STATE OF WISCONSIN

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

DISTRICT I

Case No. 2016AP2201-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY L. GARNER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. BOROWSKI, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

BRAD D. SCHIMEL
Wisconsin Attorney General

GREGORY M. WEBER
Assistant Attorney General
State Bar #1018533

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 266-9594 (Fax)
webergm@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Constitutional Provisions

Statutes

Page

Other Authorities

ISSUES PRESENTED FOR REVIEW

The State of Wisconsin first tried Larry L. Garner in 2013 on an amended information charging two counts of armed robbery and one count of felony murder, each as a party to the crime. Juror misconduct caused a mistrial. The State tried Garner again in 2014 on the same charges. The second jury found him guilty on all three counts.

This appeal presents three issues for review:

1. Did the circuit court err in finding Vanetta[1] Gholson-Wells, a State's witness at the first trial, unavailable for Confrontation Clause purposes at the second trial?

2. Did Garner suffer any prejudice at his second trial from the prosecution's use of the amended information to specify the charges?

3. Did the circuit court rely on inaccurate information at sentencing, that is, the court's belief that Garner shot the victim of the felony murder?

The circuit court answered issues one and three in the negative. (R. 48:2–5, 5–7.) It answered issue two by concluding that it properly permitted amendment of the information at the first trial. (*Id*. at 5.)

Garner characterizes the second issue presented for review as whether the circuit court erred in allowing the State to amend the information at the first trial. (Garner's

---

[1] Gholson-Wells's first name appears in the record with different spellings. It is spelled "Vanetta" in her own criminal proceedings. (R. 45:25.) The State will use that spelling in this brief.

Br. *ii,* 24–28.) The State believes its version properly reflects the actual issue before this Court. (*See* State's Br. 17–21.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. The briefs should adequately address the straightforward legal and factual issues on appeal.

INTRODUCTION

Vanetta Gholson-Wells testified at Garner's first trial, but fled before his second trial. The prosecutor made good faith, reasonable efforts to locate and produce her. Because of those efforts, the circuit court properly deemed her unavailable at the second trial for purposes of the Confrontation Clause. Garner had full notice of the nature and the cause of the charges against him at that second trial, especially since he had faced the same charges at his first trial. And disagreement between the court and Garner over proof that Garner shot the victim of the felony murder did not constitute inaccurate information for sentencing purposes.

STATEMENT OF THE CASE

During a one-night crime spree in 2012, Garner committed two armed robberies and a felony murder, each as a party to the crime. (R. 1; 6; 15; 16; 17; 27.) Three others—John Eggars, Jeron[2] Brown, and Vanetta Gholson-Wells—joined in some of these crimes. (R. 1.)

---

[2] Brown's first name also appears in the record with different spellings. He spelled it J-E-R-O-N at a court proceeding during

Garner would eventually face two trials. The first occurred in 2013, and ended in a mistrial. (R. 68:5–42.) The second occurred in 2014, and ended with the jury finding Garner guilty of both armed robberies and the felony murder. (R. 27; 69–81, 84.)

The State originally charged Garner with one armed robbery, with JG as the victim, and the felony murder with RC as the victim. (R. 1; 4.) Weeks before the first trial began, the prosecutor raised the possibility of filing an amended information adding an additional armed robbery charge. (R. 53:4.)

The additional charge against Garner related to an incident expressly described in the complaint—the armed robbery of TL. The details appeared in the probable cause portion of the complaint. (R. 1:2–3; 53:3–4.)

The possibility of facing the additional armed robbery charge came as no surprise to Garner. Trial counsel explained: "Your Honor, it's correct. In fact, my client and I discussed that last time we met so that's not a surprise." (R. 53:4.)

The State filed the amended information on October 1, 2013. (R. 6; 55:4.) Garner objected to the additional charge, claiming it lacked a factual basis. (R. 55:5.) The circuit court denied this objection, and accepted his not guilty plea to the new charge. (*Id*. at 6.)

Garner did not object to the timeliness of the amendment. He did not object to the absence of a formal,

---

the first trial. (R. 60:16.) The State will use that spelling in this brief.

written motion by the State to amend the original information. He did not claim that the amendment failed to adequately inform him of the acts he allegedly committed, or that he did not understand the new offense well enough to defend against it. And he did not claim that he lacked sufficient notice of the amendment to defend against the new charge.

