STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2017AP001852-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN L. BUCKINGHAM,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in Milwaukee County Circuit Court, the Honorable Thomas J. McAdams Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was Mr. Buckingham deprived of his right to the effective assistance of counsel when:

   - His lawyer failed to exclude irrelevant evidence about unrelated firearms?

     The trial court answered no.

   - His lawyer failed to call a law enforcement witness who could contradict the victim's identification of Mr. Buckingham?

     The trial court answered no.

   - His lawyer failed to object to an unfairly suggestive and unreliable in-court identification?

     The trial court answered no.

   - His lawyer did not move to strike unresponsive hearsay testimony linking Mr. Buckingham to an otherwise valid alternate suspect?

     The trial court answered no.

   - His lawyer failed to alert the jury to a total lack of corroborative evidence regarding motive?

     The trial court answered no.

2. Was Mr. Buckingham cumulatively prejudiced by these errors?

   The trial court answered no.

3. Was Mr. Buckingham entitled to postconviction discovery?

The trial court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication of this case is requested as it will help to guide litigants in future cases with similar facts.

While Mr. Buckingham does not request oral argument, he welcomes the opportunity to discuss the case should the Court believe that oral argument would be of assistance to its resolution of the matter.

STATEMENT OF THE CASE

The information charged Mr. Buckingham with first-degree reckless injury with use of a dangerous weapon, contrary to Wis. Stats. §§ 940.23(1)(a), 939.50(3)(d), and 939.63(1)(b), as well as two counts of felony bail jumping contrary to Wis. Stats. §§ 946.49(1)(b) and 939.50(3)(h). (7:1). A jury convicted Mr. Buckingham of all counts. (103). He was sentenced to a lengthy term of imprisonment. (83); (App. 101). Following a timely notice of intent to pursue postconviction relief, (42), Mr. Buckingham filed a Rule 809.30 postconviction motion. (63). After conducting an evidentiary hearing, the circuit court partially granted Mr. Buckingham's motion to vacate excessive DNA surcharges. (77:9); (App. 111). The circuit court denied Mr. Buckingham's motions for a new trial and for postconviction discovery. (77); (App. 103-112). This appeal followed. (85).

STATEMENT OF RELEVANT FACTS[1]

Underlying Offense

On August 19, 2013, D.F was waiting at the bus stop at 51st and North Avenue in Milwaukee with two friends, Antonio Gail and Alexandrea Coe. (99:53-54). While they waited for the bus to arrive, two young men approached the group. (99:56; 99:68). According to Alexandrea Coe, both men were holding guns. (100:34). They stopped a short distance from D.F. and, according to D.F., asked "What did [D.F.] say to him on Facebook?" (99:57).

The witnesses disagree about what happened next: According to D.F., one of the men fired his weapon a single time. (99:57). Antonio Gail, however, stated that both men pointed their weapons at D.F. and both fired a shot or shots. (100:73). Alexandrea Coe was not sure whether one or both of the men fired their weapon. (100:40). She was certain, however, that she heard "shots." (100:40).

Kira Wells, a bystander, saw only one of the men with a gun. (100:111-112). The man she witnessed with a gun then shot D.F. (100:103). At another point in her trial testimony, however, Ms. Wells was unsure whether or not "the other individual had a gun." (100:103). She did witness the other man raising his hand prior to the shooting. (100:112). Tamar Aaron was with Kira Wells when the shooting occurred. (100:118). He witnessed "two guys with a gun." (100:119). He testified that one of the individuals pointed a gun and fired two to three shots. (100:120). Law enforcement ultimately

[1] Due the lengthy nature of the trial, Mr. Buckingham's statement of facts is not an exhaustive recitation, and facts germane to the respective claims will be developed in the body of the argument.

identified two .380 casings at the scene, which they asserted were linked with the shooting. (99:48).

D.F. sustained a single non-fatal bullet wound. (99:59). He stumbled into the street and onto Tamar Aaron's vehicle. (100:121). He eventually came to rest "on the nearest stairs." (99:60). Alexandrea Coe stayed at D.F.'s side until law enforcement arrived. (100:55-57). He made no statement regarding the identity of his assailant during that time. (100:56).

Law Enforcement Investigation

Detective James Campbell was one of the first officers on the scene. (98:17). He made contact with D.F. and provided limited medical assistance. (98:19). According to Detective Campbell, D.F. "did not know the name of the person who shot him, however, he had seen the person before." (98:20). Detective Campbell was soon joined at the scene by Detective Marco Salaam. (98:41). Detective Salaam assisted in tracking the flight path of the suspects. (98:43). According to witnesses, one of the men discarded a white t-shirt while fleeing the scene. (98:43). That t-shirt was recovered in vicinity of the shooting. (98:43; 99:13-14). Surveillance video shows the owner of the shirt running from the scene prior to discarding it. (99:15; 100:139). Law enforcement testified that they were unable to discern the identity of either suspect from the video due to its poor picture quality. (101:57).

When the t-shirt recovered at the scene was tested for DNA, there was a CODIS[2] "hit"— Paul Nelson. (100:14-15).

[2] "CODIS is the acronym for the Combined DNA Index System and is the generic term used to describe the FBI's program of support for (continued)

Paul Nelson was never called as a witness at trial. The jury was informed, however, that Mr. Nelson was a suspect in this shooting and his photograph was introduced as an exhibit. (101:27,73).

Identification of the Shooter

At trial, D.F. identified Mr. Buckingham as the shooter. (99:56). He stated that he could not recall what Mr. Buckingham was wearing with great specificity, asserting that "I just remember yellow and a red hat." (99:69). He testified that he gave an identification to a "white officer" that the shooter was "Lil Lo." (99:62; 99:72). According to D.F., this was a nickname for Mr. Buckingham. (99:62). He also identified Mr. Buckingham in a photo lineup conducted while D.F. was in the hospital. (99:64).

Alexandrea Coe was also asked to participate in a photo lineup. (100:44). When asked what the results of that lineup were, Ms. Coe stated at trial that, "I'm not sure if it was right, but I did point out some." (100:44). The police report documenting the photo lineup reflects that Ms. Coe made no identification. (63:22). Ms. Coe testified she did not see "any person involved in this shooting" present in the courtroom during her testimony. (100:44). She described one of the suspects as light-skinned, wearing a white t-shirt. (100:51). She was unsure whether Mr. Buckingham's skin tone—which is not light—was consistent with that of the other suspect, which she characterized as "dark." (100:63). Antonio Gail was incapable of describing the suspect(s) in his

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criminal justice DNA databases as well as the software used to run these databases." (https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet)

trial testimony. (100:69). He was only able to state that both suspects were African-American males. (100:71).

Ms. Wells testified that the man who shot the gun wore a white t-shirt. (100:112). She gave a complete description to responding officers of both suspects. (100:112). She was also shown a photo lineup and identified Mr. Buckingham as the shooter. (100:109). Her fiancée, Tamar Aaron, was also shown a lineup that included Mr. Buckingham; he did not make a positive identification. (23:9). He described the shooter as wearing a white t-shirt. (100:125). He had "fro-ish" hair. (100:125). Despite his prior inability to make an identification, Mr. Aaron identified Mr. Buckingham as the shooter at trial. (100:126).

