STATE OF WISCONSIN

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

DISTRICT I

Case No. 2017AP968-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMEY LAMONT JACKSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DANIEL L. KONKOL AND M. JOSEPH DONALD, RESPECTIVELY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Was Jackson's trial counsel ineffective for failing to move to suppress identification testimony from two witnesses who were present at a lineup where a third witness asked to take a second look at Jackson?

The trial court determined that that lineup procedure was not unduly suggestive and that even assuming that those two witnesses' out-of-court identifications of Jackson had been suppressed, there was not a reasonable probability of a different result at trial.

This Court should affirm the circuit court.

2. Was there sufficient evidence presented to support Jackson's conviction for felon in possession of a firearm?

The jury found Jackson guilty on this charge.

This Court should affirm Jackson's conviction.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State asserts that neither oral argument nor publication are necessary. This case involves only the application of well-established law to the facts, which the briefs should adequately address.

INTRODUCTION

Ten-year-old SG was gunned down on a Milwaukee playground when two men got into an argument and began shooting at each other. A stray bullet struck SG in the head. She was rushed to the hospital, but later died. Witnesses from the playground identified Sylvester Lewis as the man who had been shooting toward the playground. Police

conducted a lineup with some of those witnesses—TM, KG, and BB[1]—to identify the second shooter. They identified the defendant, Jamey Jackson, as the other gunman, and he was found guilty at a jury trial of possession of a firearm by a felon.

Jackson claims that the lineup was impermissibly suggestive as to TM's and KG's identifications because BB asked if she could see Jackson again during the lineup. Therefore, he argues, his trial counsel was ineffective for failing to move to suppress TM's and KG's identifications. He also claims there was insufficient evidence presented at trial to convict him. He is wrong.

There was nothing impermissibly suggestive about the lineup, and even if there had been, TM's and KG's identifications were nonetheless reliable. A suppression motion on that ground would have failed. Consequently, Jackson's trial counsel was not ineffective for failing to file one. Furthermore, the witness testimony was sufficient for the jury to find that Jackson committed the crime. Jackson has not raised any facts that show otherwise; he claims that the testimony was "confusing," but he points to nothing showing that it was incredible as a matter of law. This Court should reject Jackson's claims.

STATEMENT OF THE CASE

On May 21, 2014, 12-year-old KG, her 10-year-old sister SG, and several other children were playing at the playground at Clarke Street Elementary School. (R. 1:2;

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[1] Though TM, KG, and BB were not "victims" in this case as defined in Wis. Stat. § 809.86, they were minors, and two of them are family members of the victim. The appellant's brief and many of the record documents refer to them by initials only and in an effort to protect their privacy, the State has done so as well.

68:87.) Several men, including Jackson, were sitting on steps in front of the playground. (*Id.*) Sylvester Lewis[2] rode his bike by the men sitting on the steps. (*Id.*) Lewis was carrying a loaded 9mm handgun at the time. (*Id.*) One of the men on the steps confronted Lewis about stealing some clothes. (*Id.*) Jackson then stood up and pointed a gun at Lewis. (*Id.*) After Lewis's arrest a few days later, he told police that Jackson threatened to kill him and fired a shot at him, which missed and went past his ear. (*Id.*) Lewis fired between seven and twenty shots[3] toward Jackson and the playground. (*Id.*) KG saw her sister SG fall to the ground. (*Id.*) SG was struck by a stray bullet and was bleeding from the head. (*Id.*)

When Lewis's gun was empty, he ran away through several yards. (*Id.*) BB, a witness who was near the playground, saw two men running away from the scene. (R. 1:3.) One of them was tucking a gun into his pants. (*Id.*) Police arrived at the scene and found SG unconscious, but with a pulse. (R. 1:1.) She was rushed to the hospital. (R. 68:87.) She died from the gunshot wound to her head. (R. 70:26.)

