STATE OF WISCONSIN

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

DISTRICT I

Case No. 2017AP1852-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN L. BUCKINGHAM,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF
CONVICTION AND ORDER DENYING
POSTCONVICTION RELIEF ENTERED
IN THE MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE THOMAS J. MCADAMS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Statutes

ISSUES PRESENTED

1. Did the circuit court err when it determined that none of the numerous alleged errors of trial counsel deprived Buckingham of the effective assistance of counsel, either individually or cumulatively?

The circuit court determined that trial counsel made reasonable decisions about the actions Buckingham claimed were error, and that they did not prejudice him. The circuit court also determined that under the totality of the circumstances he received a fair trial and there was not a reasonable probability of a different result.

This Court should affirm the circuit court.

2. Did the circuit court erroneously exercise its discretion when it denied Buckingham's motion for postconviction discovery?

The circuit court determined that there was not a reasonable probability that with the discovery of additional documents or lack thereof the result of the trial would have been different, and that the claim was a fishing expedition.

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State disagrees with Buckingham that publication is appropriate, and does not request oral argument. This case involves only the application of well-settled law to the facts.

INTRODUCTION

Despite Buckingham's laundry list of alleged errors by his trial counsel, he is not entitled to a new trial. None of trial counsel's alleged errors amounted to deficient performance because there were reasonable strategic

reasons for all of them. Nor could they have prejudiced Buckingham because none of them undermined the identification evidence and testimony, which was the crux of this case.

Buckingham's postconviction discovery claim also fails. The State does not have the records he seeks and cannot produce them no matter how many times Buckingham demands them. Furthermore, his request for postconviction discovery amounts to a fishing expedition to try to find records that would have been of marginal relevance to this case, at best, if they even exist.

This Court should affirm the circuit court.

STATEMENT OF THE CASE

The shooting and charges

On August 19, 2013, DF and his friends Alexandrea Coe and Antonio Gail were waiting at a bus stop. (R. 99:53–54.) Two men approached the group, asked DF about a conversation on Facebook, and then fired a gun at him. (R. 99:57.) Milwaukee Police officers responded and found DF with a gunshot wound to his chest. (R. 1:2.) After he was stabilized at the hospital, DF told police that a man known as "Lil Lo" shot him. (R. 1:2.) DF said he did not know Lil Lo personally, but that Lil Lo was dating his ex-girlfriend and had tried contacting DF through Facebook. (R. 1:2.) He identified the defendant, Steven Buckingham, as Lil Lo in a photo lineup. (R. 1:2.)

Detectives also interviewed Kira Wells, who witnessed the shooting from the passenger seat of her fiancé's car. (R. 1:2.) She also identified Buckingham as the shooter from a photo array. (R. 1:2.) Detectives learned that Buckingham was out on bond for felony possession with intent to deliver cocaine at the time, and that he failed to appear at a court hearing on August 26, 2013. (R. 1:2.)

The State charged Buckingham with one count of first-degree reckless injury with use of a dangerous weapon and two counts of felony bail jumping. (R. 1:1.) Buckingham evaded arrest for almost a year, but once arrested he pled not guilty and the case proceeded to trial. (R. 90:2.) As to the bail jumping charges, Buckingham and the State reached a stipulation that he had been charged with a felony, released on the conditions that he appear for all court dates and not commit any crimes, and that those conditions were in effect on August 19 and 26, 2013. (R. 100:156–59.) The jury was informed that Buckingham violated his bail conditions by failing to appear in court on August 26. (R. 101:5.)

Law enforcement investigation testimony

Detective James Campbell testified that he was the first responder to the scene, and said that he found DF lying on his side with a bullet wound to his chest. (R. 98:17–18.) Campbell said he told DF he might die and asked who had shot him. (R. 98:20.) DF told Campbell that he did not know the shooter's name, but that he had seen him before. (R. 98:20.) Campbell attempted to get more details from DF, but DF began having trouble breathing. (R. 98:33–35.) Medical personnel arrived and took over, and Campbell began interviewing witnesses and investigating nearby businesses for video footage. (R. 98:21, 35–37.) Kira Wells, who had witnessed the shooting, told Campbell that the shooter was wearing a white t-shirt and shorts, and that the other person was wearing a black t-shirt. (R. 101:63–64.) Antonio Gail told Officer Walter Capelli that the shooter had a dark complexion and a beard and was wearing a black t-shirt and black pants. (R. 101:70.) He said that both individuals had small, black, semiautomatic handguns, and each had fired one round. (R. 101:70–71.)

Detective Marco Salaam testified that he arrived and began assisting Campbell in the investigation. (R. 98:41.) Salaam said that based on all the witness reports, detectives

believed the suspects had fled north past a school, which had security cameras. (R. 98:43.) One witness also reported seeing one of the suspects discard a white t-shirt as he ran. (R. 98:43; 99:13–14.) Video recovered from the surveillance cameras showed two people running from the scene, but it was too grainy to identify either of them. (R. 101:57.) The detectives found the t-shirt, which was sent for DNA testing. (R. 98:43; 100:14–15.) Detectives found two .380 caliber shell casings from a semiautomatic weapon at the scene. (R. 99:47–48.)

Salaam further testified that he showed photo arrays of suspects to three witnesses: Tamar Aaron, Kira Wells, and Antonio Gail. (R. 99:19.) Wells picked Buckingham out of a photo array, but neither Aaron nor Gail were able to identify anyone. (R. 99:16–21.)

Detective Salaam also testified about the police procedures used to collect and test the evidence in this case. (R 99:42–51.) During the course of that examination, Buckingham's defense attorney, James Toran, asked Salaam specifically about the white t-shirt. (R. 99:48.) Toran asked Salaam, "[w]ere any results or was any DNA recovered that linked to Mr. Buckingham?" (R. 99:49.) Salaam replied, "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." (R. 99:49.) Salaam said the DNA found on the shirt belonged to Paul Nelson. (R. 99:49.) Toran clarified the question, and Salaam testified that Buckingham's DNA was not found on any evidence. (R. 99:49.)

Officer Michael Wawrzyniakowski identified Buckingham in court and testified that he attempted to arrest Buckingham on September 1, 2013. (R. 101:7.) Wawrzyniakowski said that another officer called him for assistance after Buckingham fled from that officer. He added that Buckingham "was wanted for some sort of firearms

offense." (R. 101:107–09.) Wawrzyniakowski and another officer were told that Buckingham might be at a house on North 41st Street and went there. (R. 101:8–9.) Three or four people were in the house, but Buckingham was not there. (R. 101:9, 12–14.) Wawrzyniakowski testified that he found a .380 Bersa semiautomatic pistol in the attic while searching for Buckingham. (R. 101:10–11.) Everyone at the house said they had no knowledge about the gun. Wawrzyniakowski took it into inventory. (R. 101:10–11, 14–15.)

Buckingham remained unapprehended until July 5, 2014, when Officer Andrew Holzem encountered Buckingham during a traffic stop. (R. 100:86–91.) Buckingham gave Holzem a fake name and ultimately fled. (R. 100:91.) Police caught and arrested him. (R. 100:92–96.) They found a .40 caliber black handgun on the floor of the car where Buckingham had been sitting. (R. 100:92–93.) The .40 caliber handgun found in the car was not introduced as evidence.