Alleged Motive

According to D.F., he and Mr. Buckingham had a prior history. (99:75). They crossed paths, once, at a house party months before the shooting. (99:75-76). D.F. also claimed to have received private calls from Mr. Buckingham—calls in which the caller did not identify himself or herself. (99:74-75). According to D.F., the two had "an argument" on Facebook prior to the shooting, although D.F. claimed he did not recall the substance of the argument. (99:77,81). The State referenced this theory of motive in both its opening and closing statement. (98:10; 102:38).

Other Trial Testimony

Evidence was presented to the jury about two prior law enforcement contacts involving Mr. Buckingham. Officer Andrew Holzem testified that he participated in a traffic stop of a vehicle he believed to be speeding on July 5, 2014, in which Mr. Buckingham was a rear-seat passenger. (100:87). According to Officer Holzem, Mr. Buckingham initially gave

a false name, and he then fled the scene. (100:91). The vehicle was eventually searched. (100:92). Law enforcement discovered a firearm "on the floorboard where the Defendant was seated." (100:92). The paperwork related to the arrest discloses that the weapon was a .40 caliber handgun. (25:7). This is a different caliber than the casings recovered at the scene of the shooting. (99:48).

The jury also heard from Officer Michael Wawrzyniakowski. (101:5). He testified that he attempted to arrest Mr. Buckingham on September 1, 2013 for a warrant relating to "some sort of firearms offense." (101:8). He was ultimately dispatched to a location. (101:8). Mr. Buckingham was not present at that address. (101:9). The home was searched. (101:10). A .380 Bersa pistol was recovered in the attic. (101:10). The officer testified that they could not be certain Mr. Buckingham was ever even in the residence. (101:15).

Stephanie Kuntz, an analyst from the Wisconsin State Crime Laboratory, was tasked with testing the .380 Bersa pistol for DNA. (100:17). She was able to exclude Paul Nelson as a contributor to the DNA found on that weapon. (100:19). No comparison to Mr. Buckingham's DNA was performed. (100:26). A separate witness testified that no fingerprints could be recovered from the weapon. (100:151). Notwithstanding these facts, the State elicited testimony that suggested Mr. Buckingham *could* have touched the weapon. (100:29). The jury was later told that the .380 cartridges found at the scene of the crime were not fired from this Bersa handgun. (100:171). In fact, that firearm was recovered from an attic in a home that law enforcement could not conclusively assert Mr. Buckingham had ever been inside of. (101:15). The State conceded in postconviction proceedings that this gun was not involved in this shooting. (71:3).

Outcome of the Trial and Sentence

At the conclusion of the trial, Mr. Buckingham was convicted of all charges. (103). At sentencing, the State recommended twenty years of initial confinement followed by "appropriate" extended supervision. (104:4). Defense counsel recommended "in the range between 7 to 10 years initial confinement" followed by probation. (104:26). The court followed the State's recommendation, imposing a global sentence of 20 years initial confinement followed by 10 years extended supervision. (104:34).

Postconviction Proceedings

Mr. Buckingham filed a notice of intent to pursue postconviction relief. (42). He ultimately filed a postconviction motion raising multiple claims:

- Mr. Buckingham was deprived of his right to the effective assistance of counsel when trial counsel failed to object to the admission of evidence regarding Mr. Buckingham's alleged contact with law enforcement on September 1, 2013, including the fact that this contact resulted in the discovery of an unrelated firearm.

- Mr. Buckingham was deprived of his right to the effective assistance of counsel when trial counsel failed to object to the admission of evidence regarding Mr. Buckingham's alleged contact with law enforcement on July 5, 2014, including the fact that this contact resulted in the discovery of an unrelated firearm.

- Mr. Buckingham was deprived of his right to the effective assistance of counsel when trial counsel

elicited direct evidence of his guilt with respect to uncharged and unproven other-acts evidence.[3]

- Mr. Buckingham was deprived of his right to the effective assistance of counsel when trial counsel failed to produce a witness who would testify that D.F. initially could not identify the shooter.

- Mr. Buckingham was deprived of his right to the effective assistance of counsel when trial counsel failed to object to a violation of Mr. Buckingham's rights under the confrontation clause.[4]

- Mr. Buckingham was deprived of his right to the effective assistance of counsel when trial counsel failed to object to an unfairly suggestive in-court identification.

- Mr. Buckingham was deprived of his right to the effective assistance of counsel when trial counsel failed to move to strike nonresponsive and highly prejudicial hearsay testimony regarding an alternate suspect in this shooting.

- Mr. Buckingham was deprived of his right to the effective assistance of counsel when trial counsel failed to alert the jury to the State's lack of evidence regarding an alleged motive.

- Mr. Buckingham was deprived of his right to the effective assistance of counsel when trial counsel did not object to the circuit court taking judicial notice of

[3] That argument is not being raised on appeal.

[4] That argument is not being raised on appeal.

untested hearsay evidence underpinning an essential element of bail jumping.[5]

- Mr. Buckingham was cumulatively prejudiced by these errors.

(63).

In addition, Mr. Buckingham requested postconviction discovery. (63). He also raised a challenge to the imposition of multiple DNA surcharges and asked that the court schedule a hearing in conformity with ***State v. Cherry***, 2008 WI App 80, 312 Wis.2d 203, 752 N.W.2d 393.[6]

The circuit court ordered briefing. (64). Following briefs, the circuit court held an evidentiary hearing. (108). Mr. Buckingham presented the testimony of trial counsel. (108:3). As relevant to this appeal, trial counsel testified:

- With respect to the September 1, 2013 alleged contact with law enforcement—which resulted in the discovery of an unrelated handgun—trial counsel testified that he did not object to this evidence because it was not relevant to the shooting. (108:9).

- With respect to the July 5, 2014 contact with law enforcement, resulting in the discovery of another unrelated handgun, trial counsel testified that he did not object because he believed it did not have anything to do with the case for which Mr. Buckingham was being tried. (108:12).

[5] That argument is not being raised on appeal.

[6] That argument is not being raised on appeal.

- With respect to his failure to call an officer who would testify about D.F.'s inability to identify Mr. Buckingham as the shooter, trial counsel did not have a strategic reason for that error. (108:15).

- With respect to the allegedly improper in-court identification, trial counsel agreed that the identification was "totally improper and inconceivable" and only failed to object because he was not anticipating it. (108:19).

- With respect to an allegedly improper and unresponsive remark that Mr. Buckingham argued should have been stricken, trial counsel asserted that he did not make that motion because he "didn't want to draw undue attention to that particular comment." (108:22).

- With respect to his failure to alert the jury to the lack of evidence regarding motive, trial counsel had no strategic reason. (108:33).