Detectives interviewed several witnesses at the scene, one of whom identified Lewis as the man shooting toward the playground. (R. 1:2.) Police arrested Lewis, and he admitted to the above events. (*Id.*) He also identified Jackson as the person who was shooting at him. (*Id.*) KG

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[2] Lewis was charged and tried separately for the events at issue in this case. On November 5, 2014, a jury found him guilty of one count of first-degree reckless homicide, one count of first-degree recklessly endangering safety, and one count of possession of a firearm by a felon. The court sentenced him to a total of 61 years' imprisonment. *See* Milwaukee County Case No. 2014CF2236

[3] Different witnesses reported hearing different numbers of shots.

told police a substantially different story than Lewis. (R. 46:13–14.) KG said that she saw a black SUV pull up in front of the steps where the men were sitting. (*Id.*) She said that three or four men got out of the car and started shooting at the men on the steps. (R. 46:14.) KG ran and hid around a corner of the school building when the shooting began. (*Id.*)

On May 30, 2014, police organized a live lineup of six individuals, including Jackson as number five. (R. 46:10.) BB, KG, and TM, another child from the playground, all simultaneously viewed the lineup. (R. 46:10–18.) After the witnesses viewed the lineup, a detective asked the witnesses if they had any questions or needed to see the lineup again. (R. 46:11.) BB asked if she could see number five again, and the entire lineup was walked back in. (*Id.*) After the lineup was over, the witnesses were interviewed by separate police officers, who also collected the witnesses' supplemental lineup reports. (*See* R. 46:15; Ex. 3–5.[4])

Detective Carlos Rutherford interviewed BB. (R. 46:11.) BB had identified number five on the supplemental report as well as written "that's him, 'Yella'" with an arrow pointing to the word "yes" under number five. (*Id.*) She had circled "no" for all of the other numbers. (*Id.*) Rutherford asked BB to tell him how certain she was about her identification. (*Id.*) BB said she was "one hundred percent positive." (*Id.*) She said she recognized number five as the perpetrator as soon as he walked into the room and that she knew him from growing up in the same neighborhood. (*Id.*) BB said she did not identify "Yella"

[4] The lineup reports at issue were added to the record as part of a supplement requested by the State, but they were not assigned a record number. (*See* R. 71–76.) The State has therefore referred to them by their circuit court exhibit number only.

during her initial interview because the shooting had happened too fast for her to recognize him. (*Id.*)

Detective Kevin Klemstein interviewed KG. (R. 46:15.) KG had originally circled "no" under all six numbers on the supplemental report but then had scratched out the "no" under number five and circled "yes." (R. 46:16.) Klemstein asked her if number five was a yes or a no. (*Id.*) KG said she circled "no" at first but then circled "yes" and that was she wanted to circle "yes." (*Id.*) Klemstein told her to initial the change and asked why she circled "yes" for number five. (*Id.*) KG said she knew number five as "TY." (*Id.*) She said that on the day of the shooting she saw TY in a car shooting at "Red."[5] (*Id.*) She said she saw TY with a gun that day. (*Id.*)

Detective Patrick Pajot interviewed TM. (R. 46:18.) TM's supplemental report had numerous marks all over it. (*Id.*) She circled "no" for numbers one through four and six, and circled "yes" for number five. (*Id.*) She had written "looks familiar" over five, but scribbled it out. (*Id.*) Pajot asked her why she wrote that and circled "yes," and TM said she saw number five in the park with a gun in his pants. (*Id.*) She said she was positive number five was the person she had seen on the playground shooting at the person in the street. (*Id.*)

The State charged Jackson with one count of possession of a firearm as a felon. (R. 3:1.) Jackson pled not guilty and proceeded to trial. (R. 58:26.) The evidence at trial consisted of the testimony of several police officers who had investigated the case and witnesses who had been at the scene. (*See* R. 68; 69.)

KG testified that she was playing at the playground with her sister and some friends when she heard gunshots

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[5] "Red" was Lewis's alias. (*See, e.g.*, R. 68:138.)

and started running away. (R. 68:126.) She said she peeked around the corner and saw her sister lying on the ground. (R. 68:128.) She testified that she had seen the two shooters and that she knew the man on the street shooting toward the playground by the nickname "Red." (R. 68:138.) She explained that the other shooter was number five in the lineup she had viewed and identified Jackson in court as that person. (R. 68:130–40.) She testified that she was sure Jackson was the other shooter. (R. 68:141.) When asked about her lineup report on cross-examination, KG admitted that she had first circled "no" under number five. (R. 68:143–44.) She testified that when she first talked to police on the day of the shooting, she did not say anything about anyone having a gun, and that she just ran when she heard the shots. (R. 68:157.) She testified that in the nine days between the shooting and the lineup, she heard many people talking about the shooting, including hearing the names "TY" and "Red" as the shooters. (R. 68:160–61.)

