to that testimony because the State did not offer it to prove the truth of the matter asserted. The State introduced that testimony to show that Hanson's rejoicing over his wife's death showed his consciousness of guilt, not proof that Hanson's wife reported him to police.

B. Second, the alleged confrontation error was harmless. The State introduced strong evidence of Hanson's guilt. Hanson's John Doe testimony about his wife was a very small part of the trial and was cumulative with testimony by other witnesses.

II. The circuit court correctly determined that Hanson received effective assistance of trial counsel in both respects that Hanson challenges.

A. Attorney Jazgar provided effective assistance by declining to call witnesses to testify. That strategic decision was reasonable because calling witnesses could have undermined the theory of defense that the State had not met its burden of proof. Further, that decision did not prejudice Hanson because the State introduced strong evidence of his guilt and because the defense witnesses' testimony would have been unbelievable, insignificant, or harmful to the defense.

B. Attorney Jazgar provided effective assistance by declining to make a *Miranda* objection at trial to the State's use of Hanson's John Doe testimony about his wife. Because the law is unsettled as to whether *Miranda* warnings are required at John Doe hearings, Attorney Jazgar reasonably declined to raise this issue. Further, his failure to raise this issue did not prejudice the defense for the same reasons that the alleged Confrontation Clause violation was harmless.

STANDARDS OF REVIEW

This Court reviews de novo whether a defendant's constitutional right to confrontation was violated, *State v. Manuel*, 2005 WI 75, ¶ 25, 281 Wis. 2d 554, 697 N.W.2d 811, and whether the alleged violation was harmless, *see State v. King*, 2005 WI App 224, ¶ 22, 287 Wis. 2d 756, 706 N.W.2d 181.

"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 (citations omitted). A reviewing court "will uphold the circuit court's findings of

fact unless they are clearly erroneous." *Id.* (citation omitted). "Findings of fact include the circumstances of the case and the counsel's conduct and strategy." *Id.* (citation omitted). "However, the ultimate determination of whether counsel's assistance was ineffective is a question of law, which [this Court] review[s] de novo." *Id.* (citation omitted).

ARGUMENT

I. Hanson is not entitled to a new trial on the grounds that testimony about his wife's out-of-court statements violated his confrontation right.

A. Hanson's wife's out-of-court statements were not offered for their truth and thus did not violate his confrontation right.

"The Confrontation Clauses of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront witnesses against them." *Manuel*, 281 Wis. 2d 554, ¶ 36 (citation omitted). Under the Confrontation Clause, "'testimonial' hearsay is not admissible in a criminal trial against a defendant unless: (1) 'the defendant had had a prior opportunity for cross-examination,' and (2) the hearsay declarant is 'unavailable to testify.'" *King*, 287 Wis. 2d 756, ¶ 5 (quoting *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004)).

"The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)). A statement that is not offered for its truth, by definition, is not hearsay. *State v. Eugenio*, 219 Wis. 2d 391, 411, 579 N.W.2d 642 (1998). A statement is *not* offered for its truth if

the prosecution uses it to establish a defendant's consciousness of guilt, *see United States v. Shorter*, 54 F.3d 1248, 1260 (7th Cir. 1995), or to explain a person's subsequent belief or conduct, *see State v. Britt*, 203 Wis. 2d 25, 40–41, 553 N.W.2d 528 (Ct. App. 1996).

Here, at trial the State introduced Hanson's testimony from a John Doe hearing that was held in November 2012. (R. 32:Ex. 54.) At that hearing, Hanson testified that his wife had told police that he killed McLean. (R. 44:82–85.) He also testified at the hearing that he had told several people that his wife's death was the best thing that ever happened to him. (R. 44:82–85.) Just before the State introduced that testimony at trial, Hanson objected to it on confrontation grounds. (R. 44:71–72.) The State argued that the testimony was admissible to show Hanson's consciousness of guilt. (R. 44:72–77.) The State reasoned that Hanson had rejoiced over his wife's death because it rendered her unable to testify against him about McLean's murder. (R. 44:72–77.) The State made the same argument during closing argument. (R. 41:56–57.) The circuit court gave the jury a general instruction about consciousness of guilt. (R. 41:12.)

The State thus did not violate Hanson's confrontation right by introducing his John Doe testimony about his wife. The State did not use that testimony to prove the truth of the matter asserted—i.e., to prove that Hanson's wife actually told police that Hanson killed McLean. The State did *not* argue that Hanson was guilty because his wife reported him to police. Rather, the State argued that Hanson's rejoice over his wife's death showed his consciousness of guilt. Hanson's John Doe testimony about his wife helped establish his belief that his wife would have been willing to testify against him. That belief, in turn, provided an explanation for Hanson's conduct of rejoicing over her death. Because the State did not use that testimony

to prove the truth of the matter asserted, it did not violate Hanson's confrontation right. This Court need not consider whether that testimony was "testimonial" under *Crawford*.

