STATE OF WISCONSIN

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

DISTRICT I

Case No. 2018AP591-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTONIO L. SIMMONS,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING A MOTION FOR POSTCONVICTION DNA TESTING UNDER WIS. STAT. § 974.07, AN ORDER DENYING RECONSIDERATION, AND AN ORDER DENYING SUPPLEMENTAL BRIEFING, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM S. POCAN AND THE HONORABLE DAVID A. HANSHER, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUE PRESENTED

The State reframes the issue.

Did Antonio L. Simmons demonstrate that he satisfied the requirements for postconviction DNA testing under Wis. Stat. § 974.07?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

In 2001, a jury found Antonio Simmons guilty of two counts of first-degree recklessly endangering safety while armed and one count of second-degree recklessly endangering safety while armed. This Court affirmed Simmons's convictions on direct appeal and subsequently affirmed the circuit court's denial of a postconviction motion under Wis. Stat. § 974.06.

In 2017, Simmons moved for postconviction DNA testing under Wis. Stat. § 974.07(7)(a). He sought testing of several items, including .380 bullet casings, 9mm bullet casings, liquor bottles, a baseball hat, a head wrap, and black shoes. The circuit court properly denied Simmons's motion for DNA testing and related motions for reconsideration and supplemental briefing.

This Court should affirm the circuit court's decision denying Simmons's section 974.07 motion, because Simmons did not satisfy its requirements for obtaining postconviction DNA testing. First, the bullet casings appear to be the only items available for testing. Officers never collected several

items identified in his motion, including the head wrap, the baseball cap, the shoes, and liquor bottles. Second, Simmons has not showed that the bullet casings satisfy section 974.07(2)(a)'s relevancy requirement. Finally, even if exculpatory DNA could be recovered from the items that Simmons wants tested, there is no reasonable probability that he would not have been prosecuted or convicted. Exculpatory DNA on these items would not be enough to overcome the testimony of four eyewitnesses—two of whom previously knew Simmons—identifying Simmons as the person who shot two of them and fired at a third.

STATEMENT OF THE CASE

In 2001, a jury found Simmons guilty of two counts of first-degree recklessly endangering safety while armed and one count of second-degree recklessly endangering safety while armed. (R.24:1.) The circuit court sentenced Simmons to a 39-year term of imprisonment. (R.24:1.)

I. Simmons's trial

In its decision denying Simmons's direct appeal, this Court synopsized the trial testimony, which is relevant to the issues that Simmons raises in his current appeal. *State of Wisconsin v. Antonio L. Simmons*, No. 03-1455-CR, 2004 WL 1698068 (Wis. Ct. App. July 30, 2004)) (per curiam). (R.42.)

Simmons and J.S.G.[1] got into a bar fight before the shooting:

> [D]uring the early morning hours of July 8, 2000, Simmons and [J.S.G.] were arguing in a tavern when [J.S.G.] hit Simmons in the head with a glass, cutting him. Tyrone Ramsey, a bouncer at the tavern, testified that he told [J.S.G.] and his sister, [P.S.G.], to leave the tavern while security personnel kept

[1] Consistent with Wis. Stat. § (Rule) 809.86, the State abbreviates the victims' names.

> Simmons inside for ten to fifteen minutes. Ramsey also stated that he believed a customer might have handed Simmons a .25-caliber pistol. [P.S.G.] testified that as she and [J.S.G.] were leaving the tavern, she saw Simmons lifting his shirt, reaching for the back of his pants as if he had a gun, and telling [J.S.G.] to "meet [him] outside."

Simmons, 2004 WL 1698068, ¶ 2.

Ramsey testified that he saw Simmons leave the bar and shoot multiple times into P.S.G.'s car. (R.142:130, 138–42.) As this Court explained,

> [J.S.G.], [P.S.G.], and her friend, [A.C.], then got into [P.S.G.]'s car. Ramsey said that although he held Simmons for ten to fifteen minutes after [J.S.G.]'s group left, he noticed that the group remained in the car talking when Simmons exited the bar and entered a white, two-door Chevy. Ramsey stated that shortly thereafter, both cars left and he saw Simmons fire multiple times into [P.S.G.]'s car while he (Simmons) was standing outside the car in the well-lit intersection. Ramsey said Simmons jumped back into the white car and sped off. Ramsey subsequently alerted police to the shooting and described the vehicle; he testified, however, that he did not see anyone else in Simmons' car.

Simmons, 2004 WL 1698068, ¶ 3.

J.S.G., P.S.G., and A.C., testified that Simmons shot at them in the car:

> [P.S.G.] testified that as she was waiting at an intersection near North 42nd Street and Capitol Drive, a white car pulled up on the passenger side of her car. [P.S.G.], [A.C.] and [J.S.G.] each testified that Simmons, who was driving the white car, stuck his head out the window, and started shooting at them. [P.S.G.] was struck by a bullet in the back of her right shoulder, and [J.S.G.] suffered eight bullet wounds; [A.C.] was not physically injured.
>
> [J.S.G.] testified that the man in the white car said, "[W]hat's up now, motherfucker?" [J.S.G.] also

> said the shooter then exited the car and fired multiple shots at him through a window on the rear passenger side of the car, while telling him to die.
>
> [P.S.G.] and [A.C.] testified that they managed to exit their vehicle and run back across the street to the tavern. [P.S.G.] testified that as they were running across the street, Simmons circled around in the white car, stopped briefly, and said, "[Y]eah, that's how I do it."

Simmons, 2004 WL 1698068, ¶¶ 4–6.

Detective Kevin Armbruster responded to the shooting scene at 2:00 a.m. (R.143:11–12.) Another officer, Marlon Davis, had pursued the white car in which the shooter allegedly fled the scene. (R.143:17–18.) According to Armbruster, the white car, a Chevy Z24, was found abandoned 11 blocks away, minutes after the shooting was reported. (R.143:13–14.) Davis told Armbruster that a woman was standing near the car and that he did not see anyone else exit it. (R.143:17–18.)

Simmons sought to elicit testimony from Armbruster that Jones, the woman near the white car, told Officer Davis that "C-Note" fled from the car. (R.143:19.) The State objected on hearsay grounds, noting that Jones later told Armbruster that Simmons ran from the car when officers stopped it. (R.143:23–24.) The circuit court ruled that if Simmons introduced Jones's statement that C-Note was in the car, it would permit the State to introduce her later statement that Simmons was in the car. (R.143:35–36.) Based on this ruling, Simmons declined to introduce Jones's statement that C-Note was the driver. (R.143:37.)

Armbruster recovered a Winchester .380 casing inside the white car, and seven 9mm casings in the intersection near where officers stopped the white car. (R.143:15.) These casings were received as Exhibit 3. (R.11; 143:15.)

Detective Michael Dubis responded to the shooting scene near the tavern. (R.143:45.) Dubis testified that the window on the rear passenger side of P.S.G.'s car had seven bullet holes within a six-inch circle. (R.143:46, 55–56.) He said the tight bullet-hole pattern suggested that the shots "were fired from a single position at a rapid pace." (R.143:56.)

Dubis observed six .380 brass shell casings and a bullet laying in the street near the tavern. (R.143:45–46, 50.) The casings and bullet were received as Exhibit 4. (R.143:47.) Dubis testified that the Winchester .380 casing in Exhibit 3 was similar to six other .380 casings and one .380-caliber bullet found in the street at the shooting scene. (R.143:46, 50, 52–53.) Crime laboratory testing showed that the .380 casing in Exhibit 3 and the .380 casings in Exhibit 4 were fired from the same weapon. (R.143:53–54.)

Dubis also said that no .9mm casings were recovered at the crime scene. (R.143:51.) He found no connection between the shooting and the .9mm casings found near 35th and Congress, where the white car was stopped. (R.143:13, 62.)

Simmons did not testify. (R.143:41.) Instead, he called John Lindsey, who claimed Simmons was with him in his car when the shooting began. (R.143:64–78.)