The State called TM, who also testified that right before the shooting she saw "Jamey," someone she knew from the neighborhood, smoking a cigarette near a bench on the playground. (R. 68:169.) She said "Jamey" told her to go get something, and she walked back toward SG. (R. 68:171.) She then testified that she saw "Jamey" and "Red" shooting at each other that day. (R. 68:171–72.) She testified that she went to view the lineup with KG. (R. 68:174–75.) The prosecutor walked her through all the writing she had done on her supplemental lineup report. (R. 68:176–78.) TM testified that she circled "yes" on number five because she knew the man and knew he was one of the shooters. (R. 68:177–78.) When asked if she saw "Jamey" in the courtroom, she said she did, and indicated someone sitting in the gallery. (R. 68:170–71, 183–84.)

At a short recess, the court and the parties discussed TM's identification of the man in the gallery. (R. 68:183–86.)

During that recess, TM told police that the man in the gallery had told her not to identify Jackson. (R. 68:187.) The court questioned the man in the gallery, who said he never talked to TM and then left the courtroom. (R. 68:188.) When the trial resumed, the prosecutor asked TM why she identified "Jamey" as the person in the gallery. (R. 68:188–89.) At first she said that person was not Jamey, but then changed her answer and said he was. (R. 68:189.) She testified that he talked to her in the hallway and said "my nigga didn't do it." (R. 68:190.) When asked if she now saw anyone in the courtroom who was in the park that night, she said no. (R. 68:190.) She then testified that "Red" and "T-Y" were the people shooting that day, and that "T-Y" was the defendant. (R. 68:191–94.) She eventually testified that "T-Y" and "Jamey" were the same person, and she always knew him as "T-Y" but saw on TV that his name was Jamey. (R. 68:217–19.)

The State's final witness before it rested was Detective Pajot. He also testified about the lineup and the usual lineup procedure. (*See, e.g.*, R. 69:21.)

Jackson waived his right to testify. (R. 69:41.) Jackson called two witnesses who were at the playground that day, AW and MW, and a detective who investigated the shooting. (R. 69:41.) AW testified that she was standing near SG when the gunfire began but could not identify anyone but Red as one of the shooters that day. (R. 69:45.) MW also testified that she was standing near SG but did not get a good look at anyone but Red. (R. 69:49–52.) The detective testified that BB had, at the lineup, identified the second shooter by the nickname "Yella" and said she knew him from the neighborhood, but that she never said anything like that in her initial police report. (R. 69:58–59.) He also testified about the course of the investigation and how identifications are usually made. (R. 69:61–69.)

The defense rested and moved to dismiss. (R. 69:74.) The court denied the motion and the case was sent to the jury, which returned a guilty verdict. (R. 70:22.) The circuit court sentenced Jackson to ten years' imprisonment consisting of five years of initial confinement and five years of extended supervision. (R. 70:35–36.)

Jackson filed a postconviction motion for a new trial, claiming his trial counsel was ineffective for failing to move to suppress the lineup identification evidence.[6] (R. 46:1.) Jackson claimed the lineup was impermissibly suggestive because TM and KG were in the room when BB asked to see "number five" again. (R. 46:1.)

The circuit court denied the motion. It determined that Jackson failed show anything indicating that BB's request unduly influenced KG or TM, and that regardless, their identifications would have been admitted because they gave reliable explanations for identifying Jackson. (R. 52:3–4.) It also found that even had the lineup identifications been suppressed, there was not a reasonable probability of a different outcome at trial due to BB's and KG's in-court identifications. (R. 52:5.) Jackson appeals.