B. Alternatively, the alleged confrontation error was harmless.

"A Confrontation Clause violation does not result in automatic reversal, but is subject to harmless error analysis." *State v. Deadwiller*, 2013 WI 75, ¶ 41, 350 Wis. 2d 138, 834 N.W.2d 362 (citations omitted). "For an error to be harmless, the party who benefitted from error must show that 'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Id.* (quoting *State v. Martin*, 2012 WI 96, ¶ 45, 343 Wis. 2d 278, 816 N.W.2d 270). "In other words, 'an error is harmless if the beneficiary of the error proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* (quoting *Martin*, 343 Wis. 2d 278, ¶ 45).

A court considers "the totality of the circumstances" to determine whether an error was harmless. *State v. Hunt*, 2014 WI 102, ¶ 29, 360 Wis. 2d 576, 851 N.W.2d 434. In doing so, a court may consider several non-exhaustive factors, including: "the importance of the erroneously admitted or excluded evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted or excluded evidence; the nature of the defense; the nature of the State's case; and the overall strength of the State's case." *Id.* ¶ 27 (citation omitted).

Here, the alleged confrontation violation was harmless because the State introduced strong evidence of Hanson's guilt and because the evidence that Hanson challenges was insignificant and redundant with other testimony.

The State introduced evidence showing that McLean was last seen alive with Hanson. Hanson, Chuck Mlados, and McLean left Debbie and Billy Byng's home around 9:30 or 10:00 p.m. on Sunday, February 22, 1998. (R. 39:256–57, 279, 282.) They headed west toward Hanson's house. (R. 39:283.) Hanson told a detective that Mlados had initially planned to drive McLean home to Green Bay, but they instead decided to drop off McLean at the Hi-Way Restaurant because there was dense fog. (R. 43:266–67.) Hanson said that he had turned around in the first driveway past the Byng house. (R. 43:185.) But Billy Byng—Hanson's friend of 25 years—testified that he remained outside for a couple minutes after Hanson left and that he did not see Hanson's truck turn around. (R. 39:283–84.) Hanson's house was less than a mile and less than a two-minute drive from Byng's house. (R. 43:280, 308.) Surveillance-camera footage did not show McLean at the Hi-Way Restaurant at all on February 22, 1998. (R. 39:130–33; 43:247–55.) Six former employees of the Hi-Way Restaurant testified that they did not see anyone there who resembled McLean on that date. (R. 39:116, 139, 149, 155, 179, 238.)

One of Hanson's neighbors, Sharon Olson, heard gunshots soon after McLean and Hanson left the Byng residence together. Olson testified that she heard two or three gunshots on February 22, 1998, shortly after 10:00 p.m. (R. 39:196–98.) The gunshots came from the east. (R. 39:197.) Hanson's house was to the east, immediately adjacent to Olson's house. (R. 39:195.) Olson did not hear any other gunshots that night. (R. 39:198.)

The location of McLean's body bolstered the State's case against Hanson. McLean's body was found in the Pensaukee River near the Sandalwood Road bridge in Abrams, Wisconsin on March 22, 1998. (R. 43:279.) This river bordered the end of Hanson's property. (R. 43:281,

310.) Hanson's property was just over a one-mile drive—about a two-minute drive—from the area where McLean's body was found. (R. 43:280, 309–10.)

The unusual gunshot wounds to McLean's head strongly supported Hanson's guilt. The four gunshot-entrance wounds on McLean's head were evenly spaced in a straight line. (R. 39:71; 40:214.) The doctor who performed an autopsy on McLean testified that this gunshot-wound pattern was "[e]xtremely atypical." (R. 39:71.) It was "much more consistent" with being shot by a fully-automatic gun. (R. 39:71.) A detective who was present at the autopsy testified similarly. (R. 40:214–15.) The doctor testified that the gunshot wounds to McLean's head were consistent with a smaller caliber gun, such as .22 caliber. (R. 39:76–77.) During the autopsy, the doctor recovered three metal fragments from McLean's head. (R. 39:79; 43:288.) The state crime laboratory determined that the metal fragments were from fired .22 caliber bullets. (R. 40:74–75; *see also* R. 43:296–97.) The doctor was unaware of any .22 caliber weapons that are manufactured to fire fully automatic. (R. 39:80.) The doctor had never worked on any other case where he thought that a fully automatic .22 caliber weapon was involved. (R. 39:81.) The detective who observed McLean's autopsy testified that fully-automatic guns are legally restricted and rare outside of the military and that they usually are not .22 caliber. (R. 40:216.)