State Crime Lab Technician Stephanie Kuntz testified about DNA testing performed on the t-shirt and the .380 Bersa pistol. (R. 100:12–20.) She said that she extracted a mixed DNA profile from at least three individuals from the t-shirt. (R. 100:12–13.) She was able to narrow the profile to two major contributors and submitted the mixed profile into CODIS. (R. 100:12–13.) She testified that CODIS returned a profile hit to a person named Paul Nelson. (R. 100:15.) She also tested swabs from the Bursa .380 semiautomatic pistol, and found a four-person mixture. (R. 100:19.) She compared that mixture to Paul Nelson's profile, and determined that Nelson's DNA was not on the gun. (R. 100:19.) No individuals were identified from the DNA on the gun. Forensic firearm and tool mark examiner Mark Simonson testified that neither of the two .380 casings found at the scene was fired from the Bursa .380 semiautomatic but said

that both casings were fired from the same gun. (R. 100:165, 170–71.)

Detective Todd Fischer testified that he interviewed Paul Nelson in connection with the shooting. (R. 101:73.) Nelson told Fischer he knew nothing about the case and gave conflicting answers about whether he knew Buckingham. (R. 101:74.) Neither side called Nelson as a witness.

Eyewitness testimony

DF testified that he knew beyond a doubt who shot him and identified Buckingham in court. (R. 99:55–56, 60.) He said after being shot, he crossed the street and fell in a stairwell. (R. 99:60.) A woman then came and helped him. (R. 99:70.) DF said he told police he knew Buckingham by the nickname "Lil Lo." (R. 99:61–63.) DF said he knew who Buckingham was because they had crossed paths before at a friend's house and had an argument over Facebook after Buckingham began dating DF's ex-girlfriend, Daijohnna Eichelberger. (*See* R. 99:76–77.) He also stated that Buckingham had been calling him and not saying anything. (R. 99:74–75.) He testified that he had selected Buckingham from a photo array. (R. 99:64.) On cross-examination, DF said he did not remember exactly what Buckingham was wearing that day, though he was able to describe "yellow and a red hat." (R. 99:69.)

Alexandrea Coe testified that she was standing at the bus stop with DF and Antonio Gail when two men, both with guns, approached them. (R. 100:33–34.) She could not describe either person apart from both being black males. (R. 100:34.) Coe said she ran when she saw the guns and did not see the shooting, but just heard it. (R. 100:39–41.) She did not know if one man fired or both. (R. 100:40.) Coe turned and saw DF fall and went back to stay with him until medical and police assistance arrived. (R. 100:44.) She said

she did not see any person involved in the shooting in the courtroom. She did not know Buckingham. (R. 100:45.) Coe also said she recalled selecting the shooters out of some photos but could not remember how many people she had identified. (R. 100:53.)

Antonio Gail testified that he saw two people with guns head toward DF. (R. 100:68–73.) He said he saw and heard both of them fire their guns, and they ran off. (R. 100:73–74.) Gail remembered being shown a photo array by police but could not identify anyone from it. (R. 100:76.) He did not remember what the shooters were wearing or giving the police any descriptions of the shooters at the scene. (R. 100:81–82.)

Kira Wells testified that she witnessed the shooting from the passenger seat of Tamar Aaron's car. (R. 100:99–100.) She said she saw four men and a woman at the bus stop. (R. 100:102.) One man began backing into the street as another man raised a gun and pointed it at him. (R. 100:103.) Wells saw the man with the gun fire a shot at the man in the street. (R. 100:103–04.) She said the man with the gun then ran northbound with another man, and she and Aaron stopped to help the victim. (R. 100:04–05.) Wells identified Buckingham in court as the man with the gun. (R. 100:108.) She testified that she was able to get a good look at Buckingham and that he was the only person she saw with a gun that day. (R. 100:107–08.) She said she was certain that Buckingham was the person she saw shoot DF. (R. 100:110.)

Aaron testified consistently with Wells, except he believed the gunman fired two or three shots and said both suspects were wearing white t-shirts. (R. 100:118–125, 127.) He identified Buckingham in court as the shooter. (R. 100:125–26.) He also claimed that he made an identification of the shooter from a photo array (R. 100:125), but on cross-examination, he said he did not. Officers also testified that he did not. (*See* R. 100:127; 101:44–45.)

Conviction and sentence

The jury convicted Buckingham of all three charges. (R. 103:3.) The sentencing court imposed a total sentence of 30 years of incarceration, consisting of 20 years of initial confinement and ten years of extended supervision. (R. 104:33–34.)

Postconviction proceedings

Buckingham filed a postconviction motion seeking a new trial based on multiple claims of ineffective assistance of his trial counsel.[1] (R. 63:7–17.) He claimed Toran was deficient in the following ways:

1) Counsel failed to object to officer testimony about the September 1, 2013, and July 5, 2014, police contacts with Buckingham involving firearms, which he claimed was prejudicial other acts evidence.[2] (R. 63:8, 10–11.)

2) Counsel did not call Officer Daniel Reilly, who rode to the hospital with DF in the ambulance, as a witness. (R. 63:12.) Reilly's report indicated that on the way to the hospital, Reilly attempted to interview DF, and DF said he did not know either suspect. (R. 63:12.)

3) Counsel failed to object to Aaron's in-court identification of Buckingham. (R. 63:13.) Buckingham claimed this was an "unfairly suggestive" showup identification because Buckingham was the only suspect at

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[1] Buckingham made several claims in this motion that are not relevant to this appeal. (*See* R. 63.) For clarity, the State has omitted discussion of any claims Buckingham is not pursuing.

[2] In his postconviction motion, Buckingham objected to this evidence in its entirety; on appeal, he is challenging only evidence about the .380 Bersa and .40 caliber handgun found in each respective incident. (Buckingham's Br. 14 n.7.)

the defense table, and Aaron had previously been shown a photo of Buckingham during the photo array. (R. 63:13–14.)

4) Counsel failed to object to Detective Salaam's response when asked whether the DNA found on the white t-shirt matched Buckingham's. Salaam responded, "[t]he 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." (R. 63:15.) Buckingham claimed this was nonresponsive hearsay. (R. 63:15.)

5) Counsel "erred by failing to alert the jury to the State's lack of corroborative evidence regarding motive." (R. 63:15.)

Buckingham further alleged he was cumulatively prejudiced by these errors, which he claimed allowed "numerous pieces of inculpatory and otherwise prejudicial evidence" to be introduced. (R. 63:17.)

Buckingham also sought postconviction discovery of Facebook records and documents related to Daijhonna Eichelberger, the girl who DF believed "set up" the altercation between DF and Buckingham. (R. 63:6, 17–19.) Law enforcement had allegedly been shown evidence exculpating Eichelberger from any involvement in the incident, which Buckingham claimed defense counsel never received. (R. 63:6.) The State had subpoenaed Facebook seeking records from Eichelberger's and DF's accounts, but only received documents related to DF. (*See* R. 63:29–135.) The State provided Buckingham with those records, but he claimed this was "not sufficiently responsive." (R. 63:18.)