Garner moved to dismiss all charges in the amended information at the close of the State's case-in-chief in the first trial. (R. 67:4.) The circuit court denied the motion, concluding that "taking the evidence and the testimony in the light most favorable to the State, the State has met their burden at this stage." (*Id*.)

Garner's first trial ended in a mistrial due to juror misconduct. (R. 68:5–42.) The State conducted a second trial on the amended information several months later. (R. 70:67, 72–86.) Garner did not object to use of the amended information at the second trial.

At the first trial, Gholson-Wells testified in pertinent part that Garner shot the victim of the felony murder. (R. 66:43–44, 44–45.)

On the morning of the second trial, two State witnesses—one of them Gholson-Wells—were not present, and their whereabouts were unknown. (R. 69:3.) The prosecutor explained that "[u]p until Friday, we had reason to believe that [Gholson-Wells] would be here in court voluntarily." (*Id.*) The prosecutor had maintained contact with Gholson-Wells through her attorney, Robert Webb, and the prosecutor fully expected her to appear voluntarily. (*Id*. at 3, 9–10.) But when faced with the possible revocation of her bail in her own criminal proceedings due to noncompliance with a condition of that bail, she fled. (*Id*. at 3, 6–8.) The prosecutor obtained a bench warrant, and police

searched for her. (R. 45:5; 69:3, 6–8.) The prosecutor also continued to work with her attorney in an effort to locate her. (R. 69:9.)

The prosecutor raised the possibility of presenting Gholson-Wells's testimony from Garner's first trial at his second trial. (R. 69:4.) Garner's trial counsel contended that the State had to make a "good faith" effort to locate Gholson-Wells and produce her as a live witness. (*Id.* at 5.) Counsel also believed that, because the State had not served her with a subpoena for the second trial, the circuit court could not declare her unavailable. (*Id.*) Counsel later invoked Garner's constitutional right to confront the witnesses against him, and to present a defense. (*Id.* at 12–14.) The circuit court acknowledged the importance of face-to-face confrontation and passed the case to the afternoon, hoping the State would locate and produce Gholson-Wells in the meantime. (*Id.* at 19–21, 25.)

By that afternoon, police had located one of the missing State witnesses, but not Gholson-Wells. (R. 84:3.) Garner's trial counsel objected to the presentation of her prior testimony, but also appeared to concede that controlling case law supported admissibility. (*Id.* at 5.) The prosecutor continued to advise the circuit court of the steps taken to locate and produce Gholson-Wells, noting that Milwaukee homicide detectives had joined the search. (*Id.* at 6.) The court decided to begin the trial while the State continued its search. (*Id.* at 6–7.)

The homicide detectives and warrant squad officers continued searching for Gholson-Wells. (R. 70:2–3.) Garner's trial counsel suggested a possible place to check; the prosecutor said the State was "following up on everything" by way of possible locations. (*Id.* at 3.)

The next morning, the prosecutor reported that Gholson-Wells had not been found, despite the State's continued efforts with her attorney, and despite police having searched at least 10 houses looking for her. (R. 45:6–7; 72:3–4.) The prosecutor told the circuit court that "[d]etectives and the warrant squad have been hitting this hard. Your Honor, they have been spending a lot of time and resources attempting to find her." (R. 72:4.)

Each time the prosecutor told the circuit court and Garner about the various attempts to locate and produce Gholson-Wells, Garner accepted the information without objection. He did not object to the manner in which the prosecutor provided that information. And he did not claim that the prosecutor should have presented sworn testimony or other evidence at a hearing to establish the State's efforts to locate and produce her.

Gholson-Wells hid herself well. The State could not find her. The circuit court concluded that the parties had made unsuccessful efforts to locate her, that she was unavailable, and that the prosecution would present her prior testimony. (R. 76:41–42.)

The circuit court made a record regarding the substance of a sidebar conference that occurred before the presentation of Gholson-Wells's prior testimony:

> THE COURT: Hang on one second. Before we break, the sidebar that we had a little while ago was just before the detective read with Mr. Huebner the testimony of Ms. Gholson-Wells.
>
> I discussed with the lawyers they both basically agreed, stipulated that I would tell the jury that my decision and my ruling is that she's unavailable, because she's unavailable, I'm allowing the reading of this testimony. The testimony was under oath from a prior proceeding and that both sides had made efforts to procure her attendance.