Although fully-automatic .22 caliber rifles are very rare, Hanson possessed one. Hanson's longtime friend Billy Byng testified that Hanson had bragged "a few times" about modifying his .22 caliber rifle to fire fully automatic. (R. 39:272.) Hanson's former neighbor Paul Terry testified that he had seen Hanson fire a .22 caliber rifle that Hanson modified to fire fully automatic. (R. 39:215–17.) Hanson admitted to a detective that he used to own a .22 caliber gun

and that he had access to a friend's modified, fully-automatic .22 caliber rifle. (R. 43:292.) When police executed a search warrant at Hanson's property, they recovered an empty box of .22 caliber ammunition from his storage shed as well as spent .22 caliber shell casings and fired .22 caliber bullets from the yard. (R. 43:289, 293–94.) The highly unusual gunshot wounds on McLean's head, coupled with Hanson's possession of a rare gun capable of causing those wounds, strongly suggested that Hanson shot McLean.

Hanson's suspicious behavior after McLean's disappearance supported this conclusion. Before McLean disappeared, Hanson had a lot of social activity at his house, including target practice with guns in his backyard. (R. 39:210–12, 302–03.) But after police started investigating McLean's disappearance, "it became very quiet" at Hanson's household. (R. 39:222.) The gunshots and parties "came to a screeching halt." (R. 39:222; *see also* R. 39:307.) Before McLean went missing, Mlados used to occasionally visit Hanson's house, mainly on weekends. (R. 39:223–24.) But after McLean disappeared, Mlados visited Hanson's house much more often, including weeknights. (R. 39:223–24, 228.) Those unusually frequent visits were suspicious because McLean was last seen alive with Mlados and Hanson.

Three witnesses testified that Hanson had confessed to killing McLean. About two months after McLean's body was found, Hanson told his close friend Kenneth Hudson that he had killed McLean by shooting him and that Chuck Mlados was present at the murder. (R. 40:162–63, 167.) Hanson said that he and Mlados had used the pickup truck of Hudson's stepson, Jason Close, to haul McLean's body and dump it into a river. (R. 40:163–64.) Jeremy Dey testified that Hanson had admitted to shooting McLean in his garage. (R. 40:114.) Hanson told Dey that he and his friend Chuck had put the body in a river and that it floated toward Hanson's

home. (R. 40:114.) Sometime between 2008 and 2010, Hanson admitted to his casual friend Barry O'Connor that he and his friend Chuck had accidentally killed a "guy" in a shed near Hanson's house about ten years earlier. (R. 40:24–26.) Hanson said that he had shot the guy and that he and his friend Chuck had dumped the body into a river near his house. (R. 40:28.)

The foregoing evidence—which Hanson does not challenge on appeal—strongly suggests that Hanson killed McLean. Although the State's case partly rested on circumstantial evidence, "[i]t is well established that . . . circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence." *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

By contrast, the evidence that Hanson challenges on appeal was insignificant and cumulative with other testimony. As explained above, the State merely used Hanson's John Doe testimony about his wife to show his consciousness of guilt. The State spent the vast majority of its closing argument—which spanned more than 50 pages—talking about the strong evidence of Hanson's guilt and only briefly discussed Hanson's John Doe testimony. (R. 41:19–67, 86–94.) Further, that testimony was redundant with Jeremy Dey's and Barry O'Connor's testimony, which established that Hanson had told his wife that he killed McLean, Hanson's wife had reported him to police, and Hanson was not concerned that she would testify against him because she was dead.

C. Hanson's arguments against harmless error are unavailing.

Hanson argues that the jury relied on his John Doe testimony about his wife because the jury, while deliberating, asked to see any exhibit about his wife's statements to police. (Hanson Br. 12–13.) But the circuit court did not provide any such exhibits to the jury because none existed. (R. 41:99.) Further, even if the jury never heard Hanson's John Doe testimony about his wife, it still would have convicted him for the reasons stated above.

Hanson also argues that the witnesses who testified about his confessions—Kenneth Hudson, Barry O'Connor, and Jeremy Dey—were unreliable. (Hanson Br. 25–26.) He argues that O'Connor and Dey were inherently unreliable because they were "jailhouse snitches." (*Id.*) He contends that Hudson was unreliable because he had a pending criminal case and because Hanson was using Hudson's stepson's truck the night McLean disappeared. (*Id.*)

But it is not an appellate court's role to determine credibility of witnesses. *State v. Marten-Hoye*, 2008 WI App 19, ¶ 25, 307 Wis. 2d 671, 746 N.W.2d 498. In any event, Hudson, O'Connor, and Dey were credible. Indeed, the circuit court found their testimony "compelling," "reliable," and "detailed and credible." (R. 106:4.)

O'Connor and Dey never asked to receive and were not offered any benefit for testifying in this case. (R. 40:31–32, 61, 123, 125, 132.) Even if they could be characterized as jailhouse informants, jailhouse informants are not inherently unreliable. *See Kansas v. Ventris*, 556 U.S. 586, 594 n.* (2009) (rejecting the argument that uncorroborated jailhouse-informant testimony must be excluded at trial because it is inherently unreliable); *see also United States v.*

Crater, 79 F. App'x 234, 236–37 (7th Cir. 2003) (noting that a factfinder's role is to weigh credibility of witnesses, including jailhouse informants). O'Connor and Dey were reliable.