The circuit court ordered additional briefing and scheduled a *Machner* hearing. (R. 64; 108.) At the hearing, Toran testified that he believed the real issue at trial was identification, which all came down to testimony because the State never introduced the weapon used. (R. 108:8–13.) He explained he did not object to testimony about the

September 13, 2013, police contact where police found the .380 Bersa because he knew that the gun found did not match the gun used in the shooting. (R. 108:8.) Toran said he realized that the State was attempting to show the steps taken to locate Buckingham and "there was no nexus to the gun used in the shooting . . . . I knew that they could not get anything to pinpoint him to that gun" (R. 108:9.) He testified that he did not object to testimony about the .40 caliber gun found in the car during Buckingham's July 5, 2014, arrest for the same reason: it was not the gun that was used in the shooting, and "it did not establish that he possessed a gun." (R. 108:10–11.) When asked to clarify his strategy for cross-examining police about the details of the incident, Toran explained that "[i]t was just an understanding that he was not charged with carrying a concealed weapon" and was not seen holding the weapon. (R. 108:12–13.) Toran testified that he "used that as a benefit." (R. 108:39.)

Regarding Toran's failure to call Officer Reilly to testify that DF had said he did not know who shot him, Toran testified that Reilly's report indicated DF was in extreme pain and unable to identify anyone at the time because he was shot. (R. 108:15.) However, Toran said he did not have a particular strategic reason for not calling Reilly as a witness. (R. 108:15.)

When asked why he did not object to the allegedly improper in-court identification by Aaron, Toran said he assumed that Aaron was going to say he could not identify Buckingham because that was what was in the police reports. (R. 108:18.) Toran said he "was shocked when he identified him in court" and that he had pointed out during trial that Aaron could not identify Buckingham in the photo array. (R. 108:19.) Toran said he had not moved to exclude Aaron's in-court identification before trial because he did not foresee it happening, but cross-examined Aaron about his identification. (R. 108:19–21.)

With respect to Detective Salaam's allegedly nonresponsive hearsay statement about Paul Nelson and the DNA found on the shirt, Toran said he did not object because he did not want to call attention to the statement, and it had established that Buckingham's DNA was not on the shirt. (R. 108:22–23.)

Finally, after some dispute about the relevance of the non-responsive Facebook records the State had obtained, Toran testified that he did not have a reason for not asking any questions about the law enforcement investigation of Facebook records. (R. 108:24–37.)

The circuit court denied Buckingham's motion in a written order. (R. 77.) It found that:

1) There was no error by Toran in failing to object to the gun evidence nor any prejudice to Buckingham. (R. 77:4.) The evidence about Buckingham's September 13, 2013, and July 5, 2014, encounters with police were "simply a description of the efforts made to arrest the defendant" and the State never attempted to connect Buckingham to the Bersa pistol. (R. 77:3–4.) Additionally, there was "little or no nexus" between the guns and the defendant in either circumstance because there were other people around each time, and "possessing a gun by itself is not illegal or immoral." (R. 77:4.)

2) Buckingham was not prejudiced by Toran's failure to call Officer Reilly because DF was gravely injured while talking to Reilly and "to expect much from a shooting victim under the circumstances is a reach." (R. 77:5.) Further, other testimony established that when DF was not in such dire condition, he was able to identify Buckingham, and yet other testimony from Wells established Buckingham as the shooter. (R. 77:5.)

3) Failure to object to the in-court identification by Aaron was not deficient performance because "courts usually

hold that issues along these lines are for the jury to sort out." (R. 77:6.) It further determined that the totality of the evidence showed that the in-court identification was not prejudicial. (R. 77:6.)

4) As to Detective Salaam's nonresponsive hearsay testimony about the DNA on the white shirt, the court found that "objecting to the volunteered information would only have highlighted it." Buckingham was also not prejudiced by Toran's failure to object because "[i]n the context of a four day trial, one brief remark like this would not have been a difference maker." (R. 77:7.)

5) Toran was not deficient for failing to argue about the lack of records corroborating the Facebook fight, and could not be faulted for failing to seek more Facebook records that may or may not exist, particularly when given no specific place to look for them. (R. 77:8.) DF's testimony corroborated the State's comments that a Facebook argument over a girl was the possible motive for the shooting, and no further corroboration was necessary. (R. 77:7–8.) The absence of Facebook records did not mean the argument never took place. (R. 77:8.)

6). There was also no reasonable probability that the discovery or non-discovery of more Facebook documents would alter the result of the case, and Buckingham's postconviction discovery claim "seems something of a fishing expedition." (R. 77:8.)

Overall, the court observed that,

> While on several occasions trial counsel conceded that he had no strategic reason for some things that happened at the jury trial, overall my impression is that trial counsel was well prepared at trial, and executed the strategy of exposing the inconsistencies in the State's case well. No trial is perfect, and in hindsight no attorney is perfect, but this was above

> all an identification case and the testimony of Ms. Wells and the victim was especially convincing.

(R. 77:9.) The court determined that "[w]hile in hindsight perhaps a couple of things could have been done or tried, none of those things individually or collectively would have caused a different result." (R. 77:10.) Buckingham appeals.

ARGUMENT

I. None of attorney Toran's alleged failures singularly or cumulatively amounted to ineffective assistance of counsel.

A. Standard of review

Whether a defendant was denied the constitutional right to effective assistance of counsel presents a mixed question of law and fact. *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115 (citation omitted). A reviewing court upholds a circuit court's findings of fact "unless they are clearly erroneous." *Id.* (citation omitted). "Whether counsel's performance was deficient and prejudicial to his or her client's defense is a question of law" reviewed de novo. *Id.* (citation omitted).

B. Relevant law

It is well-settled that the right to counsel contained in the United States Constitution[3] and the Wisconsin Constitution[4] 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

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

[4] Wis. Const. art. I, § 7.

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).

To prove deficient performance, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. Effective counsel does not mean successful counsel and counsel's performance should not be deemed deficient solely because the defense proved unsuccessful. *State v. Balliette*, 2011 WI 79, ¶ 25, 336 Wis. 2d 358, 805 N.W.2d 334. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

"The defendant may not presume the second element, prejudice to the defense, simply because certain decisions or actions of counsel were made in error." *Balliette*, 336 Wis. 2d 358, ¶ 24. To prove prejudice, Buckingham "must show that [counsel's deficient performance] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. "It is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" *State v. Domke*, 2011 WI 95, ¶ 54, 337 Wis. 2d 268, 805 N.W.2d 364 (citation omitted). Buckingham "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." *Strickland*, 466 U.S. at 694; *State v. Love*, 2005 WI 116, ¶ 30, 284 Wis. 2d 111, 700 N.W.2d 62.

C. Toran was not ineffective for failing to object to testimony about the guns found during law enforcement's efforts to arrest Buckingham.

1. Testimony about law enforcement finding either gun was not other acts evidence because there was no "act" by Buckingham introduced to show similarity to the shooting.