> Both sides agree that's what we discussed?
>
> ATTORNEY GIVENS [Garner's trial counsel]: Yes.
>
> ATTORNEY HUEBNER [the prosecutor]: Yes, Your Honor. And I just at least do think that we should just add that Mr. Givens suggested this. It was his request. And I agreed to it that you would instruct them in this fashion. And I think it's appropriate but considering the fact that they were being instructed as to certain things, I just want it to be known that that was a decision he made and he requested.
>
> ATTORNEY GIVENS: That's correct.

(*Id*. at 94–95.)

At the second trial, the jury heard Gholson-Wells's former testimony that Garner shot the victim of the felony murder. (*Id*. at 60, 62, 87–88.) The jury also heard testimony from a live State witness, John Eggars, that Garner fired the shot. (R. 74:41, 42, 44.) Based on this testimony and the testimony of other State witnesses, the jury convicted Garner of all three charges—two armed robberies and the felony murder. (R. 15; 16; 17.)

At Garner's sentencing, the circuit court addressed all three primary factors, as well as the need for sentences that reflected the goals of punishment, deterrence, and rehabilitation. (R. 81:31–48.) The court never referred to Garner as the person who fired the shot that killed the victim of the felony murder. The court imposed consecutive sentences totaling 28 years of initial confinement and 12 years of extended supervision. (*Id*. at 47–48.)

Garner filed a motion for postconviction relief, asserting in pertinent part that: (1) the circuit court erred in finding Gholson-Wells unavailable for confrontation purposes at the second trial; (2) the court erred in allowing

the State to file the amended information at Garner's first trial; and (3) the court relied on inaccurate information when it sentenced Garner, that is, the court's belief that Garner shot the victim of the felony murder. (R. 35.)

The circuit court denied Garner's motion without a hearing. (R. 48.) It made six findings relevant to the issues presented for review.

First, the information provided by the prosecutor regarding the various attempts made by the State to locate and produce Gholson-Wells established her unavailability for Confrontation Clause purposes. (*Id*. at 3–4.)

Second, the circuit court did not have to hold an evidentiary hearing regarding the State's efforts to locate Gholson-Wells before making its determination of unavailability. The prosecutor's representations adequately supported the determination. (*Id*. at 4.)

Third, Garner could only speculate about how the defense might have impeached Gholson-Wells—and how the jury might have assessed her demeanor—had she testified in person. And Garner could only speculate about whether she would have appeared at the second trial even if she had been subpoenaed. (*Id*. at 4–5.)

Fourth, the circuit court committed no error in permitting the State to amend the information before the first trial. The court specifically held that the amendment gave Garner satisfactory notice of the additional armed robbery charge. (*Id*. at 5.)

Fifth, while the circuit court held the opinion that Garner shot the victim of the felony murder, it expressed that opinion not at Garner's sentencing, but at Gholson-Wells's sentencing. (*Id*. at 6.) The court relied upon Eggars's and Gholson-Wells's testimony when it formed that opinion.

(*Id*.) The court concluded that, while Garner may have mistrusted their testimony, his mistrust did not render their testimony inaccurate as a matter of law—"The defendant's inaccuracy claim is rooted in his own particular conclusions and opinions and does not set forth a legitimate basis for resentencing." (*Id*.)

And sixth, any difference between the sentences imposed upon Garner's convictions and his possible exposure had he accepted an earlier plea agreement did not establish an erroneous exercise of discretion. (*Id*.)

Garner now stands convicted of two counts of armed robbery and one count of felony murder. (R. 27.) The circuit court imposed sentences totaling 28 years of initial confinement and 12 years of extended supervision. (*Id*.) His convictions and sentences remain in full force and effect. He appeals from the judgment of conviction and order denying his motion for postconviction relief. (R. 49.)

STANDARDS OF REVIEW

"While a circuit court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of such evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review." *State v. Hale*, 2005 WI 7, ¶ 41, 277 Wis. 2d 593, 691 N.W.2d 637. Unavailability of a hearsay declarant for confrontation purposes presents a constitutional fact, reviewed de novo. *State v. King*, 2005 WI App 224, ¶ 11, 287 Wis. 2d 756, 706 N.W.2d 181.

A circuit court's decision to permit amendment of an information is discretionary, and is reviewed on appeal for an erroneous exercise of that discretion. *State v. Flakes,* 140 Wis. 2d 411, 416, 410 N.W.2d 614 (Ct. App. 1987).