Hudson was reliable, too. Hudson testified that law enforcement did not promise him any benefits in his pending criminal matter for testifying at Hanson's trial. (R. 40:176–77.) Hudson thought that he might benefit in his pending case by testifying *honestly*. (R. 40:177.) Further, Hudson's stepson's pickup truck did not give Hudson a reason to falsely accuse Hanson of the murder. Hudson's stepson, Jason Close, was storing his pickup truck on Hanson's property during the winter in early 1998. (R. 40:197.) Hudson testified that Hanson had confessed to using the pickup truck to haul McLean's body and dump it into a river. (R. 40:163–64.) After the police searched and released the truck, Hudson was not as concerned about the truck's possible involvement in McLean's murder. (R. 40:168.) Even if Hudson was willing to commit perjury to prevent Close from becoming a suspect 15 years after McLean's death, it would make no sense for him to falsely testify that Hanson had used Close's truck to dispose of McLean's body. It would make far more sense for Hudson to accuse someone who did not have access to the truck.

In sum, the State did not violate Hanson's confrontation right by introducing his John Doe testimony about his wife. Alternatively, the alleged confrontation violation was harmless because that testimony was insignificant and cumulative and because the State introduced strong evidence of Hanson's guilt.

II. Hanson is not entitled to a new trial on the grounds of ineffective assistance of trial counsel.

A. Controlling legal principles.

The Sixth Amendment to the U.S. Constitution gives a criminal defendant the right to counsel, which includes a right to effective assistance of counsel. *State v. Trawitzki*, 2001 WI 77, ¶ 39, 244 Wis. 2d 523, 628 N.W.2d 801, *holding modified on other grounds by State v. Davison*, 2003 WI 89, ¶ 36, 263 Wis. 2d 145, 666 N.W.2d 1. A defendant who asserts ineffective assistance of counsel must demonstrate that (1) counsel performed deficiently and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If a defendant fails to prove one prong of the *Strickland* test, a court need not consider the other prong. *Id.* at 697.

To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* 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. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.*

To prove prejudice, "[t]he 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. *Strickland*'s prejudice standard "does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington v.*

Richter, 562 U.S. 86, 111–12 (2011) (quoting *Strickland*, 466 U.S. at 693, 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* (citing *Strickland*, 466 U.S. at 693).[6]

B. Hanson failed to show that his trial counsel provided ineffective assistance by not calling witnesses to testify.

Hanson's first claim of ineffective assistance fails because he has not met either prong under *Strickland*.

1. Hanson's trial counsel reasonably decided not to call witnesses to testify.

A court "will not second-guess[] the trial counsel's considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel." *State v. Hunt*, 2014 WI 102, ¶ 55, 360 Wis. 2d 576, 851 N.W.2d 434 (alteration in original) (citation omitted). Trial counsel is not required to present an alternative theory of defense if it would "divert the jury's attention" from the general theory of theory. *See Kain v. State*, 48 Wis. 2d 212, 221–22, 179 N.W.2d 777 (1970). When presented with a weak or inconsistent alternative defense, a jury might think that the general theory of defense "has no more substance than the one added against the best judgment of trial counsel." *See id.*

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[6] The reliability and fairness of Hanson's trial are *not* part of the prejudice analysis. *See Goodman v. Bertrand*, 467 F.3d 1022, 1028 (7th Cir. 2006); *Floyd v. Hanks*, 364 F.3d 847, 852 (7th Cir. 2004).

Here, Attorney Jazgar did not call any witnesses to testify at trial. (R. 102:29.) The theory of defense was that the State did not prove Hanson's guilt beyond a reasonable doubt because there was no physical evidence linking Hanson to the murder. (R. 102:8, 38.) Attorney Jazgar believed that this kind of defense is undermined when a defendant produces witnesses or when a jury rejects an alternative theory of defense. (R. 102:18, 37.)

Attorney Jazgar's chosen theory of defense—that the State had not proven its case—was reasonable. Hanson does not seem to argue otherwise. Indeed, as Hanson recognizes, the State never established his motive for killing McLean and produced no physical evidence tying Hanson to the murder. (Hanson Br. 2, 5, 14.) This lack of evidence makes Attorney Jazgar's theory of defense reasonable.

Similarly, Attorney Jazgar's decision not to call any witnesses was reasonable. He would have diverted the jury's attention from the theory of defense had he called the witnesses that Hanson now says he should have called. Their testimony would have conflicted with each other and raised several inconsistent theories of defense.

Several defense witnesses—inconsistently—could have tried to establish that Hanson had dropped off McLean at the Hi-Way Restaurant the night McLean disappeared. Lila Hetrick could have testified that McLean had called her asking for a ride from the Hi-Way Restaurant. (R. 77:15.) Susan Patton, similarly, could have testified that someone who looked like McLean appeared to have left the Hi-Way Restaurant shortly before 9:45 p.m. (R. 77:23–24.) But, inconsistently, Angelia Snow could have testified that someone who looked like McLean was sitting outside of the Hi-Way Restaurant two hours later, around midnight. (R. 77:21.)