> John Lindsey, a close friend of Simmons, and the only defense witness at trial, testified that he left the tavern with Simmons who, he said, was bleeding profusely. Lindsey said that he and Simmons got in his Red Cutlass and were headed for a hospital, when he saw gunfire coming from another car. Lindsey explained that, ultimately, he and Simmons decided not to go to the hospital because of Simmons' fears about his outstanding warrants, so they returned to his (Lindsey's) residence. No other evidence corroborated Lindsey's account.

Simmons, 2004 WL 1698068, ¶ 7.

II. Simmons's post-verdict, postconviction, and habeas litigation

Simmons's post-verdict motion. After trial and before sentencing, Simmons said that his girlfriend Zakea Jones claimed responsibility for the shooting and that his trial counsel knew about her admissions and did not defend him with this information. (R.145:3–4.) The circuit court allowed Simmons's trial counsel to withdraw. (R.145:14.)

Simmons filed a motion for a new trial before sentencing, claiming ineffective assistance of trial counsel and newly discovered evidence. (R.25:1.) In an affidavit accompanying the motion, Jones swore that she was responsible for the shooting. (R.25:2–3.) Jones said that she did not intend to fire the gun but did so when she saw the victim's gun. (R.25:3.) Jones believed that the victim shot based on his belief that Simmons was in her car. (R.25:3.) Jones said that another person, "C-note," was in the car but tried to stop her, and that "C-note" ran when the police stopped the car. (R.25:3.) The circuit court denied Simmons's motion for a new trial. (R.146:4; 147:2.)

At sentencing, Jones testified about Simmons's character, told the court that she was the "actual perpetrator," but invoked her privilege against self-incrimination when she was asked if she shot the victims. (R.147:41–42, 46–47.) Before it sentenced Simmons, the circuit court observed that Simmons was "attempting to shift the blame for the shooting" to Jones. (R.147:68.) It observed that Simmons had taken advantage of Jones's vulnerability and manipulated her to file an affidavit that it "deem[ed] to be wholly false given the testimony and the evidence." (R.147:68.)

Simmons's postconviction motion and direct appeal. In 2003, Simmons moved for postconviction relief, seeking a new trial in the interest of justice. (R.30:3.) The motion included

affidavits from Sheri Purifoy and Kina Jackson, who, consistent with Lindsay's trial testimony, claimed that Simmons got into the passenger side of a red Cutlass. *Simmons*, 2004 WL 1698068, ¶¶ 9, 11. This Court affirmed the circuit court's decision to deny Simmons's postconviction motion without an evidentiary hearing, because the affidavits did not establish a "substantial degree of probability" that a new trial would have produced a different result. *Id.* ¶¶ 14–17.

Simmons's Wis. Stat. § 974.06 motion. In 2005, Simmons filed a section 974.06 motion, claiming newly discovered evidence. *State of Wisconsin v. Antonio L. Simmons*, No. 2006AP731, 2007 WL 755095 (Wis. Ct. App. March 13, 2007) (unpublished). (R.67.) Simmons included the affidavit of a fellow prison inmate, Elijah Brooks (R.54:90–92), who claimed that he saw Simmons leave the bar after the altercation and get into a red car with another person and drive away. *Simmons*, 2007 WL 755095, ¶ 6. Brooks said that he witnessed the shooting of the people in the white car and that Simmons was not the shooter. *Id.*

This Court concluded that Brooks's affidavit did not satisfy the test for newly discovered evidence. *Simmons*, 2007 WL 755095, ¶ 8. Not only was Simmons negligent in discovering this evidence, this Court determined that "had the jury heard Brooks's testimony, given the strength of the State's witnesses and Brooks's inability to identify who he alleges was the actual shooter, it is unlikely that a different result would have occurred had another trial been held." *Simmons*, 2007 WL 755095, ¶ 8.

Simmons also contended that his postconviction counsel was ineffective for failing to raise several claims of ineffective assistance of trial counsel. *Simmons*, 2007 WL 755095, ¶ 10. First, Simmons claimed that trial counsel was ineffective for failing to investigate, based on the affidavits of Toronto Wooten, Clebern Peel, and Tawanda Jones, who claimed that

Simmons left the bar with another individual and got into a red car. *Id*. ¶¶ 13–14. This Court rejected this claim based on its assessment the evidence was insufficient to counter the trial testimony of the victims and the bouncer, Ramsey. *Id*. ¶ 16. This Court also determined that trial counsel could not be deficient for failing to locate witnesses when Simmons only provided his trial counsel with one witness's name and phone number, and because postconviction counsel determined that these witnesses would be unhelpful. *Id*. ¶ 17.

Second, based on the record, this Court determined that postconviction counsel was not ineffective, as Simmons alleged, "for failing to raise his trial counsel's failure to investigate and file a notice of alibi." *Simmons*, 2007 WL 755095, ¶¶ 18–20.

Third, based on the record, this Court also rejected Simmons's claim that postconviction counsel was ineffective for not arguing that trial counsel was ineffective for his failure to discuss trial strategy, including his right to testify. *Simmons*, 2007 WL 755095, ¶¶ 18–20.

Simmons's petition for habeas corpus. In 2007, Simmons petitioned for habeas corpus, alleging that his post-conviction counsel was ineffective for failing to argue that his trial counsel was ineffective. *Simmons v. Thurmer*, No. 07-CV-604, 2009 WL 811524, at 1 (E.D. Wis. March 27, 2009) (unpublished). In its decision denying his petition, the district court detailed the factual and procedural history of Simmons's case, including the trial testimony, the postconviction litigation, his direct appeal, and his section 974.06 litigation. *Simmons*, 2009 WL 811524, at 1–7, 12.

III. Simmons's motion for DNA testing and related motions for reconsideration and supplemental briefing

Simmons's postconviction DNA motion. In 2017, claiming innocence, Simmons filed a motion for postconviction

DNA testing under Wis. Stat. § 974.07(7)(a). (R.77:1, 5.) His motion included 42 exhibits. (R.78.) Simmons asserted that the perpetrator had likely touched several items and that DNA from these items would prove Simmons's innocence and the true perpetrator's identity. (R.77:2.) He asked the circuit court to order testing of these items:

- One .380 auto bullet casing and seven 9mm bullet casings (State Trial Exhibit 3),
- Six .380 auto bullet casings (State Trial Exhibit 4),
- Latent fingerprint test results from Milwaukee County Case No. 00-2758,
- Bottles of champagne and brandy,
- Blue baseball hat with a white New York Yankee logo,
- Black silk head wrap,
- Two black high heeled shoes.

(R.77:17.) The baseball hat and liquor bottles were found inside the white car that officers stopped blocks away from the shooting; the shoes and head wrap were found outside of the car. (R.78:7.)

The State opposed postconviction DNA testing, asserting that Simmons failed to explain how DNA testing results would "create a reasonable probability of a different outcome in light of the other strong inculpatory evidence." (R.80:5.) Simmons submitted a reply brief. (R.87.)

The circuit court, the Honorable William S. Pocan, presiding, denied Simmons's motion for postconviction DNA testing. (R.90:5.) In its decision, the circuit court synopsized the testimony of four eyewitness who positively identified Simmons as the shooter. (R.90:1.) It reasoned that the presence of someone else's DNA on the casings would not make it less probable that Simmons was the shooter, because someone else could have loaded the gun. (R.90:3.) Therefore,

the circuit court determined that there was "not a reasonable probability that DNA evidence relating to the bullet casings—or any of the other items—would have altered the verdict, and therefore, that the defendant has not met his burden for DNA testing[.]" (R.90:3.)

Simmons motion for reconsideration. Simmons sought reconsideration, claiming that: (1) The circuit court erroneously applied section 974.07(7)(a)2.'s "reasonable probability" standard; (2) it did not address his request that the State disclose whether the evidence he wanted tested existed and whether it had already been tested; and (3) it did not determine the disposition of the evidence under section 974.07(9).