The circuit court issued a written decision and order. As relevant to this appeal, the court ruled as follows:

- September 1, 2013 evidence and July 5, 2014 evidence: Trial counsel was not ineffective because this evidence was admissible and not "other-acts" evidence. (77:3-4); (App. 105-106). Moreover, the evidence was not prejudicial. (77:4); (App. 106).

- Failure to call a witness who would testify that D.F. did not identify Mr. Buckingham as the shooter: The admission of this evidence would not "have been reasonably probable to alter the outcome of the case." (77:5); (App. 107.

- Failure to object to in-court identification: "It may be argued that counsel should have objected to the in-court identification, but courts usually hold that issues along these lines are issues for the jury to sort out." (77:6); (App. 108). Moreover, "the totality of the evidence" indicates that this was a non-prejudicial error. (77:6); (App. 108).
- Failure to move to strike nonresponsive testimony: "[T]he court cannot find that it is reasonably probable that a different result would have been reached by the jury had the detective's response been stricken." (77:6-7); (App. 108-109).
- Failure to alert the jury to lack of evidence regarding motive: The court appears to have concluded that there was neither deficient performance nor prejudice. (77:8); (App. 110).
- Postconviction discovery claim: "This claim seems something of a fishing expedition." (77:8); (App. 110). "There is no need for further discovery." (77:8); (App. 110).

Mr. Buckingham timely appealed. (85).

SUMMARY OF ARGUMENT

Mr. Buckingham's right to the effective assistance of counsel was violated when his lawyer made numerous unreasonable decisions. His lawyer performed deficiently when he failed to object to the admission of irrelevant and prejudicial evidence regarding unrelated firearms which confused the jury, failed to present the testimony of a police officer whose conversation with the victim contradicts the victim's identification and ensuing testimony, failed to object to an unfairly suggestive and unreliable in-court

identification, failed to strike prejudicial testimony designed to link his client with another suspect, and failed to alert the jury to the total lack of evidence regarding motive.

These errors prejudiced Mr. Buckingham, as they led to the admission of numerous pieces of damaging testimony which undermine the confidence in the ensuing jury verdict.

In addition, Mr. Buckingham was entitled to postconviction discovery. In this case, Mr. Buckingham sought evidence relating to the State's motive theory and a co-defendant. The trial court erroneously exercised its discretion by denying that motion because the evidence is clearly relevant and material to Mr. Buckingham's defense.

ARGUMENT

I. Mr. Buckingham Was Deprived of His Constitutional Right to the Effective Assistance of Counsel.

A. Legal principles and standard of review.

A criminal defendant has the right to the effective assistance of counsel under both the state and federal constitutions. U.S. Const. Amend. VI & XIV; Wis. Const. Art. 1, § 7 & 8. To prevail on an ineffective assistance of counsel claim, a defendant must establish that counsel's performance was deficient and that counsel's deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

An attorney's performance is deficient if it falls "below objective standards of reasonableness." ***State v. Thiel***, 2003 WI 111, ¶33, 264 Wis. 2d 571, 665 N.W.2d 305. To prove prejudice, the defendant must show that counsel's deficient performance was "sufficient to undermine

confidence in the outcome." ***Thiel***, 2003 WI 111, ¶20 (citing ***Strickland***, 466 U.S. at 694).

Counsel's deficient performance is prejudicial when there is a reasonable probability "that, but for counsel's [deficient performance], the result of the proceeding would have been different," or when counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687, 694. Whether confidence in the outcome has been undermined is distinct from whether or not the evidence is sufficient to convict. ***State v. Pitsch***, 124 Wis.2d 628, 645, 369 N.W.2d 711 (1985). A defendant also need not be prejudiced by "each deficient act or omission in isolation." ***Thiel***, 2003 WI 111, ¶63. Rather, prejudice may be established by the cumulative effect of counsel's deficient performance. ***Id***.

In assessing whether trial counsel was ineffective, this Court applies *de novo* review. ***Id***., ¶21.

B. Trial counsel was ineffective for failing to object to testimony regarding Mr. Buckingham's alleged possession of a firearm on September 1, 2013.[7]

1. Background.

Officer Michael Wawrzyniakowski testified that on September 1, 2013, Mr. Buckingham "was wanted for some sort of firearms offense," and had been observed by another law enforcement officer. (101:6-8). A foot pursuit ensued.

[7] In postconviction proceedings, Mr. Buckingham focused on the *entirety* of this law enforcement contact. On appeal, Mr. Buckingham has narrowed his argument and is asking this Court to limit its inquiry as to the propriety of the weapon evidence only.

(101:7). Officer Wawrzyniakowski received information that Mr. Buckingham may have been inside a residence. (101:8). He went to that residence, but Mr. Buckingham was not there. (101:9). Officers searched the home and discovered a .380 Bersa pistol hidden in the attic. (101:10).

Officer Wawrzyniakowski testified that there were at least three or four individuals in the home. (101:13). He could not say, however, whether Mr. Buckingham had ever been inside the home. (101:15). He also testified that no effort was made to show Mr. Buckingham's picture to the home's residents and ask them if Mr. Buckingham had been there. (101:15). With respect to the gun found, Officer Wawrzyniakowski told the jury that he did not know what testing, if any, was done on that gun. (101:17).

2. Evidence relating to the discovery of this firearm was inadmissible and should have been kept out of this trial.

To be clear, this gun was not used in the shooting of D.F., as the State has already conceded. (71:3). This is also established by the trial testimony and the trial exhibits: As Mark Simonson, the firearms examiner testified, the gun he tested was not the gun that fired the casings discovered at the scene of the shooting. (100:171); (24:11). Comparison of the exhibits shows that the gun Mr. Simonson tested was the gun discovered in the attic by Officer Wawrzyniakowski. (24:10-11).

Accordingly, evidence tending to suggest that Mr. Buckingham was linked to the possession of this unrelated firearm is "evidence of other crimes, wrongs, or acts" and is therefore inadmissible so long as it is being offered to prove that "the person acted in conformity therewith"—in this case, that Mr. Buckingham was the type of person to have

possession of a firearm like that used to wound D.F. *See* Wis. Stat. § 904.04(2).

This evidence was therefore inadmissible under both t§ 904.04(2) and ***State v. Sullivan***, 216 Wis.2d 768, 576 N.W.2d 30 (1998), which outlines a familiar three-step framework for analyzing the admissibility of other-acts evidence:

- *The evidence was not offered for a permissible purpose.*

First, the evidence was not being offered for a permissible purpose. *See* ***Id***. at 783. Instead, testimony about Mr. Buckingham's link to an unrelated firearm is highly inflammatory propensity evidence. Importantly, just because the State can identify some *other* purpose for introducing this evidence, that does not mean the evidence survives prong one of the other-acts analysis. This is because "other-act evidence is usually capable of being used for multiple purposes, one of which is propensity." ***United States v. Gomez***, 763 F.3d 845, 855 (7th Cir. 2014). Accordingly, as the Seventh Circuit Court of Appeals has found,[8] "it's not enough for the proponent of the other-act evidence simply to point to a purpose in the "permitted" list and assert that the other-act evidence is relevant to it." ***Id***. at 856. The State cannot "cleanse" propensity-laden evidence by simply conjuring up some superficial argument for admissibility. *See* ***Id***. at 855. Instead, the evidence needs to be supported by a "propensity-free chain of reasoning." ***Id***. at 856.