As a preliminary matter, Buckingham has incorrectly characterized testimony from Officer Wawrzyniakowski and Officer Holzem about finding firearms during their efforts to arrest Buckingham as improper "other acts" evidence. (*See* Buckingham's Br. 16–24.) This was not other acts evidence and therefore Buckingham's *Sullivan*[5] analysis is inapposite to this case.

Wisconsin Stat. § 904.04(2) states that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes." Admission of other acts evidence is analyzed under the three-pronged test articulated in *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). However, this analysis is unnecessary if the evidence is not about another crime, wrong, or act committed by the defendant, or if it is not admitted to show a similarity between the other act and the charged offense. *See State v. Bauer*, 2000 WI App 206, ¶ 7 n.2, 238 Wis. 2d 238 687, 617 N.W.2d 902.

Buckingham claims that this testimony was regarding his "alleged possession of a firearm," but the transcripts

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[5] *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

show that is not true. (*See* Buckingham's Br. 14, 21.) None of the State's witnesses ever alleged that Buckingham possessed either firearm. The testimony simply described law enforcement's efforts to arrest Buckingham and to locate the firearm used in the shooting. There was no testimony about any "act" committed by Buckingham involving either firearm.

Officer Wawrzyniakowski testified that he was directed to search a residence while assisting in a search for Buckingham, who "was wanted for some sort of firearms offense." (R. 101:7–8.) When he arrived he found three or four people in the home, but Buckingham was not there. (R. 101:9, 13.) The occupants allowed Wawrzyniakowski to search the residence for Buckingham, and during that search Wawrzyniakowski found the .380 Bersa hidden in the attic. (R. 101:14.) Wawrzyniakowski testified that no one in the house claimed the gun, so he took it into evidence. (R. 101:14–15.) Wawrzyniakowski never testified or even implied that Buckingham had been in possession of the gun; in fact, he admitted that he could not say that Buckingham had ever been in the house. (R. 101:14–15.) Buckingham fails to explain how testimony that a gun was found in a house with three or four occupants—none of whom was Buckingham—is evidence of an "other act" committed by Buckingham admitted to show a similarity to the shooting.

Similarly, Officer Holzem testified that Buckingham was finally arrested when Holzem and his partner pulled over a Chevy Impala for speeding. (R. 100:87.) Buckingham was one of three occupants of the car. (R. 100:87.) Holzem testified that while he and his partner were running wanted checks on all three occupants, Buckingham, who had given them a fake name, opened the car door and fled. (R. 100:91.) Holzem said he ran after Buckingham. After arresting him, Holzem noticed a black handgun on the floor of the car. (R. 100:92.) Neither Holzem nor any other witness testified that

the gun belonged to Buckingham, that it was found on his person, or that any physical evidence connecting it to him was found on the gun. Nor was any evidence submitted that the gun had been used in a shooting or similar crime. Rather, Holzem testified only that Buckingham committed the crime of resisting an officer by fleeing and providing a false name. (R. 100:98.)

Accordingly, Buckingham's "other acts" analysis is lacking two crucial components: 1) an "other act" committed by Buckingham involving these firearms, 2) that was introduced to show similarity to the shooting. His claims that this evidence was "inadmissible as other-acts evidence" pursuant to Wis. Stat. § 904.04(2) and *Sullivan* therefore fail. (*See* Buckingham's Br. 20, 24.) As the circuit court correctly observed, this was evidence describing law enforcement's efforts to arrest Buckingham and to investigate the crime, and the State never attempted to connect Buckingham to either gun. (R. 77:3–4.) It was not other acts evidence.

2. Regardless of the nature of the firearms evidence, Toran had a reasonable strategic reason not to object to this evidence.

Buckingham argues in the alternative that this evidence was inadmissible under Wis. Stat. § 904.03 because it "had no probative value because the guns are unrelated to this shooting" and that its "prejudicial impact is overwhelming." (Buckingham's Br. 25–26.) He claims Toran was therefore deficient for failing to object to it. But evidence that the Bersa could not be linked to the shooting or to Buckingham easily meets the test for relevance. Evidence is relevant if it has "any tendency to make any fact that is of consequence to the determination of the action more probable *or less probable* than it would be without the evidence." Wis. Stat. § 904.01. The evidence that the Bersa

could not be linked to the shooting or to Buckingham has a tendency to make a fact of consequence—whether the Bersa was used to commit the crime and whether Buckingham was linked to it—less probable than it would be without the evidence. Wis. Stat. § 904.01. And the State never attempted to link the gun found in the Impala to the shooting or to Buckingham. Buckingham fails to explain how the prejudicial impact of this evidence was "overwhelming" when neither gun was linked to Buckingham or to the shooting. As the circuit court observed, "there were other individuals around in each of the instances and possessing a gun by itself is not illegal or immoral." (R. 77:4.) And the transcripts show that Toran made a reasonable strategic decision not to object to this evidence because it was actually helpful to Buckingham's case.

Toran testified that he did not object to testimony about the Bersa because he knew "that they could not connect it or the gun was not involved in the shooting." (R. 108:8.) Toran believed that the case came down to identification testimony, and when asked specifically why he did not object to the admission of evidence about the Bersa, Toran replied "[b]ecause I knew that they could not get anything to pinpoint him to that gun. They can establish that [the forensic examiner] tested it. [The forensic examiner] had it. And there's no relationship to the gun that was used in the case at hand." (R. 108:9–10.) Regarding the black handgun found in the Impala, Toran said he did not object because "that gun also had no relationship to the shooting. . . . In my opinion, it did not establish that he possessed a gun. And his prints were not on the gun. . . . It was not the gun that was used in this particular event. They had no D.N.A., no fingerprints. And there was no nexus to that -- that gun that was used in the offense." (R. 108:10–11.)

Toran's testimony shows that he had a reasonable strategic reason for not objecting to evidence about the guns. Neither gun had been connected to Buckingham or to the shooting. Testimony and evidence about them tended to highlight that the State was unable to present any physical evidence connecting Buckingham to this crime. The State was not even able to produce the gun used in the shooting at all, let alone connect it to Buckingham; all of the State's searches of areas where Buckingham had supposedly been were fruitless. Toran made a strategic choice not to object to this evidence after thorough investigation of the facts,[6] and his decision is therefore "virtually unchallengable." *Strickland*, 466 U.S. at 690.

3. Toran's failure to object to this testimony did not prejudice Buckingham.

Buckingham has failed to show prejudice from Toran's failure to object to this testimony. He claims that failure to do so was prejudicial because it "led to the admission of unfairly prejudicial and confusing testimony about unrelated

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[6] Buckingham's argument on this point fails to recognize the exculpatory nature of the evidence showing that neither Bersa nor the gun in the Impala were used in the crime. When Officer Wawrzyniakowski found the Bersa, the State could not have known it was not the weapon used and therefore sent it for forensic testing. The testing all showed that it was not the gun used in the crime and could not be linked to Buckingham. The handgun found in the Impala did not match the gun used in the shooting, either, which the police report showed. The State had no physical evidence linking Buckingham to any gun or any evidence linking any gun found to the shooting. This information would have been included in the discovery provided to defense counsel. Undoubtedly had the State not introduced this evidence, Buckingham would now be claiming Toran was ineffective for failing to introduce it himself.

firearms." (Buckingham's Br. 26.) But his single sentence fails to explain why there is a reasonable probability of a different result at trial had evidence that the State could not connect Buckingham to the guns or the guns to the shooting been excluded. There was nothing confusing about this evidence. The State's witnesses testified that the Bersa was not used in the shooting, and the State never attempted to show that the .40 caliber found in the impala was the gun used. The .40 caliber was not introduced as evidence at all. And as Buckingham himself admits, identification was the "central issue" in this case. (Buckingham's Br. 27.) "This was an identification case." (Buckingham's Br. 33.) None of the gun evidence corroborated or had any relation to the eyewitness identifications. There is no probability of a different result had this evidence been excluded.