The circuit court ordered supplemental briefing, directing the State to address whether the evidence still existed for testing purposes. (R.92.) The State filed an affidavit of Milwaukee Police Detective Jon Charles, who stated that the Milwaukee Police Department no longer possessed the items that were placed on inventory with Simmons's case and that they "were either turned over to the court or destroyed." (R.93:2.) Several items that Simmons identified in his motion, including the "bottle, hat, shoes, etc.," were never placed on inventory. (R.93:1, 3–6.)

After Simmons filed a reply (R.115–127), the circuit court, the Honorable David A. Hansher, denied Simmons's motion for reconsideration (R.128). Considering the "substantial eyewitness evidence pointing" to Simmons as the shooter, the circuit court determined the presence of C-Note's, Jones's, or another person's DNA would not have resulted in a different outcome at his trial. (R.128:4–5.) Based on Detective Charles's affidavit, it also determined that there was no evidence other than the bullet casings that could be subjected to DNA testing. (R.128:5.)

Simmons's motion for supplemental briefing. After the circuit court denied reconsideration, Simmons moved for supplemental briefing. (R.131.) He alleged that the State violated his due process rights either by failing to preserve "apparently exculpatory evidence" or by destroying the evidence in "bad faith." (R.131:2.)

The circuit court, the Honorable David A. Hansher, presiding, denied Simmons's motion, determining that the State cannot be charged with failing to preserve items, including the head wrap, baseball hat, bottles of alcohol, and a pair of shoes, that were never inventoried and not in the State's possession. (R.132:2.) The circuit court determined that Simmons failed to show that either the items he wants tested had an exculpatory value that was apparent to the police, or that the police acted in bad faith. (R.132:3.) Finally, it reiterated that the presence of someone else's DNA on these items would not have exonerated Simmons, based on the eyewitnesses who identified him as the shooter. (R.132:2–3.)

Simmons appealed.

ARGUMENT

The circuit court reasonably exercised its discretion when it denied Simmons's section 974.07(7) motion for postconviction DNA testing.

A. Standard of review

The interpretation of Wis. Stat. § 974.07(7) presents a question of statutory interpretation that this Court reviews independently. *State v. Denny*, 2017 WI 17, ¶ 46, 373 Wis. 2d 390, 891 N.W.2d 144.

This Court has applied an erroneous exercise of discretion standard when it reviewed a circuit court's determination that a defendant did not satisfy section 974.07(7)(a)'s requirements. *State v. Hudson*, 2004 WI App

99, ¶¶ 13–16, 273 Wis. 2d 707, 681 N.W.2d 316. In *Denny*, the supreme court declined to decide what standard of review applies to a circuit court's application of section 974.07(7). *Denny*, 373 Wis. 2d 390, ¶¶ 74–75.

For several reasons, this Court should apply *Hudson*'s deferential erroneous exercise of discretion to the circuit court's decision denying Simmons's motion. First, while the supreme court acknowledged this Court's articulation of the review standard in *Hudson*, it did not overrule or modify it. *Denny*, 373 Wis. 2d 390, ¶¶ 74–75. Rather, it declined to decide what standard applied because Denny could not prevail under either standard. *Id.* Because this Court lacks the power to overrule or modify its prior published decisions, *Hudson's* deferential review standard applies here. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

Second, a deferential approach is consistent with how Wisconsin's appellate courts reviews other collateral postconviction proceedings. A circuit court may summarily deny a direct or collateral postconviction motion without an evidentiary hearing if the motion fails to allege sufficient facts, presents only conclusory allegations, or the record conclusively shows that the movant is not entitled to relief. *State v. Romero-Georgana*, 2014 WI 83, ¶ 30, 360 Wis. 2d 522, 849 N.W.2d 668. This same reasoning should apply to postconviction motions for DNA testing under section 974.07.

Third, deferential review is consistent with two statements in *Denny* concerning section 974.07's legislative intent: First, that convicted offenders should be held to section 974.07's standards and not be permitted to "engage in postconviction fishing expeditions"; second, that the State, crime victims, and others have a strong interest in a conviction's finality. *Denny*, 373 Wis. 2d 390, ¶¶ 66, 70 n.16 (citation omitted).

Relying on *State v. Herfel*, 49 Wis. 2d 513, 182 N.W.2d 232 (1971), and *Ocanas v. State*, 70 Wis. 2d 179, 233 N.W.2d 457 (1975), Simmons asserts that this Court should review the circuit court's decisions de novo, because the judges who denied his motions for DNA testing and reconsideration did not preside over his trial. (Simmons's Br. 9.) Simmons's argument fails for two reasons. First, it ignores this Court's previous decision reviewing a section 974.07 "reasonable probability" for an erroneous exercise of discretion. *Hudson*, 273 Wis. 2d 707, ¶ 16. Second, neither *Herfel* nor *Ocanas* address the standard of review for a section 974.07 motion. *Herfel*, 49 Wis. 2d at 521 (standard for reviewing a newly discovered evidence claim when postconviction judge differs from trial judge); *Ocanas*, 70 Wis. 2d at 187 (concerns review of a court's exercise of sentencing discretion).

B. Postconviction DNA testing under section 974.07

Wisconsin Stat. § 974.07 authorizes a convicted defendant to move for postconviction DNA testing. It mandates a circuit court to order DNA testing when a defendant satisfies the criteria under section 974.07(7)(a). It confers discretion on a circuit court to order DNA testing when a defendant satisfies section 974.07(7)(b)'s criteria.

1. Section 974.07(7)(a)'s mandatory testing standard.

Section 974.07(7)(a) mandates the circuit court to order DNA testing when all the following criteria apply:

> 1. The movant claims that he or she is innocent of the offense at issue in the motion under sub. (2).
>
> 2. It is reasonably probable that the movant would not have been prosecuted [or] convicted . . . for the offense at issue in the motion under sub. (2), if exculpatory deoxyribonucleic acid testing results had

> been available before the prosecution [or] conviction. . .
>
> 3. The evidence to be tested meets the conditions under sub. (2) (a) to (c).
>
> 4. The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself can establish the integrity of the evidence.

A circuit court may only order DNA testing if the defendant satisfies these four statutory requirements. *Denny*, 373 Wis. 2d 390, ¶ 73. If defendant fails to satisfy any one of these requirements, this Court "need not address whether he has satisfied other portions of the statute." *Id.*

The evidence to be tested must meet section 974.07(2)'s conditions. Section 974.07(7)(a)3. requires the circuit court to determine whether a DNA testing motion satisfies section 974.07(2)'s requirements. The supreme court has characterized section 974.07(2) as "the linchpin of the testing regime." *Denny*, 373 Wis. 2d 390, ¶ 65. Under section 974.07(2), provided in relevant part, a person may move for DNA testing of evidence that satisfies the following criteria:

> (a) The evidence is relevant to the investigation or prosecution that resulted in the conviction . . .
>
> (b) The evidence is in the actual or constructive possession of a government agency.
>
> (c) The evidence has not previously been subjected to forensic deoxyribonucleic acid testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

Id.

Section 974.07(6) authorizes discovery to facilitate a circuit court's determination of what evidence relevant to an investigation or prosecution is available for testing because it is still in a government agency's possession. Wis. Stat. § 974.07(2)(a)–(b); *Denny*, 373 Wis. 2d 390, ¶ 50. To this end, on a defendant's demand, the State must disclose the results of any previously conducted testing of biological materials and identify physical evidence containing biological material that remains in a government agency's "actual or constructive possession." Wis. Stat. § 974.07(6)(a). Likewise, on the State's demand, the defendant must disclose the results of any previous testing of biological material and provide a biological specimen. Wis. Stat. § 974.07(6)(b).

Section 974.07(7)(a)2.'s reasonable probability standard. In *Denny*, the supreme court declined to resolve whether the "reasonable probability" standard is akin to either a newly discovered evidence standard, under *State v. McCallum*, 208 Wis. 2d 463, 561 N.W.2d 707 (1997), or the standard for assessing prejudice under *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *Denny*, 373 Wis. 2d 390, ¶ 81 n.21. Under the newly discovered evidence standard, "reasonably probable" means a "reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt." *State v. Love*, 2005 WI 116, ¶¶ 43–44, 284 Wis. 2d 111, 700 N.W.2d 62 (quoted source omitted). Under the prejudice standard for assessing ineffective assistance claims, "reasonably probable" means "a probability sufficient to undermine confidence in the outcome." *Id.* ¶ 30 (citation omitted).