ARGUMENT

I. Jackson is not entitled to a new trial on his claims of ineffective assistance of counsel.

A. Standard of review

Appellate review of Jackson's ineffective assistance of counsel claims is a mixed question of law and fact. *State v. Williams,* 2015 WI 75, ¶ 35, 364 Wis. 2d 126, 867 N.W.2d

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[6] Jackson also argued that his right to counsel was violated when the police conducted the lineup without counsel present, but he does not pursue that argument on appeal.

736. The circuit court's findings of fact are upheld unless clearly erroneous. *Id.* Whether counsel's performance is constitutionally infirm is a question of law this Court reviews *de novo*. *State v. Domke*, 2011 WI 95, ¶ 33, 337 Wis. 2d 268, 805 N.W.2d 364.

B. Relevant legal principles

It is well-settled that the right to counsel contained in the United States Constitution[7] and the Wisconsin Constitution[8] includes the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant who asserts ineffective assistance must demonstrate: (1) counsel performed deficiently, and (2) the deficient performance prejudiced the defendant. *Id.* at 687. "The defendant has the burden of proof on both components" of the *Strickland* test. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citing *Strickland*, 466 U.S. at 688). If a defendant fails to prove one prong of the *Strickland* test, a court need not consider the other prong. *Strickland*, 466 U.S. at 697.

To prove deficient performance, Jackson "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. The objective standard of reasonableness encompasses a wide range of professionally competent assistance, and "every effort is made to avoid determinations of ineffectiveness based on hindsight." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "Counsel need not be perfect, indeed not even very good, to be constitutionally

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[7] U.S. Const. amends. VI, XIV.

[8] Wis. Const. art. I, § 7.

adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

In determining constitutionally effective assistance, the standard is not "what would have been ideal, but rather . . . what amounts to reasonably effective representation." *State v. McMahon*, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). "Even if it appears, in hindsight, that another defense would have been more effective, the strategic decision will be upheld as long as it is founded on rationality of fact and law." *State v. Hubanks*, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992).

Establishing prejudice under *Strickland* is difficult. "It is not enough for [Jackson] to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland,* 466 U.S. at 693. Jackson "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; *State v. Love*, 2005 WI 116, ¶ 30, 284 Wis. 2d 111, 700 N.W.2d 62.

C. Jackson's counsel was not deficient for failing to challenge the admission of the lineup identifications because the lineup procedure was not unduly suggestive and the witnesses' identification of Jackson was reliable.

The circuit court properly denied Jackson's postconviction motion without a hearing because Jackson has not shown that his attorney was constitutionally deficient for failing to challenge the admissibility of KG's and TM's lineup identifications. It is well-established that "[c]ounsel does not render deficient performance for failing

to bring a suppression motion that would have been denied." *State v. Maloney*, 2005 WI 74, ¶ 37, 281 Wis. 2d 595, 698 N.W.2d 583 (citing *State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987)).

The admission of identification evidence violates a defendant's due process rights if it stems from a police procedure that is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *State v. Benton,* 2001 WI App 81, ¶ 5, 243 Wis. 2d 54, 625 N.W.2d 923 (citation omitted). Courts apply a two-part test to assess the admissibility of pretrial identification evidence. *Powell v. State*, 86 Wis. 2d 51, 65, 271 N.W.2d 610 (1978). First, the court must decide whether the defendant has shown that the identification procedure was impermissibly suggestive. *Id*. This Court's analysis ends if the defendant fails to satisfy his burden in this first step. *Id*. at 68. If the defendant satisfies his burden, the State must then demonstrate that, despite the suggestive procedure, the identification was reliable under the totality of the circumstances. *Id.* at 64–65.

Whether a lineup is impermissibly suggestive depends upon the totality of the circumstances surrounding the lineup. *Wright v. State*, 46 Wis. 2d 75, 86, 175 N.W.2d 646 (1970). The police must "make every effort reasonable under the circumstances to conduct a fair and balanced presentation of alternative possibilities for identification." *Id*. "What is required is the attempt to conduct a fair lineup, taking all steps reasonable under the 'totality of circumstances' to secure such [a] result." *Id*. The factors to be considered when evaluating reliability of the statement include such factors as: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5)

the length of time between the crime and the confrontation. *Powell*, 86 Wis. 2d at 65. This list is non-exhaustive, and the test is again whether the out-of-court identification was reliable under the totality of the circumstances. *Id.*