The evidence is incapable of satisfying that requirement. First, and most troublingly, the State baldly

[8] The Seventh Circuit's interpretation of the analogous federal rule is persuasive authority with respect to Wisconsin's other-acts statute.

asserted in postconviction proceedings that this evidence lacks evidentiary value with respect to its trial case. (71:3). If the evidence is not serving some proper evidentiary purpose, then the only remaining option *has to be* propensity. To get around that inevitable conclusion, the State also argued in the circuit court that the evidence was somehow being offered to describe "the efforts made to arrest the defendant as well as analyze all of the evience [sic] that was recovered." (71:3). That statement lacks coherent meaning in context of its concession that the gun has no link to the crime.

These justifications are insufficient. Accordingly, the evidence is not capable of satisfying the first-prong of the other-acts analysis.

- *The evidence was not relevant.*

Sullivan's relevance prong, ***Id***. at 786, is straightforward. Because the gun has nothing to do with the actual shooting, it does not "relate to a fact or proposition that is of consequence to the determination of the action." ***Id***. More importantly, the evidence is also incapable of satisfying a more fundamental component of relevance—that "a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act." ***State v. Landrum***, 191 Wis.2d 107, 119-120, 528 N.W.2d 36 (Ct. App. 1995). Here, there is no evidence to connect Mr. Buckingham with this firearm. The State has no evidence that he was ever inside the home before the handgun was discovered and presented no fingerprint or DNA evidence to link him to this unrelated gun. Accordingly, the evidence was plainly irrelevant.

- *The evidence's "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by*

> *considerations of undue delay, waste of time or needless presentation of cumulative evidence."* ***Sullivan***, 216 Wis.2d at 773.

Finally, and most importantly, admission of this evidence fails the relevance balancing test in Wis. Stat. §904.03. First and foremost, this evidence's extreme prejudicial nature is readily apparent in that it links Mr. Buckingham—who was on trial for shooting someone on a city street—with surreptitious possession of a firearm exactly like the one used to wound D.F. Evidence tending to suggest that Mr. Buckingham is the type of young black male who apparently hides illicit firearms in the attic of a stranger while fleeing from police is exceedingly and unfairly prejudicial.

Second, the evidence was presented in a way that was practically guaranteed to confuse the jury. The chain of events at the trial is therefore exceedingly relevant to this Court's analysis of the third ***Sullivan*** factor.

First, the State presented testimony on the first day of the trial from Detective Salaam about his gathering of evidence at the scene. (99:47). He testified about the .380 casings. (99:48). He also testified that "some other officers recovered the firearm." (99:48). That comment was not further clarified, meaning that a reasonable juror might have understood the testimony to mean that a gun was recovered at the scene. However, no gun was ever recovered from the scene. The only .380 firearm testified to at trial was the unrelated gun recovered a month after the shooting by Officer Wawrzyniakowski, which expert testimony excluded as the gun fired in this offense.

The following day, the jury heard that a DNA analyst conducted an analysis of a "Bersa" pistol. (100:17). Her analysis ruled out a third-party (Paul Nelson) as the

contributor to DNA on that pistol. (100:19). She never tested the DNA against Mr. Buckingham. (100:26-27). The State elicited testimony, however, that he "could have" touched it. (100:29). The jury had not yet heard about the circumstances under which this gun was recovered and had not yet been told that this gun *was not* used to wound D.F.—although the trial exhibits, which were not published to the jury, make clear that this is the gun Officer Wawrzyniakowski recovered. (24:4-7).

At the conclusion of that day's testimony, the State called a firearms analyst to testify about his analysis of a .380 firearm. (100:149). He testified—on cross—that this gun did not match the casings at the scene. (100:171). The jury was not told whether this was the same gun tested by the DNA analyst (the exhibits again make clear that it was) and there was no attempt to clarify how or why this gun came into the possession of the State.

The next day, Officer Wawrzyniakowski finally testified about how he recovered the ".380 Bersa." (101:10). He was asked whether that weapon was subjected to forensic analysis and he told the jury he did not know. (101:17). The State did not tie this evidence together until its closing argument:

> People see him go into a house. Police go into the house. There's a .380 weapon recovered from the attic. That's the .380 that was sent to the crime lab that you heard about. The importance of that is it's tested, it's tested for potential DNA, it's tested for fingerprints, it's tested for ballistics to see if there's any connection to the shooting itself, was very carefully done by the police, you hear, during the course of this, and saw that gun that was sent to the crime lab, and you saw the gun today by the detective who had recovered it from the attic. Another

> piece of information that the police followed up on didn't come to anything.

(102:40).

The damage, however, was done. The jury was very likely to be confused by the obfuscatory presentation of evidence which, at the end of the day, the State confessed to be irrelevant. (102:40). The jury heard hours of testimony—in a confusing order—about a weapon that had nothing to do with this crime. The jury was not given an opportunity—until the State's closing argument—to understand how and why the disparate pieces of testimony about a gun (or guns) were linked together.

Accordingly, this evidence was clearly inadmissible as other-acts evidence.

3. Trial counsel therefore performed deficiently and prejudicially by not challenging the admissibility of this evidence.

Trial counsel had meritorious grounds to either file a motion in limine asking to exclude this evidence, or in the alternative, to object during the trial itself. He did not. His performance therefore fell below an objective standard of reasonableness and satisfies ***Strickland***'s deficient performance prong. ***Kimmelman v. Morrison***, 477 U.S. 365, 375 (1986) (failure to file meritorious motion to exclude evidence is deficient performance). In this case, trial counsel's proffered strategic reason is not reasonable and therefore not entitled to deference: Trial counsel testified that he did not object to this testimony *because* it was irrelevant. (108:9). That assertion supports, rather than contradicts, Mr. Buckingham's ineffectiveness claim.

If this evidence were not admitted, there is a reasonable probability of a different outcome. But-for trial counsel's unprofessional error, the jury would not have heard multiple references—presented in a confusing fashion—suggesting a link between Mr. Buckingham and a gun of the very same type used to wound D.F. Not only is it reasonably probable that jurors were confused or distracted by this testimony, they may very well have bought into the State's propensity inference—that Mr. Buckingham is the type of young black man to have ready access guns on the streets of Milwaukee.

Accordingly, this Court should order a new trial for Mr. Buckingham.

C. Trial counsel was ineffective for failing to object to testimony regarding Mr. Buckingham's alleged possession of a firearm on July 5, 2014.