Ultimately, whether an exculpatory DNA result makes it reasonably probable that a defendant would not have been convicted is more akin to assessing the impact of newly discovered evidence on a verdict than assessing whether counsel's deficient performance prejudiced a defendant by

undermining confidence in a trial's outcome. Thus, in the context of a motion under section 974.07(7)(a), the question is whether discovery of exculpatory DNA on the evidence to be tested creates a reasonable probability that a jury, considering both the trial evidence and the potentially favorable DNA result, would have a reasonable doubt as to a defendant's guilt. *Love*, 284 Wis. 2d 111, ¶¶ 43–44.

Indeed, in *Hudson*, this Court framed the issue by reference to the newly discovered evidence standard, not *Strickland*'s prejudice standard: "[T]he question is whether it is reasonably probable that exculpatory DNA testing results would raise a reasonable doubt about Hudson's guilt." *Hudson*, 273 Wis. 2d 707, ¶ 17. This Court's analysis followed suit, focusing on whether the hypothetical DNA testing results on the evidence to be tested created a reasonable probability that he would not have been prosecuted or convicted. *Id*. ¶¶ 18–21; *see also State v. Denny*, 2016 WI App 27, ¶¶ 74–76, 368 Wis. 2d 363, 878 N.W.2d 679, *reversed*, 2017 WI 17, 373 Wis. 2d 390 (Hagedorn, J., concurring in part and dissenting in part). Finally, this Court's adoption in *Hudson* of the deferential review standard applicable to reviewing newly discovered claims reinforces the State's position that courts should assess "reasonable probability" under section 974.07(7)(a) as they would assess a newly discovered evidence claim. *Hudson*, 273 Wis. 2d 707, ¶¶ 13–16.

2. Section 974.07(7)(b)'s discretionary testing standard

The Legislature recognized that in some cases DNA testing might not exculpate a defendant, but it might mitigate the seriousness of the offense or the severity of the punishment imposed. Thus, under section 974.07(7)(b), a court may allow DNA testing if it determines, "It is reasonably probable that the outcome of the proceedings that resulted in the conviction . . . or the terms of the sentence . . .

would have been more favorable" to the defendant if the DNA test results had been available before he was prosecuted or convicted. Wis. Stat. § 974.07(7)(b)1. In contrast to a mandatory testing motion under section 974.07(7)(a)1., a defendant seeking discretionary testing need not claim innocence. Wis. Stat. § 974.07(b).

As with the requirements for a motion for mandatory testing under section 974.07(7)(a), a defendant seeking discretionary testing must also show that the evidence to be tested is "relevant evidence" that remains in a government agency's possession under section 974.07(2), and that integrity of the evidence remains intact. Wis. Stat. § 974.07(7)(b)2.–3.

C. The circuit court properly denied Simmons's motion for postconviction DNA testing because he did not satisfy section 974.07(7)(a)'s four statutory requirements.

Simmons sought mandatory testing under section 974.07(7)(a), rather than discretionary testing under section 974.07(7)(b). (R.77:1; 91:1.) Therefore, the State only addresses whether Simmons satisfied section 974.07(7)(a)'s requirements for mandatory testing.

1. Simmons's claim of innocence

In his motion for DNA testing, Simmons claimed innocence. (R.77:3, 5–6.) Therefore, the State concedes that Simmons satisfied section 974.07(7)(a)1.'s claim of innocence requirement.

2. Simmons has not shown that the other items he wants tested are relevant evidence in a government agency's possession.

Simmons had to demonstrate that the evidence he wants tested has not previously been tested, it is relevant to

the investigation or prosecution that resulted in his conviction, and it is in a government agency's possession. Wis. Stat. § 974.07(2)(a)–(c) and (7)(a)2. Simmons cannot show that the 9mm casings, headwrap, baseball hat, liquor bottles and shoes satisfy section 974.07(2)'s requirements. While the .380 casings are generally relevant, they do not satisfy section 974.07(2)'s relevancy requirements because he made no showing that they contain biological material suitable for DNA testing.

a. Neither the .380 casings nor the 9mm casings satisfy section 974.07(2)'s relevancy requirement.

Officers recovered two types of fired bullet casings in its investigation: (1) a single .380 casing found in the white car stopped near 35th and Congress and six additional .380 casings found in the street where the shooting occurred, (R.143:15, 47); and (2) seven 9mm casings found in an intersection near where the police stopped the white car (R.143:15).

Both the .380 and 9mm casings are probably in possession of a government agency because they were received as exhibits, and it does not appear from the exhibit list that the clerk returned the exhibits after trial. (R.11; 143:15, 43, 47.) Wis. Stat. § 974.07(2)(b). Based on a letter from the Crime Laboratory, it does not appear that the casings were previously subject to DNA testing. (R.78:37.) Wis. Stat. § 974.07(2)(c).

But Simmons did not show that either the .380 casings or the 9mm casings satisfy section 974.07(2)(a)'s relevancy requirements.

The 9mm casings. Simmons has not demonstrated that the seven 9mm casings meet section 974.07(2)(a)1.'s relevancy requirements. Officers found 9mm casings in an intersection

near where the police stopped Jones's white car, some 11 blocks from the shooting scene, and no 9mm casings at the shooting scene. (R.143:14–15, 46, 50–51.) Detectives identified no connection between the 9mm casings and the shooting. (R.143:16, 62.) Therefore, the 9mm casings are not relevant evidence under section 974.07(7)(a), because they do not have "any tendency to make the existence of any fact that is of consequence"—i.e., the identity of the person who shot the .380 handgun—more or less probable to a determination of whether Simmons shot the victims. Wis. Stat. § 904.01.

The .380 casings. Simmons has not demonstrated the .380 casings satisfy section 974.07(2)(a)'s relevancy requirement. Because the .380 casing found in the car that fled the shooting scene and were consistent with the .380 casings found at the shooting scene (R.143:15, 43, 45–46, 50, 52–54), the .380 casings are generally relevant to Simmons's convictions for recklessly endangering safety while armed.

But Simmons must do more than simply assert that the casings are generally relevant to the conviction. He must show that *DNA testing* of the casings would be relevant. This is because section 974.07(2)(a)'s relevancy requirement should be read in *pari materia* with section 974.07(6)(a)'s discovery requirements that focuses on physical evidence "that contains biological material or on which there is biological material." Not all evidence in a case has biological material. Therefore, evidence can only be relevant under section 974.07(2)(a) if it was generally relevant to the conviction *and* because it contains biological material identified through section 974.07(6)(a)'s discovery process.

Without support, Simmons believes that the casings, discharged from a firearm almost 20 years ago, have biological material suitable for DNA testing on them. (Simmons's Br. 12.) His assertion is conclusory and is inconsistent with the requirement that a postconviction motion's factual allegations should not be conclusory. *State v.*

Allen, 2004 WI 106, ¶¶ 12, 15, 274 Wis. 2d 568, 682 N.W.2d 433.

In the case of fired bullet casings, which the Wisconsin State Crime Laboratory will not test for touch DNA, Simmons's belief that they have biological material on them is speculative at best. Wis. Dep't of Justice, Submission Guidelines, p. 4 (Rev. June 8, 2015) (https://www.doj.state.wi.us/sites/default/files/dles/clab-forms/2015_Evidence%20Submission%20Guidelines-MLW.pdf) (last visited December 5, 2019). By failing to make even a marginally plausible showing that the casings have biological material on them for testing as contemplated under section 974.07, Simmons has not satisfied section 974.07(2)(a)'s relevancy requirement.

b. The head wrap, baseball cap, liquor bottles, and shoes were never inventoried.