Whether a defendant has been denied his constitutional right to a sentence based on accurate information presents a constitutional issue, reviewed de novo. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1.

ARGUMENT

I. The circuit court properly found Vanetta Gholson-Wells unavailable for confrontation purposes at the second trial.

A. Controlling principles of law.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.[3] The Confrontation Clause applies to the states through the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 403 (1965). The State may admit prior testimony against a defendant only if the witness is unavailable to testify, and the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). Only the first requirement—unavailability—is at issue in this appeal. Garner concurs. (Garner's Br. 21.)

A witness is unavailable when the proponent of the witness's testimony makes a good-faith effort to obtain the witness's presence at trial. *Barber v. Page*, 390 U.S. 719, 724–25 (1968). "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness."

---

[3] Garner correctly notes that Article I, § 7 of the Wisconsin Constitution also provides that an accused "shall enjoy the right . . . to meet the witnesses face to face." (Garner's Br. 15.) But he does not argue that the state constitution gives him a greater right of confrontation than the federal constitution.

Hardy v. Cross, 565 U.S. 65, 70 (2011) (per curiam) (citation omitted). The Confrontation Clause "does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising," as it is "always possible to think of additional steps that the prosecution might have taken" to produce a witness at trial. *Id*. at 71–72.

The Wisconsin Rules of Evidence reflect these constitutional concerns. Wisconsin Stat. § (Rule) 908.04(1)(e) provides that a witness is unavailable if the proponent of the witness's testimony has tried but failed to procure her attendance at trial "by process or other reasonable means." If the proponent demonstrates unavailability, the circuit court may admit the witness's former testimony from a different proceeding. Wis. Stat. § (Rule) 908.045(1).

The proponent of the evidence must demonstrate a good-faith effort and due diligence in trying to locate and produce an absent witness. *State v. Williams,* 2002 WI 58, ¶¶ 62–63, 253 Wis. 2d 99, 644 N.W.2d 919. Issuing a pretrial subpoena to a prospective witness is not a condition precedent to a finding of unavailability. *State v. Zellmer*, 100 Wis. 2d 136, 148–49, 301 N.W.2d 209 (1981). "We have never held that the prosecution must have issued a subpoena if it wishes to prove that a witness who goes into hiding is unavailable for Confrontation Clause purposes . . . ." *Cross*, 565 U.S. at 71.

Wisconsin Stat. § (Rule) 908.04(1)(e) does not require a particular quantum of proof to establish unavailability. Nor does the rule require the circuit court to hold an evidentiary hearing to establish what the proponent of the evidence did to locate and produce the missing witness. Counsel's representations to the court will suffice. In *Commercial Union Ins. Co. v. Porter Hayden Co.*, 698 A.2d 1167, 1185 (Md. App. 1997), the trial court accepted counsel's representations regarding witness unavailability under

Maryland's version of Wis. Stat. § (Rule) 908.04: "I rely on counsel and if counsel makes a representation, as far as I am concerned, counsel's word is counsel's bond unless there is something to the contrary that the opponent can bring in." *Id.* The appellate court affirmed, observing that "[a]s officers of the court, lawyers occupy a position of trust and our legal system relies in significant measure on that trust." *Id.*

B. Vanetta Gholson-Wells was unavailable for Confrontation Clause purposes.

Given the State's available options—and the extent to which the State used those options in an effort to locate and produce Gholson-Wells—the circuit court found that the prosecutor made the reasonable, good faith effort necessary to support its finding of unavailability. This Court should concur.

The proponent's attempts to locate and produce the declarant "must be adapted to the circumstances and must be unstinting." *King*, 287 Wis. 2d 756, ¶ 17. The prosecutor's attempts satisfied that standard. He told the circuit court and Garner that he had been in contact with Gholson-Wells through her attorney, Robert Webb, and fully expected her to appear voluntarily. (R. 45:5; 69:3, 9–10.) Nothing in the record suggests the prosecutor behaved unreasonably when he formed that belief. When it became clear Gholson-Wells fled—apparently to avoid revocation of bond in her own criminal case—the prosecutor quickly sought and obtained a bench warrant for her arrest, and police began their search for her. (R. 45:5; 69:3, 9–10.)

The State eventually brought Milwaukee homicide detectives into the search, investigating avenues they hoped would lead them to her. (R. 84:6.) Members of the police department's warrant squad also joined the search, which included following a lead provided by Garner's trial counsel.