1. Background.

On July 5, 2014, Mr. Buckingham was arrested for, among other things, suspicion of being the shooter in this offense. (25:4). When he was arrested, law enforcement discovered a gun near where he was seated in a car. (100:92). The clear inference is that the handgun belonged to Mr. Buckingham. The jury was not told, however, much more about that handgun—including the most important detail, that it was not the same type of gun used to wound D.F. (25:7). As Exhibit #51 proves, the gun recovered from the car was a .40 caliber. (25:7). The State alleged at trial that a .380 was used to wound D.F. (99:48). However, the jury was never told about caliber "mismatch" and the crucial exhibit was never published to the jury. The State has conceded in postconviction proceedings that this gun was unrelated to the

shooting. (71:4). Thus, the jury was told that a handgun was discovered in Mr. Buckingham's possession when he was arrested for shooting D.F. without also being told that this could not have been the weapon used in that crime.

2. Evidence relating to the discovery of this firearm was inadmissible and should have been kept out of this trial.

Evidence that Mr. Buckingham possessed an unrelated firearm when he was arrested is "evidence of other crimes, wrongs, or acts" and is therefore inadmissible so long as it is being offered to prove that "the person acted in conformity therewith"—in this case, that Mr. Buckingham was the type of person to have possession of a firearm. Wis. Stat. § 904.04(2).

- *The evidence was not offered for a permissible purpose.*

First, the evidence is clearly being offered solely for propensity—Mr. Buckingham is the type of person who carries firearms with him—rather than any proper purpose. *See* ***Sullivan***, 216 Wis.2d at 783. In its postconviction pleading, the State has asserted that this gun was totally unconnected with the shooting. (71:4). Like the evidence regarding the *other* unrelated gun, the evidence cannot be cleansed of its problematic propensity inferences and is therefore not capable of satisfying the first prong of ***Sullivan***. *See supra.*

- *The evidence was not relevant.*

Second, the evidence is clearly irrelevant to this prosecution as it could not have been the gun used to wound D.F.—a fact that the State has also conceded. (71:4).

- *The evidence's "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."* ***Sullivan****, 216 Wis.2d at 773.*

Third, the weighing test in Wis. Stat. § 904.03 clearly favors exclusion. The evidence is obviously prejudicial in a case like this. After all, this was a shooting case involving random violence on the streets of Milwaukee. "Proof" that Mr. Buckingham was linked to other unrelated firearms clearly furthers intuitive propensity inferences. The evidence was also presented in a fashion which likely confused the jury. After all, the jury was told that Mr. Buckingham was arrested with a handgun at his feet but was never told that this was *not* the gun used to wound D.F. Moreover, mention of this second gun was intertwined with ongoing testimony about the *other* unrelated weapon.

Testimony about this gun only muddies the water further. A reasonable juror would have a difficult time deciding which testimony pertained to which gun and may have formed an erroneous inference—that because one gun was ruled "out" the other gun might be ruled "in" as the murder weapon. More problematically, testimony about this gun meant there were at least three guns mentioned in this case—the one that fired the shots at D.F., the one that was found in the attic, and the one discovered in the car. Keeping these unrelated guns "straight" in a multi-day shooting trial would be difficult and there is a high likelihood of erroneous or problematic inferences being drawn. It is therefore reasonably likely that a juror would be either distracted or confused by this evidence.

Accordingly, this evidence was inadmissible as other-acts evidence, and should have been excluded.

3. Trial counsel therefore performed deficiently and prejudicially by not challenging the admissibility of this unrelated gun evidence.

By failing to make a meritorious motion to exclude this evidence, trial counsel performed deficiently. ***Kimmelman***, 477 U.S. at 375 (1986). His proffered strategic reason is unconvincing and therefore not entitled to deference. According to trial counsel, he did nothing to exclude this evidence because he believed it was unrelated to the case at hand. (108:12). That assertion only strengthens the ineffectiveness claim.

Admission of this evidence creates a reasonable probability of a different outcome, thereby satisfying the prejudice prong. But-for trial counsel's unprofessional error, the jury would not have heard multiple references presented in a confusing fashion regarding a link between Mr. Buckingham and yet another handgun—a handgun they were never told did *not* match the one used to wound D.F. Not only is it reasonably probable that jurors might have been confused or distracted by this testimony, they may very well have bought into the State's propensity inference—that Mr. Buckingham is the type of young black man to have ready access to lots of guns on the streets of Milwaukee.

In ruling on the defense motion, the circuit court lumped both guns into the same analysis, asserting that "there was little to no nexus to this defendant in either circumstance"—a finding which appears to support, rather than contradict Mr. Buckingham's claims. (77:4); (App. 106). The circuit court also made a conclusory statement that the

"evidence could not have made a difference." As argued above, the evidence was exceedingly prejudicial to Mr. Buckingham, exciting propensity judgments and causing juror confusion.

In addition, the circuit court also argued that this was not objectionable other-acts evidence because possessing a gun is not "illegal or immoral." (77:4); (App. 106). Here, there was sufficient evidence to infer that Mr. Buckingham's surreptitious possession of these two handguns was somehow morally blameworthy—if for no other reason than it was being presented in context of a case involving black-on-black street crime in inner-city Milwaukee.

Accordingly, this Court should remand this matter for a new trial.

D. In addition and in the alternative, the unrelated guns evidence was inadmissible under Wis. Stat. § 904.03 and trial counsel was ineffective for not moving to exclude it on that basis.

In this case, the circuit court ultimately asserted that "[u]nder the circumstances, the court did not have to engage in an "other acts" evidence analysis." (77:4); (App. 106). Mr. Buckingham argued in his briefs to the circuit court that, even if no other-acts analysis was required, the evidence was still irrelevant and therefore inadmissible. (72:2). Mr. Buckingham believes that this evidence should be evaluated in light of the other-acts rubric described above.

However, if this Court agrees with the circuit court and concludes that the evidence was not subject to an other-acts analysis, the evidence is still inadmissible under Wis. Stat. § 904.03's balancing test. Since the evidence has no probative value—because the guns are unrelated to this shooting—the

prejudicial impact is overwhelming and therefore counsels in favor of exclusion for the reasons already stated. Here both parties agreed in the circuit court that the guns had nothing to do with the shooting. The relevance, if any, is marginal given that fact. Admission of multiple unrelated firearms in a shooting case is therefore unfairly prejudicial.

Trial counsel is therefore deficient for failing to object under Wis. Stat. § 904.03, as that motion should have been successful. Failure to do so prejudiced Mr. Buckingham, as it led to the admission of unfairly prejudicial and confusing testimony about unrelated firearms.

Accordingly, this Court should remand this matter for a new trial.

E. Trial counsel was ineffective for failing to present police officer testimony that would have directly contradicted the victim's identification of Mr. Buckingham at trial.

1. Deficient performance.

Discovery disclosed to trial counsel contains powerful defense evidence: the report of a law enforcement witness who interviewed the victim shortly after the shooting. (63:145). That report, by Milwaukee Police Officer Daniel Reilly, reflects that he asked D.F. who shot him, and D.F. told him he did not know. (63:145). D.F. also told him that he did not know the person who shot him. (63:145). Finally, D.F. also denied that he had any confrontation with the shooter previously. (63:145).