Even if Simmons could demonstrate the relevance of the other items, he has not shown that a government agency actually or constructively possesses the head wrap, baseball cap, liquor bottles, and shoes found in or near the white car stopped 11 blocks from the shooting scene. Wis. Stat. § 974.07(2)(b). (Simmons's Br. 18, 30.)[2]

In denying Simmons's motions for reconsideration and supplemental briefing, the circuit court determined that the

[2] In his initial motion, Simmons requested DNA testing of "latent fingerprint results." (R.77:17.) The circuit court did not address the "latent fingerprint results" in its decision. (R.90.) In his motion for reconsideration, motion for supplemental briefing, and on appeal, Simmons does not reference the "latent fingerprint results" as an item he wants tested. (R.91:1–4; 131; Simmons's Br. 5, 6, 18, 30.) Simmons has abandoned any claim with respect to testing fingerprint results and this Court should not address it. *State v. Pico*, 2018 WI 66, ¶ 9 n.7, 382 Wis. 2d 273, 914 N.W.2d 95.

bullet casings were the only items available for testing because they either had not been collected or had been destroyed. (R.128:4; 132:2.) The record supports the circuit court's determination.

Simmons included Armbruster's report documenting the evidence seized and other observations of items in or near the white car. (R.78:5–7.) These items included a baseball cap, a champagne bottle, and brandy bottle inside Jones's car and a headwrap and two black shoes outside the car. (R.78:6–7.) While a technician photographed these items, nothing in Armbruster's report, his inventory report, or Detective Koceja's inventory report suggests that police collected these items. (R.78:6–7; 121; 122.) Further, based on a chain of custody report, Simmons knew that the police had years earlier destroyed other evidence, including two shirts, that had been collected but were not received into evidence at his trial. (R.115:4; 123:1–4.)[3]

Even before he filed his postconviction DNA motion in March 2017, Simmons knew that several items he was interested in testing had either not been collected as evidence or had been destroyed. In a November 2016 letter to the district attorney, Simmons's counsel asked for an itemized listing of evidence in the State's possession and whether the evidence had been tested for DNA; Simmons identified several items observed in or near Jones's car that he wanted tested, including two liquor bottles, a baseball cap, a headwrap, and two shoes. (R.78:50.)

Consistent with its obligations under section 974.07(6)(a), a prosecutor addressed Simmons's questions regarding any testing that had occurred and the evidence available for testing. (R.78:51.) In an email exchange, a

[3] Because Simmons's did not request DNA testing of the shirts, the circuit court reasonably declined to address whether they had exculpatory value. (R.77:17; 132:3 n.1.)

prosecutor gave his counsel a chain of custody report for the evidence seized in the case. (R.78:55.) The prosecutor reported that "some of the items are in the custody of the court which is so indicated. Some items have been legally destroyed." (R.78:55.) The prosecutor represented no other items were taken into police custody. (R.78:55.) The prosecutor later reiterated, "If there are any items you have noted reference to in reports or through your client that are not listed here that means those items were never taken into police custody." (R.78:56.) Finally, the prosecutor told Simmons's counsel that there was no evidence in the State's possession as it had been destroyed or was in the court's custody. (R.78:57.)

The State's response to Simmons's motion for reconsideration puts to rest any questions about the status of any evidence that the police collected in his case. (R.93:1.) In an accompanying affidavit, Detective Charles reported that the items collected in Simmons's case had been "turned over to the court or destroyed" and that the department "no longer has any items on inventory related to this case." (R.93:2.) Detective Charles's affidavit included property control sheets related to evidence officers collected. (R.93:3–6.) Except for bullet casings, none of the other items, including the head wrap, baseball hat, liquor bottles, or shoes, that Simmons wants tested are referenced in those documents. (R.93:1, 3–6.)

Simmons never provided the circuit court with any reason to believe that the head wrap, the baseball hat, the liquor bottles, and the shoes were in a government agency's possession. Therefore, he is not entitled to testing of these items because he has not shown that these items satisfy section 974.07(2)'s requirements. Wis. Stat. § 974.07(7)(a)3.

3. The chain of custody and integrity of the evidence remains uncertain.

In his motion, Simmons alleged that the evidence he wants tested—including the bullet casings, the head wrap, the baseball cap, the liquor bottles, and the shoes—has not been tampered with, replaced, or altered in any material respect. (R.77:12.) Wis. Stat. § 974.07(7)(a)4.

Officers police neither collected nor retained the head wrap, baseball cap, liquor bottles, or shoes. Section C.2.a., *supra*. Therefore, Simmons cannot satisfy section 974.07(7)(a)4.'s chain of custody requirement with respect to these items.

Only the bullet casings were marked and received as evidence and do not appear to have been returned or destroyed. (R.11.) Section C.2., *supra*. Therefore, it is reasonable to believe the clerk has retained them. (R.128:5.) However, based on the circuit court's determination that there was no reasonable probability that DNA testing of the bullets would have impacted the prosecution of the case or the trial's outcome (R.128:4), the court did not determine whether the casings had been tampered, replaced, or altered. *See Denny*, 373 Wis. 2d 390, ¶ 73.

Without knowing how these bullet casings have been stored or whether they have been accessed, it is unclear whether their integrity is still intact such that testing would produce meaningful results. Therefore, if this Court decides that Simmons satisfied section 974.07(7)(a)1.–3.'s requirements, remand would be necessary so that the circuit court can determine whether the evidence satisfies section 974.07(7)(a)4.'s chain of custody requirements.

4. Simmons would still have been prosecuted and convicted even if exculpatory DNA is found on the items he wants tested.

The circuit court twice denied Simmons's request for DNA testing because he did not demonstrate a reasonable probability that he would not have been prosecuted or convicted even if exculpatory DNA results had been available. (R.90:3; 128:4–5.) Wis. Stat. § 974.07(7)(a)4. Both Judge Pocan, who denied Simmons's original motion, and Judge Hansher, who denied Simmons's reconsideration motion, rejected his request for DNA testing based on substantial eyewitness testimony identifying Simmons as the shooter. (R.90:1; 128:4.) The record supports their determination.

At trial, four eyewitnesses, including Ramsey, J.S.G., P.S.G., and A.C, positively identified Simmons as the shooter. (R.90:1.)

- Ramsey testified that he had known Simmons for several years, describing him as a frequent customer of the bar. (R.142:130.) Ramsey saw Simmons leave the bar and get into a two-door white Chevrolet. (R.142:135.) Ramsey later saw Simmons standing outside the white car and saw him shoot into P.S.G.'s car four or five times. (R.142:138–40.) Ramsey said that Simmons got back into his car and sped away. (R.142:142.) Ramsey said the street was well lit and he had no doubt that Simmons was the shooter. (R.142:142, 149.)

- J.S.G. testified that he had not previously met Simmons but knew people who knew him. (R.142:41–42.) J.S.G. identified Simmons as the person with whom he fought in the bar. (R.142:19, 21.) J.S.G. had "no doubt" that Simmons was the driver of the two-door white car who

pulled alongside the car that he, his sister, and A.C. were in, and that Simmons shot at them from both inside and outside the car Simmons was in. (R.142:25–28, 31, 46–47, 51.) J.S.G. saw another person in the white car but was unsure if it was a male or female. (R.142:30.)

- P.S.G. had a prior, non-intimate relationship with Simmons and identified him as the person who fought with her brother, J.S.G., in the bar. (R.142:58, 77–79.) P.S.G. also identified Simmons as the person driving a two-door white Chevrolet that pulled alongside her car and started shooting at her. (R.142:62, 65–66, 81.) P.S.G. also saw a female in the white car. (R.142:66.)

- A.C. identified Simmons as the person who fought with J.S.G. in the bar. (R.142:112.) As she was leaving the area with J.S.G. and P.S.G., A.C. testified that Simmons shot at them while on the driver's side of a two-door white car. (R.142:117, 119.) A.C. said she was only one to two feet away from the white car and had no doubt that it was Simmons. (R.142:118, 125–26.) A.C. also saw a female in the car. (R.142:124.)