(R. 70:2–3.) The State was "following up on everything." (*Id.* at 3.) That included searching at least 10 houses in an effort to locate her. (R. 45:6; 72:3–4). It also included continuing to work with her attorney, Webb, to locate her and produce her for Garner's trial. (R. 45:7; 72:3–4.) The prosecutor told the circuit court—without objection or other contradiction by Garner—that "[d]etectives and the warrant squad have been hitting this hard. Your Honor, they have been spending a lot of time and resources attempting to find her." (R. 72:4.)

The State's efforts to locate and produce Gholson-Wells compare favorably with the efforts deemed sufficient in *State v. Keith*, 216 Wis. 2d 61, 573 N.W.2d 888 (Ct. App. 1997). In *Keith*, the State sought to present the former testimony of two child witnesses. In an effort to locate addresses for the witnesses, police searched Madison Police Department and Wisconsin Department of Transportation computer files. The searches proved unsuccessful. *Id.* at 73. The circuit court treated this as a customary means of finding witnesses, deemed it reasonable for purposes of determining unavailability, and admitted the witnesses' prior testimony. *Id.* at 74. This Court affirmed. *Id.* at 74. Here, the State did more. The prosecutor obtained a warrant, worked with Gholson-Wells's attorney in an effort to find her, sent police into the field in search of her, and had police search houses where she might have been found. These efforts were appropriate under the circumstances, and sufficiently reasonable to support the circuit court's unavailability determination.

Based on these facts—uncontradicted by Garner—Gholson-Wells was "unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), *abrogated on other grounds by Crawford*, 541 U.S. at 53–54. The prosecutor exercised due diligence and acted in good faith to locate her

and produce her, justifying the circuit court's determination of unavailability.

Much of Garner's appellate argument consists of historical narrative regarding the events of this case, and restatements of assertions made in his postconviction motion. (Garner's Br. 15–23.) To the extent Garner considers the narrative and the restatements separate appellate arguments, they lack adequate development and citation to legal authority. This Court should reject them. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). The properly developed arguments do not bring the correctness of the circuit court's finding of unavailability into question.

Garner cites a 1934 Wisconsin Supreme Court case—*Philbrook v. State*, 216 Wis. 206, 256 N.W. 779 (1934)—for the proposition that "the factor of unavailability" was part of Wisconsin law long before the United States Supreme Court decided *Crawford*. (Garner's Br. 16.) The State agrees.

Garner then contends the circuit court had to use *Philbrook* as a template for its decision-making on the issue of unavailability. (Garner's Br. 16–17, 22.) The State disagrees. Garner quotes language from *Philbrook* suggesting the State had an affirmative duty to present "positive evidence of the absence of the witness from the state, or positive evidence that a thorough official search for the witness in the state has been made." (Garner's Br. 16 (citation omitted).) See *Philbrook*, 256 N.W.2d at 782 (quoting *Inda v. State*, 198 Wis. 557, 224 N.W. 733, 734 (1929)).

But the tests established in *Inda* and *Philbrook* are nothing more than the good-faith effort required in *Barber*, 390 U.S. at 724–25. *See, e.g., Zellmer*, 100 Wis. 2d at 143–44. The State has established the adequacy of the prosecutor's

good faith effort in this case. The prosecutor had contacted Gholson-Wells through her attorney and expected her voluntary appearance. When that did not occur, he quickly obtained a bench warrant for her arrest, initiated police searches by increasing numbers of officers, and had them track down available leads. All of this is reasonable and indicative of a good-faith effort to locate a missing witness. The prosecutor did what he reasonably could to locate a witness who wanted to avoid being located.

Garner also asserts that *King* required the circuit court to conduct an evidentiary hearing on the question of what the State did to locate and produce Gholson-Wells, and required the State to have subpoenaed Gholson-Wells as a condition precedent to a finding of unavailability. (Garner's Br. 17 (citing *King*, 287 Wis. 2d 756, ¶¶ 13–15, 16–18).) He also assigns significance to the lack of an evidentiary hearing and a subpoena at other points in his brief. (Garner's Br. 21, 22.) The State has four responses.

First, Wisconsin Stat. § (Rule) 908.04(1)(e) does not require an evidentiary hearing. It is manifestly reasonable for a circuit court to rely on the proponent's representations regarding what has been done to secure the witness's presence. *See Commercial Union Ins. Co.*, 698 A.2d at 1185.