That police report directly contradicts the testimony of D.F. at trial. During the trial, D.F. told the jury that Mr. Buckingham was the person that shot him. (99:55). He

testified that he reported this information to police. (99:62). He told the jury that he knew Mr. Buckingham before this shooting. (99:74). He also testified that he had an argument with Mr. Buckingham sometime prior to the shooting. (99:77).

Accordingly, trial counsel should have called Officer Daniel Reilly to testify about D.F.'s inconsistent statements as contained in his contemporaneous police report. Trial counsel did not. Reasonably competent counsel would have sought to present this testimony to a jury. Tellingly, trial counsel could identify no strategic reason for failing to call this witness. (108:15). This is deficient performance, as this was relevant and admissible evidence directly contradicting the victim's identification of Mr. Buckingham as the shooter.

2. Prejudice

Had trial counsel presented this testimony, there is a reasonable probability of a different outcome. In this case, identification was a central issue. Obviously, one of the most compelling identifications came from the victim, who identified Mr. Buckingham at trial as the shooter, and told the jury that he had identified Mr. Buckingham to police. Evidence contradicting this critical testimony therefore creates a reasonable probability of a different outcome.

When the jury is presented the full picture, it becomes clear that D.F.'s identification was actually undergoing consistent evolution. He told Detective Campbell that he knew the person, but was unable to provide a name. (98:20). D.F. unambiguously told Officer Reilly, however, that he did not know the person who had shot him. (63:145). It was not until he was formally interviewed by Detective Lewandowski, that he inculpated "Lil Lo," whom he subsequently identified as Mr. Buckingham. (63:138). The

intervening statement to Officer Reilly problematizes D.F.'s inconsistent account of the shooting and undercuts the most powerful identification of Mr. Buckingham. This is highly relevant and persuasive defense evidence. Its admission, therefore, would have resulted in a reasonable probability of a different outcome.

The circuit court's reasoning for denying this postconviction claim is not persuasive. In the circuit court's view, admission of this evidence would not have made a difference. (77:5); (App. 107). In order to arrive at that conclusion, the circuit court engaged in a weighing of the competing evidence, concluding that there was a reasonable basis for a juror not to place much emphasis on Officer Reilly's testimony. (77:5); (App. 107). That analysis ignores the reasonable alternative possibility—that a juror may well have disagreed with the circuit court's subjective judgment and been greatly influenced by this testimony. At the same time, the circuit court also applied the wrong legal standard, denying relief because there was other sufficient evidence to convict Mr. Buckingham. (77:5); (App. 107). That, however, is not the legal standard. ***Pitsch***, 124 Wis.2d at 645.

Accordingly, this Court should remand for a new trial.

F. Trial counsel was ineffective for failing to object to an unfairly suggestive in-court identification of Mr. Buckingham.

1. Background.

Tamar Aaron witnessed this shooting and was asked to participate in a photo array involving Mr. Buckingham. (23:9-10). He made no identification. (23:9-10). He was then called as a witness and asked to make an in-court identification. (100:126). There was no objection to that procedure, although

trial counsel testified postconviction that he was "shocked" by the "totally improper and inconceivable" request that Mr. Aaron identify Mr. Buckingham at trial. (108:19). Trial counsel's only reason for not objecting was surprise. (108:19).

2. Mr. Aaron's in-court identification was unfairly suggestive and unreliable.

The problems inherent to eyewitness testimony are well-known. The Wisconsin Supreme Court has acknowledged a growing body of social science which confirms that "eyewitness testimony is often 'hopelessly unreliable.'" ***State v. Dubose***, 2005 WI 126, ¶30, 285 Wis. 2d 143, 699 N.W.2d 582 (quoting ***Commonwealth v. Johnson***, 420 Mass 458, 650 N.E.2d 1257, 1262 (1995). "The research strongly supports the conclusion that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined." ***Id***.

In-court identifications are particularly problematic because of their "obviously suggestive" nature. *See* ***United States v. Archibald***, 734 F.2d 938, 941 (1984). As the Connecticut Supreme Court has observed;

> First, and most importantly, we are hard-pressed to imagine how there could be a *more* suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the State has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime. If this procedure is not suggestive, than *no* procedure is suggestive.

State v. Dickson, 322 Conn. 410, 423 (2016). Essentially, in-court identifications are functionally identical to "showup" identifications, which are known to carry a high risk of undue suggestiveness. *See* ***Com. v. Crayton***, 470 Mass. 228, 237 (2014) ("In fact, in-court identifications may be more suggestive than showups."); *see also* ***Dubose***, 2005 WI 126, ¶29-31, (discussing the problems related to showup identifications).

Such in-court identifications are especially problematic when, as here, they follow an earlier unsuccessful identification procedure targeting the defendant. *See* ***Dickson***, 322 Conn. at 425 ("Indeed the present case starkly demonstrates the problem, in that [the witness] was unable to identify the defendant in a photographic array, but had absolutely no difficulty doing so when the defendant was sitting next to defense counsel in court and was one of only two African-American males in the room."); ***United States v. Beeler***, 62 F. Supp.2d 136, 141 (D. Maine 1999) ("Rather, Defendant argues that an in-court identification by [witness] who has not made a prior positive identification of Defendant, would be impermissibly suggestive in and of itself. The Court agrees."). Such identification procedures also run afoul of the "Model Policy and Procedure for Eyewitness Identification" which instructs law enforcement to, "Avoid multiple identification procedures in which the same witness views the same suspect more than once."[9]

The United States Supreme Court has held that if an identification procedure is "so unnecessarily suggestive and conducive to irreparable mistaken identification, the defendant is denied due process of law." ***Stovall v. Denno***, 388 U.S. 293, 302 (1967). "It is the likelihood of

[9] (App. 113-138).

misidentification which violates the defendant's right to due process, and it is this which is the basis of the exclusion of evidence . . . ." ***Neil v. Biggers***, 409 U.S. 188, 198 (1972). "[R]eliability is the linchpin in determining the admissibility of identification testimony." ***Id***. at 114.

Tamar Aaron's in-court identification of Mr. Buckingham was clearly the product of an unfairly suggestive identification procedure. Not only was he asked to make an in-court identification—a showup, which is inherently suggestive under ***Dubose***—he had also been previously shown a photo array that included Mr. Buckingham, who he did not identify.

Mr. Aaron's in-court identification also lacks sufficient indicia of reliability. Mr. Aaron witnessed the shooter through a car window while driving his car. (100:131). He also suggested that the shooter may have been some distance from him, at least enough distance for him to have trouble distinguishing a second individual standing slightly further in from the road. (100:130). Mr. Aaron gave only a very generic description consisting of two components—a white shirt and "fro-ish" hair. (100:125). Mr. Aaron was interviewed shortly after the shooting and was unable to identify the shooter in a photo array, despite being given an opportunity to do so in a controlled environment using the "best method practice." (100:129-130).

Accordingly, Mr. Aaron's identification was sufficiently suggestive and unreliable, and deprived Mr. Buckingham of his right to due process of law.