After reviewing the eyewitnesses' testimony, the circuit court considered whether the presence of someone else's DNA on the items Simmons wanted tested created a reasonable probability that he would not have been prosecuted or convicted. (R.90:1–3.) Because anyone could have loaded the gun, the presence of a third person's DNA on the casings would not have exonerated Simmons as the shooter. (R.90:3.) As the circuit court observed, touch DNA from the person who loaded the gun "would not tend to make it any less probable that [Simmons] was the shooter." (R.90:3.)

The possibility that Simmons may have used someone else's gun and, therefore, never handled the casings, is not

speculative. As the circuit court noted, someone attempted to give Simmons a pistol in the bar after the fight but before the shooting. (R.90:1 n.1.) To be sure, Ramsey described the handgun as a .25-caliber semiautomatic handgun, not a .380 that was used in the shooting. (R.78:15; 142:134–35, 146–47.) Whether Ramsey correctly identified the make of the gun that the patron attempted to give to Simmons is beside the point. Had Simmons already been armed with a gun, there would have been no reason for anyone to give him a gun following the altercation. Under the circumstances, a third party's DNA on the .380 casings found at the shooting scene and in the white car would not have undermined the testimony of four witnesses who identified Simmons as the shooter.

In conducting its reasonably probable analysis, the circuit court did not expressly differentiate the .380 casings found at the shooting scene and in the white car from the 9mm casings found in the intersection near where police stopped the white car. (R.90:3.) But as the State argued in Section C.2., *supra*, the 9mm casings do not even satisfy section 974.07(2)(a)'s basic relevancy requirement, because there was no evidence connecting the 9mm casings found 11 blocks from the shooting scene to the shooting. Therefore, Simmons also cannot show that the presence of any DNA on the 9mm casings makes it reasonably probable that he would not have been prosecuted or convicted. Wis. Stat. § 974.07(7)(a)2.

Because Simmons has not shown that the head wrap, baseball hat, liquor bottles, and shoes are in a government agency's possession, Section C.2.b, *supra*, this Court does not need to address whether "exculpatory DNA results" on these items make it reasonably probable that he would have been prosecuted or convicted. Wis. Stat. 974.07(7)(a)2.; *Denny*, 373 Wis. 2d 390, ¶ 73. But even if these items had been available for testing, the circuit court properly denied this request. (R.90:3.)

Officers located the liquor bottles and baseball hat inside the white car's passenger compartment and the head wrap and shoes on the street near where the police stopped the white car. (R.78:3–4, 7.) Simmons has failed to articulate how DNA found on these objects would have any relevance to his identification of the shooter. He cannot.

None of the witnesses described the shooter as wearing a head wrap or baseball hat, wearing black shoes like those found in the street, or carrying a liquor bottle. And Jones, upon whose statements Simmons relies to advance his motion (Simmons's Br. 15, 38), never referenced the head wrap, baseball hat, shoes, or liquor bottle in her statements (R.78:3–4, 21–25). Simmons has not demonstrated a reasonable probability that the presence of exculpatory DNA on the head wrap, baseball hat, liquor bottles, or shoes, when viewed against the trial evidence that resulted in his conviction, would have prevented him from being prosecuted or convicted. *Hudson*, 273 Wis. 2d 707, ¶ 17.

Thus, Simmons failed to demonstrate a reasonable probability that he would not have been prosecuted or convicted even if exculpatory DNA had been recovered from the items he wants tested. Based on the record, it is not reasonably probable that a jury looking at the trial testimony and the exculpatory DNA test results would have a reasonable doubt as to Simmons's guilt. The circuit court properly denied Simmons's motion for postconviction DNA testing.

D. Simmons's arguments notwithstanding, the circuit court properly denied his DNA testing requests.

Simmons raises various challenges to the circuit court's decision denying his section 974.07 motion. None undermine the circuit court's determination that Simmons is not entitled to postconviction DNA testing.

1. The circuit court properly considered the testimony of four eyewitnesses when it evaluated Simmons's motion.

Simmons criticizes the circuit court's reliance on the testimony of Ramsey, J.S.G., P.S.G., and A.C. (Simmons's Br. 10, 17.) Based on nothing more than speculation and innuendo, Simmons has accused Ramsey, J.S.G., P.S.G., and A.C. of conspiring to fabricate evidence against Simmons:

- "A simple reading of the four witnesses trial testimony and the statements that they gave to the police . . .prove they did lie to the jury and the police." (Simmons's Br. 10.)
- "Compare their statement to the police with what they testified to at trial and it is very clear that all four witnesses are fabricating their testimony in an effort to get Simmons convicted." (Simmons's Br. 10.)
- "If one witness is telling the truth, the other three are lying." (Simmons's Br. 12.)
- "We must look at the impact of why these witnesses would lie about Simmons." (Simmons Br. 19.)
- "To further [A.C.'s] outright lies . . . " (Simmons's Br. 22)
- "A.C.'s identification of Simmons is truly a lie." (Simmons's Br. 24.)
- "The eyewitnesses in this case have been shown to be complicit with each other in obtaining a conviction of Simmons." (Simmons's Br. 29.)

Not only are these accusations outrageous, they are irrelevant to this Court's determination of the central issue in this appeal: Did the circuit court erroneously exercise its discretion when it denied Simmons's motion for DNA testing?

Simmons's criticism of the circuit court for considering the testimony of Ramsey, J.S.G., P.S.G., and A.C. is also

misplaced and ignores the obvious: a jury found Simmons guilty despite his trial counsel's efforts to undermine their credibility throughout the trial.

In his opening statements, counsel challenged the witnesses' identification of Simmons, raised questions about J.S.G.'s bias, and identified differences in the witnesses' anticipated testimony about where the shooter was when he fired the gun. (R.142:15–16.) In his closing argument, counsel later questioned the truthfulness of witness testimony identifying Simmons. (R.143:112–13.)

The jurors also had reason to question the victims' ability to accurately recall what happened based on their alcohol consumption. J.S.G. said he had several drinks before his altercation with Simmons, and his sister described him as "drunk" and "tipsy." (R.142:33–35, 59, 80.) P.S.G. and A.C. were also drinking that evening. (R.142:63, 115.)

To undermine their credibility, trial counsel illustrated the witnesses' disagreement about several factual issues, including whether the shooter was inside or outside the white car during the shooting, whether the witness's testimony was consistent with Detective Dubis's observation that the shots were fired from a single position at a rapid pace, (R.142:28, 47, 73; 143:56–57, 112–13), and the description of the make and model of the shooter's car (R.142:31, 50–51, 81–82, 117).

Through his cross-examination of J.S.G. and P.S.G., trial counsel established a motive for them to accuse Simmons of the shooting: J.S.G. was still angry with Simmons after the bar fight ended and had a score to settle with Simmons. (R.142:42–43, 58–60, 81, 92.)

Trial counsel also impeached J.S.G.'s testimony with his prior statements to officers and his prior delinquency adjudications. (R.142:46–47, 50, 54.) Trial counsel also established that two witnesses, P.S.G. and Ramsey, who identified Simmons through their past contact with him, were

biased against him. P.S.G. told the jury that she and Simmons had been nonintimate friends before the shooting until something happened between them. (R.142:79.) The jury also knew that the bouncer Ramsey had a familial relationship to the shooting victims. (R.142:89–90)

Finally, based primarily on her trial testimony, Simmons challenges A.C.'s credibility, including the plausibility of her description of the shooting. (Simmons's Br. 23–24.) The same trial testimony that Simmons relies on to challenge A.C.'s credibility now is information that the jury likely considered when it assessed her credibility.

Trial counsel challenged the credibility of the four eyewitnesses who accused Simmons of the shooting throughout the trial. The jury rejected these attacks and found Simmons guilty. Simmons's request for DNA testing rests primarily on his claim that four eyewitnesses who identified him "were not credible . . . The idea that the DNA results [Simmons] seeks would tip the scales and cause police or a jury to reject substantial evidence against [Simmons] is simply conjecture." *Denny*, 373 Wis. 2d 390, ¶ 80. Under the circumstances, the circuit court properly considered the eyewitnesses' testimony when it determined that exculpatory DNA results on the evidence Simmons wants tested would not have changed the jury's verdict.