Had counsel filed a motion, the court would have denied it because the lineup was not impermissibly suggestive and the two identifications Jackson challenges were reliable. There was nothing about the lineup that gave "rise to a very substantial likelihood of irreparable misidentification." *Benton*, 243 Wis. 2d 54, ¶ 5. Jackson claims that TM's and KG's identifications were unduly influenced because BB "raised her hand and said out loud for all the other people viewing the lineup to hear . . . that she wanted to see number 5 [Jackson] again." (Jackson's Br. 8.) But he fails to allege any facts suggesting that KG and TM identified him because of BB's request. (*Id.*) He also fails to acknowledge that KG and TM each gave contemporaneous, reliable explanations for why they identified Jackson as the shooter, and none of them had anything to do with BB's statement.

First, there is no evidence that the lineup was impermissibly suggestive. The lineup was conducted only nine days after the crime when events would still be fresh in the witnesses' minds. (*See* R. 46:15.) When BB asked to see number five again, the detectives ran the entire lineup again and did not single out Jackson. (*See* R. 46:15.) Nothing suggests that either KG or TM were influenced by BB's asking to see number five again. Neither KG nor TM gave any indication during their post-lineup interview that they even heard BB say something. (*See* R. 46:16, 18.) Additionally, during cross-examination, Jackson asked BB if she asked "out loud" to see number five again, and BB said "no." (R. 69:17.) Rather, BB said she had asked the police officer standing next to her if she could see number five again, and the officer told her they would have to run the

whole lineup again. (R. 69:17–18.) Detective Pajot testified that he heard BB ask to see number five again during the lineup, (R. 69:31–33), but neither KM nor TG gave any indication that they had heard BB ask. Nothing about the lineup "give[s] rise to a very substantial likelihood of irreparable misidentification." *Benton*, 243 Wis. 2d 54, ¶ 5.

Second, TM's and KG's lineup identifications of Jackson were reliable under the totality of the circumstances. Both TM and KG independently explained that that they identified Jackson because they saw him carrying a gun at the crime scene. When interviewed after the lineup, KG said she circled "no" at first but then circled "yes" for number five. (R. 41:16.) She said knew number five from seeing him in the neighborhood for at least a year, and that he went by the nickname "TY." (R. 46:16.) She said she circled number five because she saw "TY" with a gun shooting at someone named "Red" that day. (R. 46:16.) Similarly, TM explained during her post-lineup interview that she was familiar with number five because she had seen him around the neighborhood for at least two years. (R. 46:18.) She said she had circled number five because "she was positive that the person in position 5 [was] the person she saw with a gun on the playground shooting back toward the street." (R. 46:18.)

Both TM and KG were familiar with Jackson from seeing him around their neighborhood in the past. They both were on the playground that day and had an opportunity to see the shooters. They both said that they identified Jackson because they saw him at the playground shooting a gun that day. Under the totality of the circumstances, their identifications were reliable even if they heard BB ask to see number five again.

And since there was nothing impermissibly suggestive about the lineup and TM's and KG's identifications were reliable, there would have been no basis for the court to

grant a suppression motion. Consequently, Jackson's trial counsel cannot have performed deficiently by failing to file one. *Maloney*, 281 Wis. 2d 595, ¶ 37.

D. Jackson has not sufficiently alleged prejudice from trial counsel's failure to attempt to suppress the lineup identification evidence.

Even if Jackson's attorney was deficient for failing to file a motion to suppress TM's and KG's lineup identifications, Jackson's claim fails because he has not sufficiently alleged and cannot show prejudice. "[T]he defendant must affirmatively prove prejudice." *State v. O'Brien*, 214 Wis. 2d 328, 347, 572 N.W.2d 870 (Ct. App. 1997). To do so, Jackson had to allege "within the four corners" of his postconviction motion sufficient facts showing that, but for his attorney's deficient performance, there is a reasonable probability of a different outcome at trial. *State v. Allen*, 2004 WI 106, ¶ 23, 274 Wis. 2d 568, 682 N.W.2d 443. "Wisconsin courts have long held that conclusory allegations without factual support are insufficient" to entitle defendants to relief. *State v. Bentley*, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996).