Another possible defense was that Cory Byng killed McLean. Tina Krake could have testified that Byng had told her that he killed someone "in the woods up north" when Byng "was 'coked' up." (R. 77:30.) But that defense could have conflicted with the idea that Hanson had taken McLean to the Hi-Way Restaurant because Byng—McLean's ride home—was passed out at his aunt and uncle's house.

Other defense witnesses could have offered yet another theory of defense. Pamela Smith, Beatrice Ambrosius, and Jerome Chicocki could have testified that they saw someone who looked like McLean in Brown County six days after he disappeared. (R. 77:17, 25, 27.) The jury could have found that testimony inconsistent with the theory that Byng had killed McLean.

Further, as discussed below, the jury would have found the defense witnesses' testimony unbelievable, irrelevant, or harmful to Hanson's case. For these reasons, Attorney Jazgar reasonably focused the defense on the alleged insufficiency of the State's circumstantial evidence.

Hanson argues that this Court may not consider Attorney Jazgar's stated reason for not calling any witnesses because it is an impermissible hindsight explanation. (Hanson Br. 23–24.) He is wrong. This Court must determine whether an attorney's challenged conduct had an objectively reasonable basis, even if the attorney does not remember his rationale for the conduct. *State v. Honig*, 2016 WI App 10, ¶ 28, 366 Wis. 2d 681, 874 N.W.2d 589, *review denied*, 2016 WI 78, 371 Wis. 2d 607, 885 N.W.2d 379. A court may even consider reasons that an attorney overlooked or disavowed. *State v. Koller*, 2001 WI App 253, ¶ 8, 248 Wis. 2d 259, 635 N.W.2d 838. But a court may not assess an attorney's performance based on a hindsight observation

that the defense proved unsuccessful. *State v. Balliette*, 2011 WI 79, ¶ 25, 336 Wis. 2d 358, 805 N.W.2d 334.

Here, the State is not asking this Court to assess Attorney Jazgar's performance based on hindsight. At the *Machner* hearing, Attorney Jazgar testified that he had reviewed every discovery document and outlined it all, including the discovery about all of the possible defense witnesses. (R. 102:27, 30–31.) Attorney Jazgar did not remember almost three years later why he did not call particular witnesses to testify. (R. 102:10–16, 30.) But he did recall that the theory of defense was that the State had not carried its burden, and his general philosophy is that this kind of defense is undermined when a defendant produces witnesses or makes an unconvincing argument that someone else was the real perpetrator. (R. 102:8, 18, 37–38.) This Court may consider that rationale.

Hanson next argues that Attorney Jazgar's rationale was unreasonable because calling witnesses would have been "cohesive" with the theory of defense. (Hanson Br. 24–25.) He argues that defense witnesses could have helped to create reasonable doubt. (*Id.*) His argument is unavailing. Attorney Jazgar explained that presenting defense witnesses—and specifically presenting an unsuccessful third-party-perpetrator defense—undermines a defense attorney's argument that the State had not met its burden of proof. That rationale is objectively reasonable.

State v. Hubanks is instructive. In *Hubanks*, the State charged Hubanks with sexual assault and armed robbery, both of which required proof that Hubanks had used or threatened to use a dangerous weapon. *State v. Hubanks*, 173 Wis. 2d 1, 11–12, 496 N.W.2d 96 (Ct. App. 1992). Trial counsel's strategy was arguing that the State had not proven Hubanks' identity as one of the perpetrators. *Id.* at 27. On

appeal, this Court rejected Hubanks' argument that his trial counsel had provided ineffective assistance by not also arguing that the State failed to prove the dangerous-weapon element. *Id.* at 27–28. This Court reasoned that "[a]t the time of trial, counsel believed that arguing the insufficiency of the evidence on the dangerous weapon element would have undermined the defense of mistaken identity. We conclude that counsel's course of action was based on a reasonable choice of strategy." *Id.* at 28.

The same conclusion applies here. Like in *Hubanks*, here the theory of defense was that the State had failed to prove the defendant's identity. In each case, trial counsel declined to make an argument that, in his view, would have undermined the theory of defense. Further, in each case the theory of defense was *compatible* with the argument that trial counsel declined to make. In *Hubanks*, arguing that the State failed to prove identity would have been compatible with arguing that the State failed to prove one of the elements of the charged crimes. Trial counsel in *Hubanks* still performed reasonably because he thought that the second argument would have undermined the first one. Here, similarly, Attorney Jazgar performed reasonably because offering several alternative theories would have undermined the defense that the State had introduced insufficient evidence to establish Hanson's identity as the killer. As explained above, those alternative theories could have conflicted with each other. And Attorney Jazgar's credibility—including the credibility of his main theory of defense—very well could have been damaged if and when the jury found the defense witnesses unbelievable or irrelevant.