2. The circuit court properly declined to consider the affidavits of several other people who claimed Simmons left the bar in a red car.

Lindsey, the sole defense witness at Simmons's trial, testified that he and Simmons left the bar in a red Cutlass after the bar fight and that he saw shooting coming from a white car. (R.143:68–70.) On several occasions following his conviction, Simmons unsuccessfully sought a new trial based in part on affidavits from witnesses who claimed that

Simmons got into a red Cutlass. *Simmons*, 2004 WL 1698068, ¶ 9; *Simmons*, 2007 WL 755095, ¶ 8; *Simmons*, 2009 WL 811524 at 2. In appealing the circuit court's decision denying his claim for postconviction DNA testing, Simmons criticizes the circuit court for disregarding these affidavits when it evaluated his section 974.07 motion. (Simmons's Br. 26–27, 36.)

In assessing whether Simmons met his burden under section 974.07, the circuit court assessed the significance of a third-party's DNA on the items he wanted tested against the evidence presented at trial. (R.90:1–5; 132:2–3.) The circuit court declined to consider these affidavits, reasoning that Simmons could not "meet his burden for postconviction DNA testing under section 974.07(7), Stats., based on stale affidavits and non-viable ineffective assistance of counsel claims." (R.90:5 n.3.) The circuit court's non-consideration of the postconviction affidavits is consistent with section 974.07's framework.

A court assesses whether it is reasonably probable that a person would not have been prosecuted or convicted had exculpatory DNA results been available before a defendant's prosecution or conviction. Wis. Stat. § 974.07(7)(a)2.; *Denny*, 373 Wis. 2d 390, ¶ 76. Thus, in *Hudson*, this Court upheld a circuit court's decision denying DNA testing because, even if the DNA results were favorable, there was no reasonable probability that Hudson would not have been convicted based on the overwhelming evidence of his guilt. *Hudson*, 273 Wis. 2d 707, ¶¶ 19–21. Similarly, in *Denny*, based on the "overwhelming and damning evidence" presented at trial, the supreme court affirmed the circuit court's determination that it was not reasonably probable that he would not have been prosecuted or convicted had exculpatory DNA results been available before trial. *Denny*, 373 Wis. 2d 390, ¶ 81.

In his brief, Simmons contends that he has no "intent to relitigate" previously raised ineffective assistance of counsel

claims. (Simmons's Br. 3.) Yet, his invitation to consider the affidavits of alleged witnesses *is* an attempt to bootstrap his previously unsuccessful postconviction claims into a section 974.07 motion. This Court should decline his invitation. Instead, like the circuit court, this Court should determine that the presence of exculpatory DNA on the items he wants tested would not have discredited the testimony of the four eyewitnesses who identified Simmons as the shooter at trial. (R.90:5.)

3. Postconviction DNA testing would not have supported Simmons's third-party liability claim.

Simmons contends that the circuit court should have considered his section 974.07 motion based on his "right to present a third party defense at trial[.]" (Simmons's Br. 30.)

As the State argued, a court assesses the significance of the exculpatory DNA evidence against the trial record, not against evidence he might present if he could retry the case now. Section D.2., *supra*. Therefore, it should not address whether there is a reasonable probability that Simmons would not have been convicted had the jury had exculpatory DNA results and Jones had testified that she shot at the J.S.G., P.S.G., and A.C.

More importantly, and contrary to Simmons's assertion (Simmons's Br. 18), he was neither prevented from presenting testimony nor arguing that a third-party committed the shooting. Lindsey testified that Simmons was with him in a red Cutlass when he noticed gunfire coming from a white car. (R.143:70.) Simmons also attempted to elicit testimony from Detective Armbruster that Jones told Officer Davis that C-Note fled from the car. (R.143:18–19.) Outside the jury's presence, the circuit court determined that Jones's statement to Davis about C-Note was admissible, but if Simmons introduced Jones's statement to Davis, the State could

introduce Jones's subsequent statement to Armbruster that Simmons was the white car's driver. (R.143:34–36.)

Based on the circuit court's ruling, Simmons's counsel declined to introduce Jones's statement about C-Note. (R.143:36.) In his closing argument, trial counsel argued that Jones might well have been the shooter because she was the only person that the police found near the white car involved in the shooting. (R.143:115.) Although the court's rulings limited the scope of his third-party defense argument, Simmons *did* raise a third-party defense; the jury rejected it by finding him guilty.

Finally, the presence of a third-party's DNA on the evidence would not, as Simmons argues, allow him to present a third-party defense. Under the legitimate tendency test, the defendant must establish that the third-party had a plausible reason or motive to commit the crime, the opportunity to commit the crime, and show a direct connection between the third-party and the crime's commission. *State v. Wilson*, 2015 WI 48, ¶¶ 52, 57–59, 362 Wis. 2d 193, 864 N.W.2d 52. The mere presence of DNA on an object alone does not satisfy these requirements.

Despite his suggestion that C-Note might have been the shooter, Simmons makes no effort to identify C-Note's potential motives for shooting the victims. (Simmons's Br. 30–33.) Without more, a third-party defense predicated on C-note's liability would be inadmissible.

Even if Simmons could show that Jones had a legitimate tendency to commit the crime, it would not have changed the circuit court's analysis of his section 974.07 motion. Jones did not execute her affidavit admitting to the shooting until after the jury convicted Simmons. (R.25:2–3.) Jones's statement would have been thoroughly impeached based on: (1) her relationship to Simmons as his girlfriend; (2) her first statement to Officer Davis that she knew nothing

about the shooting and her comment that C-Note fled the car; (3) her statement to Detective Armbruster that Simmons was in the car, did not have a gun, or say anything about shooting anyone; and (4) the lack of details in her affidavit, including information about the gun. (R.78:3, 21–23.)

In addition, Ramsey, J.S.G., P.S.G., and A.C. identified Simmons, not a female, as the shooter. Finally, the people who claimed that they saw Simmons get into a red car with Lindsey either provided no information about the shooting (R.30:4, 6; 54:68–69), or did not identify the shooter's gender (R.54:91; 143:70). None of this information trumps the four eyewitnesses' trial testimony that Simmons was the shooter.

4. The court properly relied on a non-testifying witness's identification of Simmons.

Simmons criticizes the court's reference to five eyewitnesses who identified him as the shooter when only four testified at trial. (Simmons's Br. 36–38; R.90:1 n.1.) The complaint reflects that James Ramsey, who did not testify, also identified Simmons. (R.1:3.) Based on section 974.07(7)(a)2.'s language, the court's reference to a non-testifying witness's identification of Simmons was proper.

Here, the court had to consider whether Simmons "would not have been *prosecuted* [or] convicted" if exculpatory DNA results "had been available before the *prosecution* [or] conviction." Wis. Stat. § 974.07(7)(a)2 (emphasis added); *Denny*, 373 Wis. 2d 390, ¶ 76. In considering whether the State would have prosecuted Simmons in the first instance, the court was not bound by the trial evidence. It could also consider the other information available to the State that provided probable cause to initiate an action against Simmons. And here, a fifth eyewitness identifying Simmons as the shooter further undermines any claim that he would

not have been prosecuted in the first instance had exculpatory DNA been available.

But even if the court improperly considered James Ramsey's identification when it decided Simmons's motion, the error was harmless because there was no reasonable probability that it contributed to the court's decision. *Martindale v. Ripp*, 2001 WI 113, ¶ 30, 246 Wis. 2d 67, 629 N.W.2d 698. The court would have still concluded Simmons would have still been prosecuted and convicted based on the four eyewitnesses' trial testimony identifying him as the shooter. Section C.4., *supra*.

5. Simmons's reference to *Kyles v. Whitley* is misplaced.

In support of his section 974.07 motion, Simmons repeatedly refers to *Kyles v. Whitley*, 514 U.S. 419 (1995). (Simmons's Br. 18–19, 33–35.) *Kyles* is inapposite.