D. Toran's failure to introduce Officer Reilly's testimony that DF could not identify Buckingham while in the ambulance was not deficient or prejudicial.

Toran's failure to call Officer Reilly to testify that DF could not identify the shooter while DF was clinging to life in the back of the ambulance was reasonable and did not prejudice Buckingham. Though Toran did not give a reason for not calling Reilly, "[a] reviewing court can determine that defense counsel's performance was objectively reasonable, even if trial counsel offers no sound strategic reasons for decisions made." *State v. Honig*, 2016 WI App 10, ¶ 24, 366 Wis. 2d 681, 874 N.W.2d 589. And here, failure to call Reilly as a witness was reasonable because DF's inability to identify anyone while his condition worsened in the ambulance was of minimal probative value given the circumstances.

Reilly's report states that while in the ambulance en route to the Children's Hospital, Reilly asked DF who shot him, and DF said "I don't know." (R. 63:145.) DF was able to

give a brief description of the suspects as two 17-year-old black males about five feet, ten inches tall. (R. 63:145.) Reilly asked DF if he knew the two men and if he had a confrontation with them previously, and DF answered "no" to both questions. (R. 63:145.)

Buckingham claims that Toran's failure to call Reilly to testify that DF could not identify anyone while en route to the hospital was deficient and prejudicial. (Buckingham's Br. 26–27.) But it was neither. His characterization of Reilly's police report as "powerful defense evidence," that "directly contradicts the testimony of D.F. at trial" ignores the circumstances under which DF's statement was given and the other identification statements given to police. (Buckingham's Br. 26.)

While DF was still coherent before the ambulance arrived, he told Officer Campbell that he did not know the name of the person who shot him but had seen the person before. (R. 77:5; 98:20.) Additionally, once he was out of surgery and stabilized, DF told police he knew the shooter's nickname, Lil Lo—the defendant's nickname. (R. 99:62–64.) He identified Buckingham as Lil Lo in a photo array. (R. 1:2.) Meanwhile, Reilly's report notes that while en route to the hospital, DF was in extreme pain, in and out of consciousness, and could not breathe when Reilly asked him about the shooter. (R. 63:145.) As the circuit court observed, "[t]o expect much from a shooting victim [while his condition worsened in the ambulance] is a reach." (R. 77:5.) Contrary to Buckingham's assertion that DF's "identification was actually undergoing consistent evolution," (Buckingham's Br. 27), when DF was not in danger of imminent death, he consistently maintained that he knew the shooter but did not know his real name. A reasonably competent attorney could determine that DF's inability to identify someone while being rushed to the hospital in extreme pain and while barely conscious was of minimal probative value at best and

would not negate his other statements identifying Buckingham. Toran's failure to introduce this testimony was reasonable under the circumstances. It was not deficient performance.

And Buckingham has not shown that failure to introduce this testimony was prejudicial. DF was not the only eyewitness who identified Buckingham as the shooter both in a photo array and in court. Kira Wells also identified Buckingham in a photo array. She further identified him in court and said she was certain he was the shooter. In light of DF's other statements identifying Buckingham that were made when DF was more coherent and Kira Wells' consistent and certain statements identifying Buckingham, there is not a reasonable probability that the outcome of the trial would have been different had Toran introduced this testimony.

E. Toran appropriately responded to Aaron's in-court identification of Buckingham.

Buckingham's claim that Aaron's in-court identification of Buckingham was "the product of an unfairly suggestive identification procedure,"—namely, asking Aaron if he saw the shooter in the court room after having been shown a photo array—and that Toran was ineffective for failing to prevent it fails on multiple fronts. First, this argument is built on a series of statements from nonprecedential or factually distinguishable cases that Buckingham has strung together to claim that *any* in-court identification is actually an unfairly suggestive due process violation. (*See* Buckingham's Br. 28–35.) But the end result is a misstatement of the law in Wisconsin and as stated by the United States Supreme Court, and this Court should reject it. (*See* Buckingham's Br. 28–35.) Second, his claim that Toran was ineffective for failing to anticipate and somehow prevent Aaron from making this identification

commits the classic and impermissible mistake of second-guessing counsel's performance with the benefit of hindsight. (*See* Buckingham's Br. 32.) Finally, there is not a reasonable probability that the outcome of the trial would have been different if Aaron's in court identification had been stricken, because DF and Wells both consistently identified Buckingham as the shooter.

1. Buckingham's claim that all in-court identifications are unreliably suggestive "show-up" identifications that amount to a constitutional due process violation is a misstatement of the law.

Buckingham argues that Aaron's in-court identification was unfairly suggestive because Buckingham was sitting in court at the defense table and particularly problematic because Aaron had been shown a photo array that included Buckingham. (*See* Buckingham's Br. 30.) Essentially, he asks this Court to adopt the position that the defendant's presence in court amounts to a "showup"[7] identification, and the Wisconsin Supreme Court has held that showups are inherently suggestive in *State v. Dubose*, 2005 WI 126, ¶ 2, 285 Wis. 2d 143, 699 N.W.2d 582. (Buckingham's Br. 30.) He then claims that showing a witness any photo array containing the suspect—even a properly-conducted photo array—taints the witness further. (Buckingham's Br. 31.) Ergo, he claims, being asked to identify a suspect in court is always an unfairly suggestive identification procedure, especially if the witness has been

[7] A "showup" identification is a procedure where a suspect is presented singly to witness for identification purposes. *State v. Dubose*, 2005 WI 126, ¶ 1 n.1, 285 Wis. 2d 143, 699 N.W.2d 582.

shown a photo array, and it violates due process. (Buckingham's Br. 31.) He is wrong.

First and perhaps foremost, the United States Supreme Court has rejected the argument that due process requires exclusion of any identification obtained under suggestive circumstances. *Perry v. New Hampshire*, 565 U.S. 228, 241–42 (2012). Rather, the Court has held that due process concerns arise only if there has been improper police conduct in conducting the identification procedure, and even if there was improper conduct, whether the identification is admissible must be evaluated on a case-by-case basis. *See id.*

In *Perry*, a citizen called police to report a man breaking into cars in a parking lot. *Id.* at 233. Officers found Perry standing in the parking lot, and a resident pointed to Perry and said he was the person she had seen breaking into a car. *Id.* at 233–34. Perry moved to suppress the identification on the ground that it was made under inherently suggestive circumstances and its admission would violate due process. *Id.*

The Supreme Court disagreed. It observed that the Constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." *Perry*, 565 U.S. at 237. "Constitutional safeguards available to defendants to counter the State's evidence include the Sixth Amendment rights to counsel, compulsory process, and confrontation plus cross-examination of witnesses." *Id.* (citations omitted). They further include "state and federal statutes and rules" that "govern the admissibility of evidence," and juries that are "assigned the task of determining the reliability of the evidence presented at trial." *Id.* Accordingly, it is "[o]nly when evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice'" that the

Supreme Court has "imposed a constraint tied to the Due Process Clause." *Id.* (citations omitted).