3. Trial counsel performed deficiently when he failed to move to exclude or object to the improper identification evidence.

Here, trial counsel had two legal avenues to challenge Mr. Aaron's highly improper identification of Mr. Buckingham. He did not do so. His failure constitutes deficient performance, as trial counsel appeared to concede at the ***Machner***[10] hearing. (108:19).

First, trial counsel could have made a meritorious motion to exclude this highly problematic identification as a violation of Mr. Buckingham's right to due process of law under ***Stovall***. The in-court showup procedure is plainly, and inarguably, suggestive. As administered in this case, the identification procedure has a high likelihood of misidentification. Its admission was therefore improper, and trial counsel's failure to seek to exclude it was deficient performance.

Second, trial counsel could have asked the circuit court to exercise its discretion and to exclude the evidence under Wis. Stat. § 904.03, which gives the circuit court "the discretion to exclude relevant evidence under § 904.03 if it is 'so unreliable that its probative value is substantially outweighed by the danger of prejudice and confusion.'" ***State v. Hibl***, 2006 WI 52, ¶48, 290 Wis. 2d 595, 714 N.W.2d 194. ***Hibl*** stands for the proposition that the court, as gatekeeper, has a responsibility to exclude obviously unfair or unreliable evidence—including eyewitness evidence. ***Id***. ¶56. In this case, the identification process at issue was unfairly prejudicial to Mr. Buckingham as a result of its total lack of

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

reliability. Mr. Aaron had been given an opportunity to identify Mr. Buckingham in a photo array—a controlled, non-suggestive setting—shortly after witnessing the crime. He was unable to do so. Under those circumstances, inviting him to make a second identification in the courtroom—when he had already been shown Mr. Buckingham's picture in the earlier photo array—is indisputably problematic. Trial counsel erred by not objecting to this tactic.[11]

Instead, trial counsel, who acknowledged he was "surprised" by the in-court identification, did nothing and let this highly problematic and grossly unfair testimony go unchallenged. This is deficient performance.

4. Trial counsel's deficient performance prejudiced Mr. Buckingham.

This was an identification case. While Mr. Aaron did not contribute the only identification of Mr. Buckingham, the inquiry into prejudice is distinct from an inquiry into whether the evidence was sufficient to convict. ***Pitsch***, 124 Wis.2d at 645. Had trial counsel successfully moved to exclude Mr. Aaron's identification, there is a reasonable probability of a different outcome. When Mr. Aaron's identification is removed or minimized, the jury's complicated weighing of inconsistent eyewitness testimony necessarily shifts. Here, at least two people claim to have identified Mr. Buckingham (D.F. and Kira Wells). Two other witnesses—Ms. Coe and Mr. Gail, who were standing right next to D.F. when he was

[11] The circuit court did not adequately address whether it would consider such a motion, instead asserting, "It may be argued that counsel should have objected to the in-court identification, but courts usually hold that issues along these lines are issues for the jury to sort out." (77:6); (App. 108).

shot—did not. Without Mr. Aaron's identification, the competing evidence is in seeming equipoise. This shift—which necessitates a re-weighing of the varying eyewitness accounts by jurors—therefore creates the reasonable probability of a different outcome.[12]

Accordingly, this Court should remand for a new trial.

G. Trial counsel was ineffective for failing to move to strike nonresponsive hearsay testimony.

1. Deficient performance.

The facts of this case, as they were presented at trial, presented a compelling alternate suspect: Paul Nelson. Multiple witnesses described the shooter as wearing a white t-shirt. (100:51; 100:112; 100:125). Law enforcement believed that the white t-shirt they recovered at the scene was possibly the shooter's. (98:43). Paul Nelson's DNA was found on that shirt. (100:15).

The State did not call Paul Nelson as a witness, although they did confirm he was a suspect in their investigation. (101:73). Paul Nelson's curious absence from this trial was not further explained to the jury—leaving a great opportunity for the defense to exploit in a closing argument.

However, Detective Salaam, during his cross-examination, attempted to circumvent this by putting in

[12] In its decision and order, the trial court engaged in a re-weighing of the evidence and concluded that there was no reasonable probability of a different outcome. (77:6); (App. 108). However, the circuit court's weighing ignores the existence of any alternative to Mr. Buckingham's guilt.

hearsay evidence designed to link Mr. Nelson to Mr. Buckingham:

> Q: Were any results or was any DNA recovered that linked to Mr. Buckingham?
>
> A: The DNA on the shirt: The person who the DNA came back on the shirt was arrested and interviewed and they admitted to knowing Mr. Buckingham.

(99:49).

Detective Salaam's remark was nonresponsive hearsay. Trial counsel should have asked that the Court strike this nonresponsive and improper answer. Trial counsel did not do so. This is deficient performance. Importantly, counsel's strategic judgment—that he did not wish to emphasize the remark (108:22)—is not entitled to deference. Reasonably competent counsel would have understood the significance of the remark and would have sought to have it stricken as evidence.

2. Prejudice.

Failure to object to the detective's remark—clearly intended to shore up an evidentiary hole in the State's case—prejudiced Mr. Buckingham. Absent the remark, the jury had a valid doubt—that the mysterious "Paul Nelson" was the shooter, or at the very least, that there was a substantial portion of the narrative that was not being sufficiently explained. Detective Salaam's remark eliminates that doubt by tying Paul Nelson *back* to Mr. Buckingham. While the circuit court asserted in its decision and order that "one brief remark like this would not have been a difference maker," (77:7); (App. 109), this ignores the lack of any other evidence tying Mr. Buckingham to Mr. Nelson. In this one exchange,

Mr. Nelson went from a possible alternate suspect in the shooting, to a probable accomplice of Mr. Buckingham. This is constitutionally cognizable prejudice.

Accordingly, this Court should remand for a new trial.

H. Trial counsel was ineffective for failing to expose the insufficiency of the State's case regarding motive which, while not a required element, was a key component of the State's attempt to prove Mr. Buckingham guilty beyond a reasonable doubt.

1. Deficient performance.

The State insisted in its opening statement that this case was about a Facebook feud that spilled into the real world. (98:10). D.F. testified that his feud with Mr. Buckingham started on Facebook. (99:77). He also testified that one of the suspects referenced Facebook during his confrontation. (99:57).

However, as trial counsel was well aware, the State had already tried and failed to collect records which would corroborate their theory—that Mr. Buckingham had fought with D.F. on Facebook before deciding to shoot him. As the postconviction motion demonstrated, law enforcement was told that D.F.'s ex-girlfriend had apparently "set up" the shooting over Facebook. (63:138). On the basis of that report, police tried to access the Facebook pages for both D.F. and his ex-girlfriend. (72:14). The ex-girlfriend's page was not available. (72:14). Law enforcement subpoenaed her Facebook records. (63:40). There is no record that any responsive records were ever generated. However, the police reports suggest that law enforcement did view Facebook records in the possession of the ex-girlfriend's family, which

were apparently offered in response to her being arrested as a party to the crime for this shooting. (63:138). There is no record that she was ever prosecuted.