Kyles concerned the government's failure to disclose exculpatory evidence, including contemporaneous statements of eyewitnesses to the police and other information that would have discredited a non-testifying informant who implicated Kyles in a homicide, and who was arguably a viable third-party suspect. *Id*. at 440–42, 445–48.

In contrast, Simmons complains that his trial counsel "withheld" the eyewitnesses' statements to officers from the jury. (Simmons's Br. 19.) Counsel's actions did not violate Simmons's due process rights under *Kyles*. At most, it arguably violated his right to effective counsel, a claim that Simmons has expressly declined "to relitigate . . . in this action." (Simmons's Br. 3.)

Simmons also invokes *Kyles* when he complains about Detective Armbruster's handling of evidence based on his purported failure to comply with his department's policies regarding the collection and testing of evidence. (Simmons's

Br. 33–35.) His argument fails for several reasons. First, *Kyles* concerned the State's suppression of evidence, not its failure to properly collect or process evidence. Second, Simmons bases his claims on police department policies promulgated in 2017, not 2000, when the crime occurred. (Simmons's Br. 34; R.117; 118; 119.) Simmons has not shown that Armbruster violated the policies in effect when he investigated his case. Third, contrary to Simmons's assertion, officers, including Armbruster, filed inventories documenting the evidence they recovered and secured. (Simmons's Br. 34; R.93:3–6.)

6. This Court should disregard Simmons's attacks on Detective Armbruster and the investigation.

Simmons also attacks Detective Armbruster's veracity throughout the brief. In his statement of the case,[4] Simmons asserts that Armbruster "testified falsely," characterizes his testimony as "false testimony" about the location of evidence near the white car, and uses the phrase "we know that is a lie" to describe Armbruster's testimony about another officer's statement. (Simmons's Br. 5.) Simmons later characterizes Armbruster as "a known forger of what witnesses need to say at trial" and asserts "he was shoddy and fraudulent." (Simmons's Br. 20, 34.)

In attacking Armbruster's character, Simmons claims that the Seventh Circuit found that Armbruster was one of the "detectives specifically named by the Seventh Circuit as making witnesses testify falsely[.]" (Simmons's Br. 21, citing *Avery v. City of Milwaukee*, 847 F.3d 433 (7th Cir. 2017).)

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[4] A statement of the case's "fact section should objectively recite the historical and procedural facts; it is no place for argument or 'spin.'" *Dawson v. Goldammer*, 2006 WI App 158, ¶ 1 n.3, 295 Wis. 2d 728, 722 N.W.2d 106.

Simmons's assertion is not true. To be sure, Avery alleged that four detectives, including Armbruster, fabricated the false statements of informants. *Id*. at 437. However, a federal jury found only two detectives, *not* Armbruster, liable for fabricating Avery's confession. *Id*. at 437.

Simmons also questions Armbruster's failure to adequately document A.C.'s identification of Simmons through a photo array, suggesting that, "For all we know, the detective only showed her one photo or 6 different photos of the same person, Mr. Simmons." (Simmons's Br. 17, 20.) The record contradicts this assertion. While the State did not timely disclose information about A.C.'s identification, the court determined that the photo array marked as Exhibit 6 was the photo array that A.C. reviewed, and that the array included six photographs, including one person whom the judge described as looking like Simmons's brother. (R.11; 142:157–58, 161; 143:8.) There is simply no evidence that the array included six photos of Simmons.

Simmons attacks the quality of the investigation, asserting, for example, that officers "had a video tape from inside the bar, but never followed up on it." (Simmons's Br. 35.) In fact, officers inventoried and viewed the videotape, noting that it showed Simmons, J.S.G., and others but did not show the altercation. (R.78:16.) Simmons's trial counsel was unable to tell "who was who" when he reviewed it. (R.143:6) The record does not support Simmons's claim that officers poorly investigated his case.

E. The circuit court did not err when it denied Simmons's motion for supplemental briefing.

Following the circuit court's denial of his reconsideration motion, Simmons moved for supplemental briefing. (R.131:2.) Citing *State v. Greenwald*, 189 Wis. 2d 59, 525 N.W.2d 294 (Ct. App. 1994), he asked the circuit court to

order the State to address his argument that his case should be dismissed with prejudice based on the destruction of apparently exculpatory evidence. (R.131:2.) Simmons contends that the circuit court's denial of his motion without an evidentiary hearing constituted an erroneous exercise of discretion. (Simmons's Br. 39–40.)

The State violates a defendant's due process rights through the destruction of material exculpatory evidence only if he shows that it: (1) failed to preserve apparently exculpatory evidence; or (2) acted in bad faith by failing to preserve potentially exculpatory evidence. *State v. Luedtke*, 2015 WI 42, ¶¶ 7, 79, 362 Wis. 2d 1, 863 N.W.2d 592, citing *Greenwald*, 189 Wis. 2d at 67.

The circuit court properly denied Simmons's motion for supplemental briefing without a hearing based partly on its prior determination that the bullet casings were the only evidence potentially available for DNA testing. (R.128:5; 131:1–2.) Further, it determined the police never collected the head wrap, baseball hat, partially consumed alcohol bottles, and shoes. (R.132:2–3.) Finally, the circuit court reasonably determined Simmons failed to show that the exculpatory nature of the items he wanted tested should have been readily apparent to the police or that the police destroyed them in bad faith. (R.132:3.) The record supports the circuit court's decision.

First, except for the casings, the record conclusively demonstrates that officers neither collected nor retained the other items that he wants tested, including the head wrap, baseball hat, partially consumed alcohol bottles, and shoes. Section C.2., *supra*. As the circuit court recognized, the "State cannot be charged with failing to preserve evidence that was not in its possession." (R.132:2.) Additional briefing or a hearing would not have changed its determination.

Second, even if officers had collected and later destroyed the head wrap, baseball hat, liquor bottles, and shoes, section 974.07 only authorizes testing of evidence that exists; it creates no remedy for the destruction of collected evidence. Nonetheless, relying on *Greenwald*, 189 Wis. 2d 59, Simmons appears to suggest that the State's destruction of evidence violated his due process rights and that he was entitled to vindicate those rights through his section 974.07 postconviction DNA testing motion. (Simmons's Br. 39.) His argument fails.

Section 974.07 only authorizes a court to order testing of evidence that is in a government agency's "actual or constructive possession." Wis. Stat. § 974.07(2)(b). Section 974.07 provides no remedy, including the dismissal of a defendant's case with prejudice, if the agency never collected evidence or if it subsequently destroyed it. And other statutory provisions requiring government agencies, including the police, the district attorney, crime laboratory, and courts, to preserve evidence for postconviction testing, also do not sanction their failure to collect evidence or its subsequent destruction. *See* Wis. Stat. §§ 165.81, 757.54(2), 968.205, and 978.08. Because relief under section 974.07 is limited to testing of evidence that still exists, the circuit court did not err when it denied Simmons's request for further briefing or a hearing on the alleged "destruction" of this evidence. (R.131:2.)

Further, the circuit court correctly determined that Simmons failed to make the requisite showing under *Greenwald*. (R.132:3.) The State does not concede that *Greenwald's* due protections extend to items never collected in the first instance or that *Greenwald* applies to postconviction proceedings. But even if it does, Simmons failed to show that the head wrap, hat, liquor bottles, or shoes had an exculpatory value readily apparent to the officers or anyone else, including his trial counsel, during the

investigation or prosecution of his case. (R.132:3.) And, as the circuit court also determined, Simmons had not made "even the *thinnest of shreds* showing of bad faith." (R.132:3.) Without either showing, Simmons was not entitled to relief and the circuit court properly denied his motion.

CONCLUSION

This Court should affirm the circuit court's orders denying Simmons's motions for postconviction DNA testing, reconsideration, and supplemental briefing.

Dated this 10th day of December 2019.

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 10,955 words.

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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 10th day of December 2019.

_____
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