Jackson's prejudice argument in both his postconviction motion and his brief consists of a single sentence stating that there is a reasonable probability that the outcome of his trial would have been different had his attorney filed a suppression motion. (*See* R. 46:5; Jackson's Br. 10.) But he has not alleged any facts in support. (*See id.*) Jackson's allegation that the outcome of his trial would have been different had his attorney filed the motion is undeveloped and conclusory, and it is insufficient to afford him relief. Consequently, the circuit court properly rejected his motion without a hearing, and this Court need not address his prejudice claim. *See Allen*, 274 Wis. 2d 568, ¶ 12 (circuit courts may deny an insufficiently pled postconviction

motion without a hearing); *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address undeveloped arguments).

Additionally, the record shows that there is not a reasonable probability of a different result even had KG's and TM's lineup identifications been suppressed. Jackson fails to address the fact that BB's lineup identification, which was the most certain of the three, would still have been admitted even had his attorney successfully moved to suppress KG's and TM's lineup identifications. (*See* R. 46:11 (BB was "one hundred percent positive" Jackson was the man she saw with a gun); R. 69:8–11.) Jackson also fails to address the fact that KG, TM, and Detective Pajot all identified him in court. (*See* R. 68:139–41, 191–94; 69:29.) The jury's verdict shows that they found the witnesses' identifications of Jackson credible. There is nothing to suggest that the jury would have found the in-court identifications and BB's lineup report testimony less credible without KG's and TM's lineup report testimony. There is not a reasonable probability that the jury would have doubted Jackson possessed the gun without TM's and KG's lineup identifications.

II. There was sufficient evidence to support the jury's finding that Jackson was guilty of possession of a firearm.

A. Standard of review

"[W]hether the evidence was sufficient to sustain a verdict of guilt in a criminal prosecution is a question of law" which this Court reviews de novo. *State v. Smith,* 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410 (citation omitted). However, review of a sufficiency of the evidence challenge is very narrow, and the reviewing court must give great deference to the trier of fact. *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis. 2d 1, 681 N.W.2d 203. "[A]n appellate court

may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

B. Relevant legal principles

This Court may overturn the fact finder's verdict "only if the trier of fact could not possibly have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." *State v. Watkins*, 2002 WI 101, ¶ 68, 255 Wis. 2d 265, 647 N.W.2d 244. It is the trier of fact that decides which evidence is worthy of belief, which evidence is not, and how to resolve any conflicts in the evidence. *State v. Wilson,* 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). This Court "must examine the record to find facts that support upholding the jury's decision to convict." *Hayes*, 273 Wis. 2d 1, ¶ 57. Therefore, when more than one inference can reasonably be drawn from the evidence, the inference that supports the trier of fact's verdict must be the one followed on review. *State v. Allbaugh*, 148 Wis. 2d 807, 809, 436 N.W.2d 898 (Ct. App. 1989); *see also Smith,* 342 Wis. 2d 710, ¶ 31 (reaffirming the holding in *Poellinger,* 153 Wis. 2d at 506, that "the trier of fact is free to choose among conflicting inferences of the evidence and may, within the bounds of reason, reject that inference which is consistent with innocence of the accused").

The credibility of the witnesses and the weight to be given their testimony are exclusively for the trier of fact to determine. *State v. Perkins*, 2004 WI App 213, ¶¶ 14–15, 277 Wis. 2d 243, 689 N.W.2d 684; *Poellinger*, 153 Wis. 2d at 504, 506. The trier of fact must resolve any conflicts or inconsistencies in the evidence, whether in the testimony of the same witness or in the testimony of different witnesses.

Perkins, 277 Wis. 2d 243, ¶ 15. A reviewing court may substitute its judgment for the determination of the trier of fact only if the court can conclude as a matter of law that no finder of fact could believe the testimony. *State v. Garcia*, 195 Wis. 2d 68, 75, 535 N.W.2d 124 (Ct. App. 1995); *State v. Wind*, 60 Wis. 2d 267, 275, 208 N.W.2d 357 (1973). Testimony is incredible as a matter of law only if it is "in conflict with the uniform course of nature or with fully established or conceded facts." *State v. King*, 187 Wis. 2d 548, 562, 523 N.W.2d 159 (Ct. App. 1994).