In sum, Hanson failed to show that Attorney Jazgar's decision not to call defense witnesses was objectively unreasonable. Accordingly, this claim of ineffective assistance fails.

2. In any event, Hanson's trial counsel did not prejudice the defense by declining to call witnesses to testify.

Hanson has not shown that Attorney Jazgar prejudiced the defense by declining to call witnesses, nor can he, for two reasons.

First, "[w]hen there is strong evidence supporting a verdict in the record, it is less likely that a defendant can prove prejudice." *Trawitzki*, 244 Wis. 2d 523, ¶ 45 (citing *Strickland*, 466 U.S. at 696), *holding modified on other grounds by Davison*, 263 Wis. 2d 145, ¶ 36. As explained above in Argument Section I.B., the State introduced strong evidence that Hanson killed McLean: (1) McLean was last seen alive with Hanson heading toward Hanson's home; (2) shortly thereafter, Hanson's neighbor heard gunshots coming from the direction of Hanson's home; (3) McLean's body was found about a mile away from Hanson's home in a river that bordered Hanson's property; (4) McLean had highly unusual gunshot wounds that were consistent with a rare type of gun that Hanson had in his possession; (5) Hanson behaved suspiciously shortly after McLean disappeared; and (6) Hanson told three people that he killed McLean.

Second, the jury would have found the seven defense witnesses' testimony unbelievable or irrelevant, and some of it would have *hurt* the defense:

Lila Hetrick. Lila Hetrick's testimony would have been unbelievable or harmful to the defense. In May 2001, Hetrick told Oconto County investigators that McLean had called her from the Hi-Way Restaurant truck stop and asked her for a ride. (R. 77:15.) A jury likely would not have believed that testimony. Six former employees of the Hi-Way Restaurant testified that they did not see anyone there who resembled McLean on the day that he disappeared. (R. 39:116, 139, 149, 155, 179, 238.) McLean was not depicted in any surveillance-camera videos outside, inside the restaurant, or inside the convenience store on the day he disappeared. (R. 39:130–33; 43:247–55.) In the past, McLean called his roommates and mother for rides, and they were willing to pick him up. (R. 43:95–96, 123–24, 131.) But he did not call them for a ride on the night he went missing. (R. 43:100, 124.) The jury thus likely would not have believed that McLean called Hetrick for a ride from the Hi-Way Restaurant the night he went missing.

If the jury believed Hetrick's testimony, it would have hurt Hanson's defense. Hetrick told investigators that McLean was scared when he called her for a ride, and she suggested that people were at the Hi-Way Restaurant waiting for him. (R. 77:15.) Hetrick did not pick up McLean from the Hi-Way Restaurant. (R. 77:15.) Hetrick's testimony would have hurt Hanson's defense by suggesting that McLean was scared of Hanson and that Hanson and his friend Chuck Mlados were waiting for McLean. The jury could have inferred that McLean got back into Hanson's truck after Hetrick said she could not pick him up.

Susan Patton and Angelia Snow. The jury would have found Susan Patton's and Angelia Snow's testimony irrelevant. Susan Patton saw a man walking on the side of the road when she was heading home on the night of February 22, 1998. (R. 77:23.) She thought that the man was

walking away from the Hi-Way Restaurant. (R. 77:24.) She returned home around 9:40 or 9:45 p.m. (R. 77:22.) Angelia Snow went to the Hi-Way Restaurant around midnight on February 22, 1998, and saw two men sitting on the steps outside. (R. 77:21.) She said that one of the men "might have been Chad McLean." (R. 77:21.) The jury would have found Patton's and Snow's testimony irrelevant because neither of them said for sure that they saw McLean. And for the same reasons that the jury would not have believed Hetrick's testimony, the jury would not have believed that McLean was at the Hi-Way Restaurant shortly before he disappeared.

Even if the jury believed that Hanson had taken McLean to the Hi-Way Restaurant, it would not have acquitted Hanson. Hanson easily could have killed McLean after taking him to the Hi-Way Restaurant. Had Hetrick testified, the jury could have believed that Hanson and Mlados were waiting for McLean at the Hi-Way Restaurant. Hanson told a detective that he and Mlados went to Hanson's house around 10:00 p.m. to drink more beer after they dropped off McLean at the Hi-Way Restaurant, and that Mlados headed home to Green Bay around 11:30 p.m. (R. 43:185–87.) The jury thus could have inferred that Hanson took McLean to the Hi-Way Restaurant, McLean called Hetrick but she could not pick him up, McLean got back into Hanson's truck hoping that Mlados would drive him home to Green Bay, McLean went to Hanson's house, and Hanson then killed McLean. It is irrelevant whether McLean was at the Hi-Way Restaurant before Hanson killed him.

Pamela Smith and Beatrice Ambrosius. Pamela Smith and Beatrice Ambrosius saw someone who fit McLean's description in a truck stop restaurant in De Pere on February 28, 1998, six days after McLean disappeared.