After discussing its previous decisions regarding out-of-court identification procedures, the Court noted that "due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Id.* at 238–39. But even then, "suppression of the resulting identification is not the inevitable consequence." *Id.* at 239. Rather, the cases established "that the Due Process Clause requires courts to assess, on a case-by-case basis, whether *improper police conduct* created a 'substantial likelihood of misidentification.'" *Id.* (emphasis added) (citation omitted). Improper police action is required before due process concerns arise, because the "primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances" is "to deter law enforcement use of improper lineups, showups, and photo arrays." *Id.* at 241. That "deterrence rationale" crumbles in cases "in which the police engaged in no improper conduct." *Id.* at 242.

Like Buckingham, Perry attempted to rely on the Court's statement from *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977), that "reliability is the linchpin in determining the admissibility of identification testimony" for the proposition that reliability alone determined the admissibility of an identification. *Perry*, 565 U.S. at 240–41; (Buckingham's Br. 31). But the Court observed that, like Buckingham, "Perry has removed our statement in *Brathwaite* from its mooring, and thereby attributes to the statement a meaning a fair reading of our opinion does not bear." *Perry*, 565 U.S. at 241. The Court explained that "the *Brathwaite* Court's reference to reliability appears in a portion of the opinion concerning the appropriate remedy *when the police use an unnecessarily suggestive identification procedure*." *Id.* The check for reliability "comes into play only

after the defendant establishes improper police conduct." *Id.* The Court recognized that "[m]ost eyewitness identifications" and "all in-court identifications" involve "some element of suggestion." *Perry*, 565 U.S. at 244. Regardless, the Court held that "[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness" because "the jury, not the judge, traditionally determines the reliability of evidence." *Id.* at 245.

Wisconsin has followed the United States Supreme Court in this regard: "[t]he admissibility of an in-court identification depends upon whether that identification evidence has been tainted by illegal activity. In general, evidence must be suppressed as fruit of the poisonous tree, 'if such evidence is obtained "by exploitation of that illegality."'" *State v. Roberson*, 2006 WI 80, ¶ 32, 292 Wis. 2d 280, 717 N.W.2d 111 (quoting *State v. Knapp,* 2005 WI 127, ¶ 24, 285 Wis. 2d 86, 700 N.W.2d 899; *New York v. Harris,* 495 U.S. 14, 19 (1990)).

Buckingham makes no attempt to distinguish or even address either *Perry* or *Roberson*. (Buckingham's Br. 28–33.) Nor does he allege that there was anything improper, let alone illegal, about the photo array police showed Aaron. His claim that Aaron's in-court identification violated due process is meritless.

The cases Buckingham cites to construct his theory that in-court identifications violate due process are inapposite. Both of the United States Supreme Court cases he cites dealt with suggestive out-of-court identifications, and neither held that they must be automatically excluded. *See Stovall v. Denno*, 388 U.S. 293, 302 (1967) (whether a showup identification violates due process depends on the totality of the circumstance); *Neil v. Biggers*, 409 U.S. 188,

194–95 (1972) (same). In *Dubose*, the single Wisconsin case on which he relies, the Wisconsin Supreme Court was also exclusively discussing "the law relating to the right to due process *in out-of-court* identification procedures," particularly out-of-court showups. *Dubose*, 285 Wis. 2d 143, ¶ 17 (emphasis added). Additionally, even after determining that showup identifications were inherently suggestive, *Dubose*, like *Stovall* and *Neil*, did not hold that showup identifications were inadmissible at trial. *Id.* ¶ 33. It held that evidence obtained from an out-of-court showup is still admissible if, "based on the totality of the circumstances, the procedure was necessary." *Id.* Once trial has commenced, sequestering the defendant until it is time for a witness to make an identification and then bringing a parade of possible suspects into the courtroom in the middle of a trial to replicate a lineup is not feasible. Even accepting the dubious proposition that an in-court identification is a "showup," it would be necessary pursuant to *Stovall* and *Dubose*. *Cf. id.*

Additionally, the Massachusetts and Connecticut cases on which Buckingham primarily relies are outliers and are distinguishable. (*See* Buckingham's Br. 29–31 (citing *Commonwealth v. Crayton*, 21 N.E.3d 157 (Mass. 2014); *State v. Dickson*, 141 A.3d 810 (Conn. 2016)).) In *Crayton*, the Massachusetts Supreme Court held that in-court identifications are functionally identical to showups and could be excluded as inherently unreliable. *Crayton*, 21 N.E.3d at 165. But it did so based on the Massachusetts constitution and "common-law principles of fairness." *Id.* at 169–70. Furthermore, it expressly recognized that Massachusetts had parted ways with the United States Supreme Court's due process jurisprudence on the issue. *Id.* at 164. Unlike Massachusetts, Wisconsin generally follows the Supreme Court's identification jurisprudence. And at any rate, this Court cannot ignore the Wisconsin Supreme

Court's holding in *Roberson* that "[t]he admissibility of an in-court identification depends upon whether that identification evidence has been tainted by illegal activity."[8] *See Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997).

Dickson involved similar facts to the situation here, but there, the Supreme Court of Connecticut recognized that it was extending the United States Supreme Court's jurisprudence on the issue based on a prior Connecticut case. *See Dickson*, 141 A.3d at 821–22 (citing *State v. Marquez*, 967 A.2d 56 (Conn. 2009)). As previously noted, Wisconsin generally follows the Supreme Court's identification jurisprudence. This Court should not depart from it now based on a single nonprecedential foreign case.

Finally, Buckingham's claim that any in-court identification amounts to a highly suggestive "in-court showup procedure" and violates due process leads to absurd results. For one, it arguably violates one of the most fundamental principles of a fair trial, namely the right to confront one's accusers. And even adopting the narrower view that such identifications are problematic only if preceded by an out-of-court identification procedure would create more problems than it would solve. It would eliminate any in-court identification except those where the witness had never been asked to identify the suspect previously. This would cripple law enforcement efforts to identify suspects and would leave defendants in the dark about which witnesses may identify him or her from the stand. It would also eliminate any possibility of impeaching witness identifications with earlier equivocations or

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[8] *State v. Roberson*, 2006 WI 80, ¶ 32, 292 Wis. 2d 280, 717 N.W.2d 111.

misidentifications. It is not, nor should it be, the law in Wisconsin.

2. Trial counsel was not deficient for failing to argue Buckingham's erroneous statement of the law or for failing to anticipate that Aaron would identify Buckingham in-court.