Accordingly, trial counsel was in a position to undercut the State's motive theory by pointing out the lack of any corroborative evidence. Despite telling the jury that the genesis of the shooting was a Facebook argument, the State was never able to substantiate that claim with hard evidence. The jury deserved to know that fact. The jury should also have been told about the suggestive circumstances relating to the ex-girlfriend—including the fact that family members apparently tried to show Facebook records attempting to disprove the motive theory pushed by the State.

Failure to present such evidence—to undercut the State's explanation for why Mr. Buckingham allegedly shot D.F.—was deficient performance.

2. Prejudice.

While motive is not a required element, it is powerful, relevant evidence in case involving an otherwise random and inexplicable act of violence. In this case, the State promised the jury that they would get an explanation for *why* Mr. Buckingham shot D.F. However, if the jury were told that the State's proffered explanation was not supported by any evidence—and that the State had actually tried and failed to collect such evidence—that would have undermined the State's narrative and created a reasonable probability of a different outcome.[13]

[13] In its decision and order, the circuit court appears to have largely conflated this claim with the motion for postconviction discovery. (continued)

Accordingly, this Court should remand for a new trial.

I. Mr. Buckingham was cumulatively prejudiced by trial counsel's errors.

This case, like many urban street shootings, presented numerous evidentiary challenges for the State. The witnesses had contradictory, at times confusing, versions of what occurred. This case hinges on eyewitness testimony, a notoriously fickle species of evidence. There was no conclusive forensic evidence and no confession.

Trial counsel, however, made the State's task much easier by committing numerous blunders. Taken together, these errors combine to undermine faith in the jury verdict. But for trial counsel's errors, there is a reasonable possibility of a different outcome, as numerous pieces of inculpatory and otherwise prejudicial evidence would have been excluded. The jury would not have heard confusing testimony about unrelated handguns, would have heard testimony undermining the victim's identification of Mr. Buckingham, would not have heard uncorroborated hearsay testimony about Paul Nelson, and would not have been swayed by a highly improper in-court identification.

This is constitutionally cognizable prejudice. Accordingly, this Court should remand for a new trial.

II. Mr. Buckingham is Entitled to Postconviction Discovery.

A. Legal standard.

Undersigned counsel is unable to discern a basis for its denial of this claim.

Under the constitution's due process clause, a criminal defendant has a right to postconviction discovery "when the sought-after evidence is relevant to an issue of consequence." ***State v. O'Brien***, 223 Wis. 2d 303, 321, 588 N.W.2d 8, 16 (1999). The evidence is consequential when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." ***Id***. (quoting ***United States v. Bagley***, 473 U.S. 667, 682, 105 S.Ct. 3375 (1985) (plurality opinion)). Whether to grant or deny the motion for postconviction discovery is vested in the trial court's discretion. ***State v. Kletzien***, 2008 WI App 182, ¶8, 314 Wis.2d 750, 762 N.W.2d 788.

B. Applied to this case.

1. Facebook records

According to the State, the genesis of the shooting was a fight on Facebook. (98:10) Law enforcement tried to access the Facebook pages of both the victim, D.F., and the woman who they believed "set up" the fight—D.F.'s ex-girlfriend, Daijhonna Eichelberger. (72:14). Law enforcement discovered, however, that Ms. Eichelberger's page had been taken down. (72:14). Following that discovery, law enforcement subpoenaed Facebook for both D.F. and Ms. Eichelberger's records. (63:39-40). It is not clear to undersigned counsel whether Ms. Eichelberger's records would still be maintained by Facebook after she apparently took down her personal Facebook site. Presumably, the records would be maintained by a Facebook server. When, if ever, that information would be physically deleted is not presently known.

In any case, law enforcement clearly believed there was a basis to try and obtain this information from Facebook—meaning that they did not take Ms. Eichelberger's deletion of her page as a "dead end." However, there is no indication of what, if anything, happened after they subpoenaed Facebook because the only records that were disclosed to the defense are records relating to D.F.'s page. However, Ms. Eichelberger's records would—if the State's narrative is true—contain the proof that she "set up" the shooting involving Mr. Buckingham and D.F.

Undersigned counsel has therefore consistently requested one of two things from the State: (1) the responsive records relating to Ms. Eichelberger or, in the alternative, (2) documentation from Facebook that there were not responsive records available. If further Facebook records exist, then they are clearly "relevant to an issue of consequence." ***O'Brien***, 223 Wis. 2d at 321. In this case, they go directly to Mr. Buckingham's motive, or lack thereof. If, for example, the Facebook records do not support the claim of a Facebook "beef," this powerfully undermines D.F.'s account and, by extension, the State's case. Even if no Facebook records exist—and the only documentation available is that the records were deleted before the subpoena could be acted upon—then this too is material. At trial, the State alleged that there was a motive for the shooting. The fact that there is now no way to verify that claim is extremely relevant to Mr. Buckingham's defense.

Accordingly, the records should be disclosed in postconviction proceedings. The trial court therefore erroneously exercised its discretion in refusing to grant the motion, labeling it instead as a "fishing expedition." (77:8); (App. 110). As Mr. Buckingham has argued, motive was in

issue during this trial. Evidence which goes directly to that issue is exceedingly relevant and would be "of consequence."

2. Materials related to Daijhonna Eichelberger

Discovery materials disclosed to the defense also indicate that the State received information that Ms. Eichelberger had "set up" the shooting of D.F. (63:138). She was therefore arrested as a party to the crime. (63:138). However, CCAP reflects no charge or conviction. (63:140).

It would appear that Ms. Eichelberger's family attempted to provide material to the State to prove that she was not involved in the shooting. (63:138). Trial counsel's file does not include copies of that material. This material is "relevant to an issue of consequence" and should be disclosed in postconviction proceedings. ***O'Brien***, 223 Wis. 2d at 321. The report suggests that there was evidence in the family's possession which they believed contradicted the claim that she set up the shooting. If that is true, then this is exculpatory evidence. Accordingly, the circuit court erroneously exercised its discretion.

Undersigned counsel has also requested, via both an open records request and a formal letter, all of the materials pertaining to her arrest and eventual (non) prosecution. No such records have been disclosed. Because this information again goes to motive—and involves a possible codefendant—it is clearly "relevant to an issue of consequence" and should be disclosed in postconviction proceedings. ***O'Brien***, 223 Wis. 2d at 321.

The circuit court's order denying the motion for postconviction discovery fails to reasonably assess the relevance of the sought after evidence, which includes

Facebook records, materials presented by family members, and law enforcement records related to the prosecution of an alleged co-defendant. Accordingly, this Court should reverse and remand for further proceedings, including a possible supplemental postconviction motion should further responsive records support additional postconviction claims for relief.

CONCLUSION

Mr. Buckingham therefore respectfully requests that this Court grant the relief requested.

Dated this 10th day of January, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,040 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 10th day of January, 2018.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 10th day of January, 2018.

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