(R. 77:17.) The jury would not have believed that McLean was that man. When an officer showed a photo of McLean to Smith and Ambrosius on March 1, 1998, they merely said that he looked like the man they had seen the previous day. (R. 77:17.) Sixteen years later, Smith met with a defense investigator and said she had "no doubt" that the man she had seen in 1998 was McLean. (R. 77:18.) But based on the equivocal statement that Smith made *one day* after seeing the man, the jury would not have believed that Smith actually saw McLean.

And it is implausible that McLean was alive six days after he disappeared. McLean lived and worked in Green Bay. (R. 43:86–87.) McLean's mother and roommates never saw him alive after Sunday, February 22, 1998. (R. 43:100, 125, 134.) The coworker with whom McLean carpooled testified that McLean was not at home after February 22 when she arrived to pick him up. (R. 43:143–46.) But before, McLean had always been ready to leave for work when his carpool arrived. (R. 43:140.) McLean loved his job and was going to receive a bonus for his perfect attendance record. (R. 43:90, 130, 141.) When McLean's body was recovered from the Pensaukee River, he was wearing jeans and a plaid shirt or jacket—the same clothes he was wearing when he disappeared on February 22. (R. 39:8; 40:103–04; 43:125.) McLean had 15 cents on him when his body was recovered, but he had paychecks waiting for him at work. (R. 39:66; 43:144.) Many of McLean's friends and relatives tried looking for him shortly after he disappeared, but nobody saw him. (R. 43:101–02.) McLean had no history of hitchhiking or disappearing for days. (R. 43:96, 126, 133.)

Based on those facts, it is inconceivable that after McLean disappeared in the Town of Abrams in Oconto County on February 22, 1998, he: (1) wandered around for six days without changing his clothes, going home,

contacting his mother or roommates, or cashing his paychecks; (2) ruined his perfect attendance record at work and did not bother to tell his carpool that he was not going to work; (3) resurfaced at a truck stop in De Pere; (4) disappeared again; (5) was murdered; and (6) somehow ended up back in the Town of Abrams, where his body was found in a river close to both Hanson's house and the area from which McLean originally disappeared. Even if Pamela Smith and Beatrice Ambrosius had testified, the jury would not have believed that McLean was still alive several days after he disappeared.

Jerome Chicocki. The jury would have found Jerome Chicocki's testimony irrelevant. On February 28, 1998, Chicocki and his wife saw a man walking on Highway 41 in Green Bay, but they did not see any stalled vehicles. (R. 77:25.) Chicocki's wife later drove by the same spot and saw a cardboard sign with "Milwaukee" written on it, but she did not see the man who had been walking there earlier. (R. 77:27.) Had Chicocki testified, the jury would not have believed that he and his wife had seen McLean. As just explained, it was implausible that McLean was still alive six days after he disappeared. Further, McLean lived in Green Bay and had no history of hitchhiking. (R. 43:87, 96, 133.) The man whom Chicocki saw was apparently hitchhiking to Milwaukee. He was not McLean.

Tina Krake. The jury would have found Tina Krake's testimony irrelevant. Tina Krake could have testified that Cory Byng told her that he had killed someone with a gun "in the woods up north" when Byng "was 'coked' up." (R. 77:30.) Krake had used cocaine "back then" and hung around with drug users. (R. 77:31.) Even if the jury believed two cocaine users, it would not have acquitted Hanson. Krake and Byng did not say that Byng had killed *McLean*. Krake said that Byng, his victim, and his friend Mike

Georgia would "go up north partying" and play hide and seek. (R. 77:31.) But there was no evidence that McLean knew Mike Georgia or ever partied with him. And there was no evidence that McLean had ever gone into woods with Byng to do cocaine and play hide and seek. Whoever Byng might have killed, McLean was not him. The evidence showed that Hanson killed McLean while Byng was passed out on the kitchen floor at his aunt and uncle's house.

In sum, this Court should reject Hanson's claim that his trial counsel provided ineffective assistance by not calling witnesses to testify. Hanson has not shown deficient performance or prejudice.

C. Hanson failed to show that his trial counsel provided ineffective assistance by not objecting on *Miranda* grounds to Hanson's John Doe testimony about his wife.

Whether counsel performed deficiently depends on the reasonableness, not correctness, of counsel's judgment. *State v. Weber*, 174 Wis. 2d 98, 115, 496 N.W.2d 762 (Ct. App. 1993). "When the law is unsettled, the failure to raise an issue is objectively reasonable and therefore not deficient performance." *State v. Jackson*, 2011 WI App 63, ¶ 10, 333 Wis. 2d 665, 799 N.W.2d 461 (citing *State v. Maloney*, 2005 WI 74, ¶ 23, 281 Wis. 2d 595, 698 N.W.2d 583). The law is unsettled if there is no binding authority on point. *See State v. Van Buren*, 2008 WI App 26, ¶ 19, 307 Wis. 2d 447, 746 N.W.2d 545.