As shown, no Wisconsin or United States Supreme Court case holds that an in-court identification is the functional equivalent of a showup identification and that witnesses can be impermissibly tainted by a properly-conducted photo array. Toran, therefore, cannot be deficient for failing to preemptively move to exclude any in-court identification by Aaron on this ground. *See State v. Breitzman*, 2017 WI 100, ¶ 84, 904 N.W.2d 93 (attorneys are not deficient for failing to argue unsettled points of law). Furthermore, because that is not the law in Wisconsin, it is highly unlikely that such a motion would have succeeded. Attorneys are not deficient for failing to make nonmeritorious motions. *State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

And finally, Buckingham fails to explain how Toran was supposed to anticipate and prevent this testimony when Aaron never identified Buckingham as the shooter before. It is black-letter law that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. But hindsight is all Buckingham bases his claim on. Indeed, Buckingham acknowledges that Toran was "surprised" by the in-court identification. (Buckingham's Br. 33.)

Buckingham, though, claims that Toran then "did nothing," amounting to deficient performance. That is false. Toran took immediate steps to impeach Aaron's identification during cross-examination. (*See* R. 108:17–20; 100:126–32.) Toran did precisely what a reasonable attorney would do when faced with surprise testimony that is inconsistent with what a witness has consistently maintained. And though he also could have objected and asked the court to strike the identification, his choice to impeach Aaron through cross-examination was reasonable and therefore not deficient. *See Strickland*, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.") Toran's failure to raise Buckingham's nonmeritorious argument that identifying someone in court is an unfairly suggestive showup does not prove that Toran did nothing to challenge Aaron's identification. He did not perform deficiently.

3. Buckingham was not prejudiced by Toran's decision to cross-examine Aaron rather than move to strike this testimony.

There is not a reasonable probability that the outcome of the trial would have been different if Toran had moved to strike Aaron's in-court identification rather than cross-examining him about it. Toran immediately and thoroughly cross-examined Aaron about his identification. (R. 100:126–32.) Aaron admitted that he did not identify anyone when police showed him a photo array. (R. 100:129–30.) He also made several statements that conflicted with his earlier conversations with police and descriptions given by DF and Wells. (R. 100:126–32.) Toran's cross-examination made clear that none of Aaron's identifications were reliable. And as the circuit court correctly observed, "the totality of the

evidence in this case renders any failure on counsel's part to object non-prejudicial." (R. 77:6.) Even had Aaron's testimony been stricken or had never been admitted at all, there were two other independent witnesses who identified Buckingham as the shooter, DF and Wells. Those two witnesses had both picked Buckingham out of the photo array and identified him in court. There is no probability that Aaron's shaky identification made a difference.

F. Toran's failure to strike Detective Salaam's single nonresponsive hearsay statement was not ineffective.

At trial, Toran cross-examined Detective Salaam about the police procedures used to collect and test the evidence in this case. (R 99:42–51.) During the course of that examination, Toran asked Salaam specifically about the white t-shirt. (R. 99:48.) Salaam said he recovered the t-shirt and had put on black plastic gloves to do so. (R. 99:48.) Toran asked if all of the items recovered were checked for DNA, and Salaam said they were. (R. 99:49.) The following exchange then took place,

> [TORAN] Were any results or was any DNA recovered that linked to Mr. Buckingham?
>
> [SALAAM] 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.
>
> [TORAN] So my question is: Did you say the DNA on the shirt?
>
> [SALAAM] Correct.
>
> [TORAN] Was identified as being someone other than Mr. Buckingham?
>
> [SALAAM] That is correct.
>
> [TORAN] Is that correct? What was his name?

[SALAAM] Paul Nelson.

(R. 99:49.) Buckingham claims that Salaam's statement that the DNA on the shirt came back to a person who admitted he knew Buckingham was nonresponsive hearsay, that Toran was deficient for failing to move to strike it, and that failure prejudiced Buckingham. He is wrong.

The State does not dispute that the statement about what Paul Nelson said was hearsay.[9] However, Toran gave a strategic reason for not asking the court to strike the response. (R. 108:22.) Toran testified that "I didn't want to draw undue attention to that particular comment. . . . there was no nexus as to how [Paul Nelson] knew [Buckingham], [Paul Nelson] was there at the scene. It was kind of left up in the air. . . . And I established that Mr. Buckingham's D.N.A. was not on that t-shirt." (R. 108:22–23.) Again, "[t]he reasonableness of counsel's conduct must be evaluated 'on the facts of the particular case, viewed as of the time of counsel's conduct.'" *Balliette*, 336 Wis. 2d 358, ¶ 23 (citation omitted). Buckingham has identified nothing that was unreasonable about Toran's decision to move on rather than move to strike and therefore call attention to the statement. (Buckingham's Br. 35.) Buckingham's conclusion that Toran's failure to strike the response was deficient performance simply because he says it was is erroneous. (Buckingham's Br. 35.) As is his claim that "counsel's strategic judgment—that he did not wish to emphasize the

[9] Whether Salaam's answer was nonresponsive is debatable. Toran asked if any results "linked to Buckingham." It appears Salaam understood Toran to be asking if any of the evidence recovered led to any connection to Buckingham. Given the form of the question, that is not an insupportable understanding of what was asked. Nevertheless, the State will assume for the sake of argument that this statement was inadmissible.

remark (108:22)—is not entitled to deference." (Buckingham's Br. 35.) Buckingham offers no supporting authority for this statement, likely because it is in direct opposition to *Strickland*. *Strickland*, 466 U.S. at 698 ("Judicial scrutiny of counsel's performance must be highly deferential"); *see also Honig*, 366 Wis. 2d 681, ¶ 24 ("We will sustain counsel's strategic decisions as long as they were reasonable under the circumstances.") Toran made a reasonable strategic decision not to object, which is all that *Strickland* requires.

And, again, Buckingham has failed to show prejudice. His claim that Salaam's statement was "clearly intended to shore up an evidentiary hole in the State's case" is completely unsupported by the record. (*See* Buckingham's Br. 35.) As the State noted, it is likely that Salaam simply misunderstood what Toran meant when he asked if any of the evidence could be "linked" to Buckingham. *See supra* page 31 n.9.) And his claim that Salaam's remark eliminated any possibility the jury could believe that Paul Nelson may have been the shooter is nonsensical. (Buckingham's Br. 35.) Salaam simply said that Nelson said he knew Buckingham; he did not even imply that Nelson said Buckingham had anything to do with the shooting. This single statement did nothing to undermine the witness identification of Buckingham, and the jury knew that Paul Nelson's DNA was found on the t-shirt, but Buckingham's was not. There is no probability that this single errant statement had any effect on the outcome of the trial.

G. Toran was not ineffective for failing to pursue postconviction counsel's alternative strategy for arguing Buckingham's case.