Second, the proponent's failure to subpoena a witness does not preclude a finding of unavailability. *Zellmer*, 100 Wis. 2d at 148–49; *Cross*, 565 U.S. at 71. Apart from his complaint that the prosecutor should have subpoenaed Gholson-Wells pretrial, Garner does not identify any other steps he believes the prosecutor should have taken to locate and produce her. Nor does he find fault with anything the prosecutor and police did do to locate and produce her. By his silence, he concedes that police competently conducted their search and explored all available leads.

Third, Garner never objected in the circuit court to the manner in which the prosecutor provided information regarding what the State was doing to locate and produce Gholson-Wells. He never suggested or demanded an evidentiary hearing. The absence of objection violates Wisconsin's contemporaneous objection rule, and should result in waiver of review of this issue on appeal. Wis. Stat. § (Rule) 901.03(1)(a); *McClelland v. State,* 84 Wis. 2d 145, 157–58, 267 N.W.2d 843 (1978).

Fourth, *King* does not require either a hearing or a subpoena as a condition precedent to a finding of unavailability, either as a matter of constitutional law or as a statutory requirement under the Wisconsin Rules of Evidence. In *King*, this Court noted the proponent's ability to subpoena the witness, but did not state it was a requirement. 287 Wis. 2d 756, ¶ 13. *King* also noted the proponent's responsibility to specify the facts relied upon to demonstrate diligence in locating and producing the witness. But it does not require an evidentiary hearing. *Id.* ¶ 17.

Garner next asserts that, had Gholson-Wells testified in person, he would have had multiple opportunities to impeach her testimony. (Garner's Br. 20–21, 23.) These are the claims the circuit court deemed speculative when the court denied Garner's postconviction motion. (R. 48:4–5.) Their speculative nature has not changed. We do not know how Gholson-Wells would have testified, had the State located and produced her. We do not know which possible avenues of impeachment Garner's trial counsel would have attempted to explore, and we do not know whether the circuit court would have permitted the inquiries. And even if the prosecutor had served her with a pretrial subpoena, we do not know if Gholson-Wells would have honored it. What we do know is that Gholson-Wells disappeared when she realized that she faced jail confinement as a result of

violating her bail in her own criminal proceedings. (R. 69:3, 6–8.) It is far from certain that, even if she had been subpoenaed, she would have appeared at Garner's trial, knowing she stood an excellent chance of being jailed afterward.

In the context of ineffective assistance of counsel claims, reviewing courts unambiguously reject assertions of prejudice based on speculation as to what might have happened under different circumstances. *See, e.g., State v. Erickson*, 227 Wis. 2d 758, 773–74, 596 N.W.2d 749 (1999). This appeal does not involve a claim of ineffective assistance, but rejecting speculative assertions is apt in this context as well. This Court should refuse to indulge Garner's speculation.

Garner also fails to explain the relevancy of the lost possibility of impeachment to the circuit court's determination of unavailability. Unavailability does not turn on what the opponent of the evidence could have done to impeach the testimony of the witness, had she appeared live at trial. "A declarant who is not in court despite the proponent's efforts to procure the declarant's presence by process or other reasonable means is unavailable." 7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 804.1 at 838 (3d ed. 2008).

The circuit court properly found Gholson-Wells unavailable for Confrontation Clause purposes.

II. Garner suffered no prejudice at his second trial from use of the amended information.

Wisconsin Stat. § 971.26 provides that "[n]o indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant." "The purpose of

a charging document is to inform the defendant of the acts he allegedly committed and to allow him to understand the offense charged so that he can prepare a defense." *Flakes,* 140 Wis. 2d at 419. "The key factor in determining whether an amended charging document prejudiced the defendant is whether the defendant had notice of the nature and cause of the accusations against him. There is no prejudice when the defendant has such notice." *Id.* (citation omitted).

When it denied Garner's postconviction motion, the circuit court concluded that Garner had notice of the nature and cause of the accusations against him at the time of the first trial. (R. 48:5.) It properly exercised its discretion in reaching that decision. The court concluded that the facts as alleged in the complaint gave him adequate notice: "He was in the same vehicle with the other co-defendants on the same night that the other two offenses were committed. The robbery of [TL] occurred in the time between the robbery of [JG] and the attempted armed robbery and shooting of [RC]. [Garner] was charged with party to a crime liability, and thus, notice was sufficient as to what occurred." (*Id.*)

If Garner understood the nature and cause of the charges at the time of the first trial, he understood them at the time of the second trial. Because the circuit court applied the proper legal principles to the relevant facts and reached a reasonable decision, this Court should affirm. *State v. Robinson,* 146 Wis. 2d 315, 330, 431 N.W.2d 165 (1988).