When a defendant argues that his attorney provided ineffective assistance by not raising an issue of first impression, a court need not decide the merits of the underlying issue. *See Maloney*, 281 Wis. 2d 595, ¶¶ 19, 24. Instead, the claim of ineffective assistance fails because

the law was unsettled and thus counsel did not perform deficiently. *See id.* ¶ 30.

Here, Hanson testified at a John Doe hearing in November 2012. (R. 32:Ex. 54.) The John Doe judge advised Hanson of his rights but did not say that the State would appoint an attorney for him if he could not afford one. (R. 32:Ex. 54:49–51.). One of the *Miranda* warnings is "that if the suspect cannot afford an attorney, an attorney will be appointed for him or her both prior to and during questioning." *State v. Santiago*, 206 Wis. 2d 3, 19, 556 N.W.2d 687 (1996) (citation omitted). At Hanson's trial, the State introduced Hanson's testimony from the John Doe hearing. (R. 40:221–53; 44:21–69, 83–105.) When the State was about to introduce Hanson's John Doe testimony regarding his wife, Attorney Jazgar objected on confrontation, not *Miranda*, grounds. (R. 44:71–72.) At the *Machner* hearing, Attorney Jazgar testified that he believed that *Miranda* warnings were not required at a John Doe hearing. (R. 102:26.) It is a matter of first impression whether a witness at a John Doe hearing—even a witness who is in custody—has a right to receive *Miranda* warnings.

Questioning *by police* may require *Miranda* warnings. "The warning mandated by *Miranda* was meant to preserve the privilege [against compelled self-incrimination] during 'incommunicado interrogation of individuals in a police-dominated atmosphere.'" *Illinois v. Perkins*, 496 U.S. 292, 296 (1990) (quoting *Miranda v. Arizona*, 384 U.S. 436, 445 (1966)). "[B]efore [*Miranda*] warnings need be given, it must be established that the defendant was both 'in custody,' and under 'interrogation' *by police*." *State v. Mitchell*, 167 Wis. 2d 672, 686, 482 N.W.2d 364 (1992) (emphasis added). An "interrogation that triggers the right to counsel involves *direct questioning by police* that is reasonably likely to elicit an incriminating response from a suspect." *State v.*

Schloegel, 2009 WI App 85, ¶ 7, 319 Wis. 2d 741, 769 N.W.2d 130 (emphasis added) (citation omitted).

Courts have declined to require *Miranda* warnings in judicial and quasi-judicial proceedings. *Miranda* warnings are not required at grand jury proceedings. *United States v. Gillespie*, 974 F.2d 796, 802–04 (7th Cir. 1992). Grand jury proceedings are similar to Wisconsin's John Doe hearings because both are secretive investigations into possible crimes. *See O'Keefe v. Chisholm*, 769 F.3d 936, 942–43 (7th Cir. 2014). Courts also have declined to require *Miranda* warnings at CHIPS proceedings, parole revocation hearings, and prison discipline hearings. *State v. Thomas J.W.*, 213 Wis. 2d 264, 270–76, 570 N.W.2d 586 (Ct. App. 1997).

Accordingly, it was reasonable for Attorney Jazgar to think that Hanson did not need to receive *Miranda* warnings before he testified at a John Doe hearing, even though Hanson was allegedly in custody. A John Doe hearing is unlike a police-dominated interrogation but rather is more like a grand jury proceeding, where *Miranda* warnings are not required. More importantly, no Wisconsin case law has required *Miranda* warnings at John Doe hearings or determined whether questioning at a John Doe hearing constitutes a police interrogation for *Miranda* purposes. Because those issues are unsettled, Attorney Jazgar reasonably declined to raise a *Miranda* issue at Hanson's trial. Hanson's claim of ineffective assistance fails because he cannot prove deficient performance.

In any event, Hanson's claim fails because he cannot show prejudice. If an error is harmless beyond a reasonable doubt, it is not prejudicial under *Strickland*. *State v. Weed*, 2003 WI 85, ¶¶ 34–35, 263 Wis. 2d 434, 666 N.W.2d 485. Hanson's John Doe testimony about his wife did not

prejudice his defense at trial because, as explained above, that testimony was harmless.

In sum, this Court should reject Hanson's claim that his trial counsel provided ineffective assistance by not raising a *Miranda* objection at trial to the State's use of his John Doe testimony about his wife.

CONCLUSION

The State respectfully asks this Court to affirm Hanson's judgment of conviction and the circuit court's order denying his motion for postconviction relief.

Dated: May 18, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-
Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539
(608) 266-9594 (Fax)
rosenowse@doj.state.wi.us

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 10,754 words.

_____
SCOTT E. ROSENOW
Assistant Attorney General

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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).

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Dated: May 18, 2017.

_____
SCOTT E. ROSENOW
Assistant Attorney General