Buckingham claims that Toran was ineffective for failing to place greater emphasis on the State's failure to introduce physical evidence of the Facebook fight DF said

sparked the incident or to seek records showing that it did not happen. (Buckingham's Br. 36–37.) He claims this would have undermined the State's proffered motive for the shooting. (Buckingham's Br. 36–37.) But an allegation that postconviction counsel would have defended the case differently is insufficient to support an ineffective assistance claim, and that is all this argument amounts to. Indeed, the Wisconsin Supreme Court has made clear that "[t]he defense selected need not be the one that by hindsight looks best," and it has repeatedly stated that it "disapproves of postconviction counsel second-guessing the trial counsel's considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel." *State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Buckingham admits that the State was not required to prove motive, and his argument that the jury "deserved to know" that the State never found any Facebook records that would prove a fight took place is nothing more than an assertion that postconviction counsel would have emphasized that fact. (Buckingham's Br. 37.) He has pointed to nothing showing that Toran's failure to make this point was unreasonable.

He also has failed to show prejudice. He claims that if Toran had only told the jury that the State failed to find any Facebook records substantiating the argument, there would have been a reasonable probability of a different result. (Buckingham's Br. 37.) But, as with his other claims, he again fails to explain why this would have so undermined the eyewitness testimony that the jury would likely have had a reasonable doubt about Buckingham's guilt. DF testified that the two had a Facebook fight. As the circuit court recognized, that the State was unable to locate records substantiating the fight does not prove it never happened. Anyone with a smartphone or computer access knows that it is possible to delete messages or to use someone else's

account to send them. There is no chance that the jury would have acquitted Buckingham if only Toran would have pointed out the lack of substantiating Facebook records.

H. Buckingham was not cumulatively prejudiced.

This Court may consider whether the aggregate effects of counsel's deficiencies establish cumulative prejudice. *Thiel*, 264 Wis. 2d 571, ¶ 60. That said, "a convicted defendant may not simply present a laundry list of mistakes by counsel and expect to be awarded a new trial." *Id.* ¶ 61. "[I]n most cases errors, even unreasonable errors, will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if the evidence against the defendant remains compelling." *Id.* In addition, only actual deficient errors are "included in the calculus for prejudice." *Id.*

As shown, counsel made no actual deficient errors. There is therefore nothing to be included in the calculus for prejudice, and adding the "errors" together yields nothing. "Zero plus zero equals zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

But even assuming that everything on Buckingham's list of mistakes was a constitutionally deficient error, he still cannot not show prejudice. Nothing that Buckingham has presented has undermined the most compelling evidence presented at trial. DF's statement that he knew who shot him but did not know his name and his two out-of-court identifications of Buckingham would still have been introduced. His in-court identification still would have been introduced, as well. All of these statements were made when DF was coherent. Officer Reilly would have testified that DF said he did not know who shot him, but that when DF made the statement he was in extreme pain, in and out of consciousness, and his health was steadily declining.

Nothing Buckingham has introduced would have had any bearing on Kira Wells' identifications or testimony, which were the most consistent and strongest of the identifications. Excluding Aaron's in-court identification would not have undermined Wells' or DF's identifications. Excluding evidence about the guns would have put Buckingham in a worse position: the jury would not have heard that the State was unable to locate the gun used in the shooting or connect Buckingham to any gun whatsoever. The "uncorroborated hearsay testimony of Paul Nelson" was inconsequential as it consisted only of a statement that Nelson said he knew Buckingham. And pointing out that the State did not produce evidence corroborating the Facebook fight would have done nothing to disprove its existence. Buckingham has not shown prejudice, cumulative or otherwise, from Toran's performance.

II. The circuit court properly denied Buckingham's motion for postconviction discovery.

A. Standard of review

This Court reviews a circuit court's denial of postconviction discovery for an erroneous exercise of discretion. *State v. Ziebart*, 2003 WI App 258, ¶ 33, 268 Wis. 2d 468, 673 N.W.2d 369.

B. Relevant law

A defendant may make postconviction motions, including motions for postconviction discovery. *See State v. O'Brien*, 223 Wis. 2d 303, 320, 588 N.W.2d 8 (1999). Buckingham has a due process right to the postconviction discovery he seeks if the desired evidence is relevant to an issue of consequence. *Id.* Evidence is relevant to an issue of consequence,

> "only if 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." Evidence that is of consequence then is evidence that probably would have changed the outcome of the trial. "The mere possibility that an item of undisclosed information might have helped the defense . . . does not establish '[a consequential fact]' in the constitutional sense."

Id. at 320–21 (alterations in original) (citations omitted).

If a defendant's postconviction discovery motion presents only conclusory allegations that fail to raise a question of fact, or if the record conclusively demonstrates that the defendant is not entitled to relief, a circuit court may in its discretion deny a postconviction motion on its face without holding an evidentiary hearing. *See Ziebart*, 268 Wis. 2d 468, ¶ 33.

C. The circuit court properly exercised its discretion when it denied Buckingham's motion.

The circuit court properly denied Buckingham's motion for postconviction discovery. Buckingham's claim for postconviction discovery of additional Facebook records seeks records that the State does not possess. The State is not obligated to provide Buckingham with records it does not have. But even if the State had the records Buckingham seeks, he has not shown that they would create a reasonable probability of a different result.

Buckingham notes that law enforcement attempted to access the Facebook records of the victim, DF, and the girl they believed set up the argument, Daijohnna Eichelberger. (Buckingham's Br. 39; R. 72:14.) Eichelberger was DF's ex-girlfriend, and was dating Buckingham at the time of the shooting. However, Eichelberger's page had been taken down, therefore the State subpoenaed Facebook for the

records. (Buckingham's Br. 39; R. 63:39–40.) All of the responsive records Facebook provided related to DF's page, and they have all been turned over to the defendant. (*See* R. 71:10; 63:41–136.) The fact that Buckingham keeps demanding more records does not mean that the State can conjure up records it does not possess. (*See* R. 71:10; Buckingham's Br. 39–41.) If Buckingham wishes to cast a wider net with Facebook, he should seek his own subpoena for additional records.

Moreover, the circuit court was correct that Buckingham's search for additional Facebook records is nothing more than a fishing expedition, and none of the records he seeks are relevant to an issue of consequence in this case. He claims that Eichelberger's family "attempted to provide material to the State to prove that *she was not involved in the shooting*." (Buckingham's Br. 41) (emphasis added). He then claims that such material "is exculpatory evidence." (Buckingham's Br. 41.) However, that is pure speculation. The fact that Eichelberger may not have been involved in the shooting says nothing about whether Buckingham was. Eichelberger did not need to prompt Buckingham to shoot DF in order for DF and Buckingham to have a fight over Facebook or for the shooting to occur. Nor would Eichelberger's non-involvement show that Buckingham did not have jealousy issues over his girlfriend's ex-boyfriend, DF. Eichelberger's non-involvement says nothing at all about whether Buckingham shot DF.

In sum, Buckingham's postconviction discovery claim is nothing more than a fishing expedition to discover whether anything relevant to an issue of consequence even exists. Furthermore, the State does not have the records Buckingham seeks and therefore cannot produce them no matter how many times Buckingham demands them. The circuit court properly denied his claim.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the circuit court.

Dated this 12th day of March, 2018.

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 10,881 words.

Dated this 12th day of March, 2018.

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LISA E.F. KUMFER
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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 12th day of March, 2018.

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