The fact that Garner faced two trials on the charges contained in the amended information leaves no doubt at all that, when he stood trial the second time, he had full knowledge of the nature and cause of the accusations again him.

Before the first trial, Garner's trial counsel acknowledged that both he and his client anticipated the

charge the State added at that proceeding—the second armed robbery involving TL. The factual basis for the charge appeared in the probable cause portion of the criminal complaint. (R. 1:2–3; 53:3–4.) The charge came as no surprise at all to the defense: "Your Honor, it's correct. In fact, my client and I discussed that last time we met so that's not a surprise." (R. 53:4.)

Garner and his trial counsel then went on to see precisely how the State presented the case against him on all three charges, including the charge added to the information. He also saw how that charge withstood his motion to dismiss at the end of the State's case-in-chief at the first trial. (R. 67:4.) By the time of the second trial, Garner had as much notice of the nature and cause of the State's allegations—including the charge added to the information before the trial trial—as any defendant could reasonably hope to receive. And "[t]here is no prejudice when the defendant has such notice." *Flakes*, 140 Wis. 2d at 419.

Garner pays short shrift on appeal to the existence of prejudice at the second trial. He cites *Whitaker v. State*, 83 Wis. 2d 368, 265 N.W.2d 575 (1978), for the proposition that reviewing courts should consider a defendant's right to notice of the charges when determining whether amending the information will prejudice the defendant's rights. (Garner's Br. 25.) But he does not go on to discuss whether, at the time of the second trial, he had notice of the nature and causes of the charges against him, including the second armed robbery.

Instead, Garner dwells in the past. He complains that the circuit court should not have allowed the State to file the amended information at the first trial. (*Id.* at 24–28.) He complains that the court did not fully determine the possible prejudice he might suffer from the amendment at the first trial. (*Id.* at 25.) He complains that the only reason the

prosecutor amended the information at the first trial was to prompt a guilty plea to the two original charges. (*Id*. at 25–26.) And he complains that the court should have done more at the first trial to ascertain his understanding of the additional charge and formalize the amendment of the information. (*Id*. at 27.) These complaints share two fatal flaws.

First, they refer to what Garner claims happened at the first trial, not the second. And this Court has no work to do with respect to complaints about what happened at the first trial. A mistrial is the equivalent of no trial—a "nugatory proceeding." *United States v. Whaley*, 830 F.2d 1469, 1478 (7th Cir. 1987), *abrogated on other grounds by United States v. Durrive*, 902 F.2d 1221, 1226 (7th Cir. 1990). "[T]he trial after a mistrial is not a continuation of the mistrial—it stands alone." *United States v. McAllister*, 29 F.3d 1180, 1183 (7th Cir. 1994).

The issue before this Court is not what the circuit court might have done differently at the first trial with respect to the amendment of the information. The issue is whether Garner suffered prejudice at his second trial from the use of the amended information. And the key to determining prejudice is whether Garner received notice of the nature and cause of the accusations. He received full and complete notice. He sat through the State's case-in-chief at the first trial. That makes it virtually impossible for him to credibly claim that, at the second trial, he lacked adequate notice of the nature and cause of the allegations against him.

Second, Garner did not take his complaints and turn them into objections at the second trial. Following the mistrial and the beginning of the second trial, Garner had months in which to lodge any objections he had to proceeding on the information as amended at his first trial. But he filed no motion in the second proceeding challenging

any of the charges specified in the information, nor did he object to them at any point during the second trial. The absence of objection is not surprising. He knew the nature and the cause of the allegations against him. That is what the law requires. *Flakes*, 140 Wis. 2d at 419.

III. The circuit court did not rely on inaccurate information in sentencing Garner.

"When a criminal defendant challenges the sentence imposed by the circuit court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue." *State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). This Court starts with the presumption that the circuit court acted reasonably. *Id*.