C. There was sufficient evidence for the jury to find that Jackson was in possession of a firearm.

The testimony presented at trial was sufficient for a reasonable jury to find that Jackson possessed a firearm.

KG testified that she was dancing and singing with her sister and some friends when she heard gunshots and ran toward the school. (R. 68:123–27.) She said that a "dude" ran past her and said "they shot that little girl" and kept going toward the parking lot. (R. 68:127.) She testified that she remembered telling the police about the men on the steps and about a car pulling up, but she did not remember telling them the men from the car were the shooters. (R. 69:129.)

The prosecutor then asked KG about her lineup report. (R. 68:130.) KG testified that she had circled "yes" under number five because he was one of the two men she saw shooting at each other. (R. 68:131–32.) She said that she did not see the man who was standing in the street (Lewis) anywhere in the room. (R. 68:133.) She again said that she circled number five because he was the man who had been standing in the playground shooting toward the man in the street. (R. 68:136.) She said she knew the man in the street's nickname, "Red," and that the other shooter was the one she

picked out of the lineup. (R. 68:138–39.) She said she saw that person in the courtroom. (R. 68:139.) She identified Jackson as the man shooting toward "Red" from the playground and the one she picked out of the lineup. (R. 68:140.) She said she was sure he was the other shooter. (R. 68:140–41.)

TM testified that she circled "yes" on number five because she knew the man and knew he was one of the shooters. (R. 68:177–78.) She testified that she knew that person as "T-Y." (R. 68:191–92.) Though she said she did not see anyone who was in the "park" that night in the courtroom, she also testified that the person she knew as "T-Y" was Jackson and identified him in court. (R. 68:192.) She testified that there were multiple people present with multiple nicknames and that she was getting confused. (R. 68:215–19.) But she definitively testified that she saw two people shooting that day, Sylvester or "Red," and "T-Y," and that "Red" was shooting toward the playground and "T-Y" was shooting back at "Red." (R. 68:194.)

BB testified that as she was walking home near the playground that evening she heard gunshots. (R. 69:7.) She said a man with a gun ran past her away from the school. (R. 69:8.) She then testified about her lineup report where she had identified Jackson and that she was one hundred percent certain he was one of the men she saw running from the scene with a gun. (R. 69:8–16.)

Viewed most favorably to the State and the verdict, this testimony was sufficient to establish beyond a reasonable doubt that Jackson had possessed a firearm. Three witnesses who were at the scene testified that Jackson was the second shooter and that they knew that because they saw him with a gun. The jury found their identifications credible, and Jackson has presented nothing to undermine the jury's finding.

Jackson argues only that KG's and TM's testimony was "confusing," and claims that therefore it was insufficient to establish he possessed a firearm beyond a reasonable doubt. (Jackson's Br. 11.) In other words, he proceeds as though this Court reevaluates the evidence on appeal giving no deference to the jury's verdict. (*See* Jackson's Br. 11–12.) But that is not how this Court reviews the sufficiency of the evidence on appeal. *See, e.g., Garcia*, 195 Wis. 2d 75. Rather, Jackson must establish that no reasonable finder of fact could believe the witnesses' testimony. *Id.* To do so, Jackson must show that their testimony is "in conflict with the uniform course of nature or with fully established or conceded facts." *King*, 187 Wis. 2d at 562. Jackson has alleged nothing showing that the testimony placing him at the scene with a gun is in conflict with the uniform course of nature or with fully established facts. (Jackson's Br. 11–12.) All three witnesses were under oath, all three had been present at the scene of the crime, and all three testified that they personally saw Jackson with a gun that day. The fact that Jackson believes the testimony was confusing does not establish that no trier of fact could reasonably find the witnesses' identification of Jackson credible. Jackson has failed to meet his burden and this Court should reject his claim.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reject Jackson's claims and affirm his conviction.

Dated this 25th day of September, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5654 words.

_____
LISA E.F. KUMFER
Assistant Attorney General

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

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

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

Dated this 25th day of September, 2017.

_____
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