Garner has a constitutionally protected due process right to a sentence based upon accurate information. *Tiepelman*, 291 Wis. 2d 179, ¶ 9. But he must demonstrate that the disputed information was inaccurate and that the circuit court actually relied on the inaccurate information in imposing sentence. *Id*. ¶ 26. Because Garner bears the burden of proof of demonstrating both the presence of inaccurate information and actual reliance, this Court need not reach both issues if Garner fails to prove one or the other.

Mere disagreement between the sentencing court and the defendant regarding the probative value of information—or the credibility of the witness who provides it—does not render the information inaccurate for purposes of due process. "It is not within the province of this court or any appellate court to choose not to accept an inference drawn by a factfinder when the inference drawn is a reasonable one." *State v. Friday,* 147 Wis. 2d 359, 370–71, 434 N.W.2d 85 (1989). And "[t]he trial judge, when acting as

the factfinder, is the ultimate arbiter of the credibility of a witness." *In re Sensenbrenner,* 89 Wis. 2d 677, 701, 278 N.W.2d 887 (1979) (citation omitted). The assessment of evidence, the weighing of relative credibility, and the drawing of factual conclusions from testimony all lie at the heart of a circuit court's discretionary sentencing decision. *See State v. Harris,* 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). A defendant cannot convert those assessments, credibility determinations, and factual conclusions into constitutionally inaccurate information simply by saying, "I see things differently."

We have no inaccurate information here. Both John Eggars and Gholson-Wells testified that Garner fired the gunshot that killed RC, the victim of the felony murder. (R. 74:41, 42, 44; 76:60, 62, 87–88.) They testified to a plausible scenario, grounded in observations they made at the time of the crime. Nothing about their testimony—or the circuit court's conclusion that Garner was the shooter—is incredible as a matter of law. Their testimony and the court's conclusion do not conflict "with nature or the fully established facts, or unless the testimony supporting and essential to the verdict is inherently and patently incredible." *State v. Sharp*, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993). Garner would have preferred that the court reject their testimony and reach a different conclusion about who fired the fatal shot. But this Court does not ask whether the court might have exercised its discretion differently. *See State v. Prineas*, 2009 WI App 28, ¶ 34, 316 Wis. 2d 414, 766 N.W.2d 206. Nothing prevented the court from concluding, on the strength of the evidence before it—that Garner fired the fatal shot.

Again, much of Garner's appellate argument consists of historical narrative and restatements of assertions from his postconviction motion. (Garner's Br. 29–32.) Again, if he

considers the narrative and the restatements separate appellate arguments, they lack appropriate development and this Court should reject them. *Pettit*, 171 Wis. 2d at 646. The remainder of his argument breaks cleanly into two assertions: (1) Jeron Brown actually fired the gunshot that killed RC, the victim of the felony murder, and (2) the circuit court should have disbelieved Eggars and Gholson-Wells when they testified that Garner was the shooter.

But these assertions establish only that Garner and the circuit court disagree in their interpretation and assessment of evidence—that they hold different opinions. Garner would have preferred that the circuit court share his opinions regarding the identity of the shooter, and Eggars's and Gholson-Wells's credibility. The court did not, and Garner fails to explain how the court's decision to believe their testimony regarding Garner's role as the shooter constitutes reliance on inaccurate information, as opposed to a mere difference of opinion regarding the probative value and reliability of their testimony. He does not address this Court's limited ability to reject an inference drawn by a factfinder. *Friday*, 147 Wis. 2d at 370–71. He does not address the circuit court's role as the ultimate arbiter of witness credibility. *Sensenbrenner*, 89 Wis. 2d at 701. He does not address the circuit court's authority to assess facts, weigh credibility, and draw factual conclusions from testimony. *Harris*, 119 Wis. 2d at 623. And he provides no reason for this Court to conclude that their testimony—and the court's conclusion drawn from it—is incredible as a matter of law. *Sharp*, 180 Wis. 2d at 659.

CONCLUSION

This Court should affirm Garner's judgment of conviction and the order denying his motion for postconviction relief.

Dated at Madison, Wisconsin, this 16th day of June, 2017.

BRAD D. SCHIMEL
Wisconsin Attorney General

GREGORY M. WEBER
Assistant Attorney General
State Bar #1018533

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 266-9594 (Fax)
webergm@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 6290 words.

_____
GREGORY M. WEBER
Assistant Attorney General

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

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated at Madison, Wisconsin, this 16th day of June, 2017.

_____
GREGORY M. WEBER
Assistant Attorney General