STATE OF WISCONSIN

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

DISTRICT I

Case No. 2018AP783-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL E. DUNN,

Defendant-Appellant.

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On Appeal from a Judgment of Conviction
Entered in the Milwaukee County Circuit Court,
the Honorable William S. Pocan, Presiding, and from the
Decision and Order Denying Postconviction Relief,
the Honorable David A. Hansher, Presiding.

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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## ISSUES PRESENTED

1. Did Mr. Dunn meet his burden to show a prima facie violation of the fair cross-section requirement?

The postconviction court believed it did not have jurisdiction over Milwaukee County's jury selection process. (62:3; App.102-103).

2. Was Mr. Dunn denied equal protection of the law when the prosecutor used peremptory strikes to remove two black jurors from the jury panel?

The circuit court ruled that the prosecutor's peremptory strike was not the result of purposeful discrimination and therefore did not violate the Equal Protection Clause. (76:165; App.145).

3. Was Mr. Dunn entitled to an evidentiary hearing on his postconviction argument alleging his trial attorney provided ineffective assistance of counsel when he failed to cross-examine a key witness' identification of Mr. Dunn on surveillance footage at trial?

The postconviction court declined to hold a hearing, concluding that trial counsel was not ineffective as there was no probability of a different outcome. (62:2; App.102).

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Dunn welcomes oral argument if it would be helpful to the court. As this case involves facts applied to settled law, publication is likely not warranted.

## STATEMENT OF FACTS

On August 9, 2015, Michael Dunn, Austin Cooper, and Sarah Parker were each charged with one count of robbery, use of force, as a party to a crime, in violation of WIS. STAT. §§ 943.32(1)(a), 939.50(3)(e), 939.05. (1:1). The complaint alleged V.S. used the website Backpage to find a prostitute, Parker, and that he met her at a West Allis Days Inn on April 3, 2015. (1:1-2). V.S. told police he and Parker went to room 228, and shortly thereafter, two men came out of the bathroom and began striking V.S. (1:2). The two men took V.S.'s pants and fled from the room, along with Parker. (1:2). V.S. told police his pants contained his cell phone, approximately $380.00 in cash, debit cards, and house keys. (1:2).

A jury trial was conducted February 29, 2016 through March 2, 2016, the Honorable William S. Pocan, presiding. (75-79).

Prior to voir dire, Mr. Dunn's trial attorney brought an issue to the court's attention. As will be described in greater detail in the argument section below, trial counsel noted only three of the thirty prospective jurors were of African American descent. (76:8; App.105). He referred to a case "where the county in that particular matter used an improper method for selecting jurors, a method that resulted in underrepresentation by minorities." (76:9; App.106). He asserted that the circuit court had "an inherent authority to assure any defendant including this defendant…gets a fair trial. I think the Court has inherent authority to make sure that things are done fairly and that Mr. Dunn gets a fair trial of his peers." (76:9; App.106). He further argued, "[I]n a panel

where only ten percent of the possible jurors are of African-American descent, that does not represent a fair trial and does not represent a fair cross-section of Milwaukee County. It's not a jury of his peers." (76:9; App.106).

The circuit court responded, "I think your objection is a bit premature....But we will see how it plays out once we know a little bit more and we've gotten to know this jury and we have it. And we will see what happens and see what strikes are made, et cetera." (76:10-11; App.106).

The jury was then brought in and voir dire began. The parties selected fourteen jurors from the panel to serve as the jury, with two alternates. (76:153; App.142). The court excused the new jury for a break to put sidebars on the record, and then trial counsel renewed his previous objection, and asked the circuit court to strike the entire jury panel. (76:153, 158; App.142-43).

Trial counsel also noted the State struck two of the three black potential jurors, taking them from 3 black jurors out of 30, to 1 black juror out of 14. (76:160; App.143). He calculated that was only 7%, which was:

> far short of being a truly representative panel. I told the Court earlier that I do not have grounds at this point to raise a ***Batson*** [1] challenge because I haven't been able

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1 As argued in the postconviction motion, it appears that trial counsel inaccurately described his challenge to the composition of the jury panel as a ***Batson*** challenge. (76:9; App.105). A ***Batson*** challenge is concerned with the use of racially-motivated peremptory challenges. ***Batson v. Kentucky***, 476 U.S. 79 (1986). However, counsel made it clear that he was separately raising a fair cross-section challenge, referring to Mr. Dunn's right to be tried by a jury of his peers, to the need for a representative panel, and to the specific population of African American (continued)

> to see how that Milwaukee County picks its p[ro]spective jurors. But I think the Court has an inherent authority to ask that the defendant be tried by a jury of his peers and to make sure that that happens. And I think the Court has an inherent authority to make sure that the trial is done fairly and properly and that there's no appearance of impropriety or appearance of unfairness. And I think having one juror out of fourteen is far below what the voting age population is of African-Americans in Milwaukee County and ... even further below the percentage of African-Americans that make up Milwaukee County. I think it's not something that indicates fairness and propriety.

(76:160-61; App.143-44).

The state also responded to trial counsel's objection to the striking of two of the three African American jurors: "I can tell the Court, because now I'm going to make a record, that I struck two African-American jurors. I struck juror number 2 for that because she was asleep and juror number 12 because she works third shift. And in general, I strike third shifters. So, there's your race neutral explanation for the record on why those jurors got struck." (76:162; App.144).

Trial counsel responded, "I don't remember number 2 was falling asleep. I didn't notice that. And no record of it was made to the Court that could have been grounds for her to be excused for cause. And if the juror that worked third shift was excluded solely because she has to work third shift, I think she could well explain that that wouldn't be a problem

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residents of voting age in Milwaukee County. (76:7-10; App. 105-106). He specifically argued, "in a panel where only ten percent of the possible jurors are of African-American descent, that does not represent a fair trial and does not represent a fair cross section of Milwaukee County." (76:9; App.106).

that she could even get that day off. The Court would help her paperwork, et cetera, necessary so that she wouldn't have to work third shift. And furthermore, there was another [juror] that indicated that he worked third shift as well, and that person was not struck." (76:164-165; App.144-45).

The circuit court "agree[d] with [the prosecutor], there's not a basis here to—certainly, not under ***Batson***. But I don't think that based on what I've heard here and what I've seen here that there's any reason based on equity or other grounds to strike this jury panel. And, so, we are going to proceed. I do agree with the State." (76:165; App.145).

Over the course of the trial, the State presented the testimony of V.S., three police officers, one detective, the Days Inn manager, and Mr. Dunn's ex-girlfriend, Dana Ganske. Mr. Dunn elected not to testify after a colloquy with the court, and the defense did not call any witnesses. (78:158-163, 166).

V.S. testified that he went to the Days Inn on April 3, 2015 to have sex with a woman he had found on the website Backpage earlier in the week and whom he had previously met. (77:10-13, 38). V.S. explained "Anna" met him near the Days Inn entrance, took him to a room, and that he gave her money according to their previous arrangement. (77:10-12, 16-18, 32). V.S. testified they undressed and went toward the bed, at which point two black men jumped out of the bathroom and beat him up. V.S. was unable to identify his male attackers, besides their gender, race, and the fact that they both wore hooded sweatshirts. (77:19-20). V.S. testified that his cell phone was stolen, along with his shoes and his wallet. (77:21). He testified his phone had tracking software, and he "constantly" checked the tracking website online after the robbery. (77:30, 32-3). He testified that eventually he was

able to track his phone to a general location, and he called Detective DiTorrice and left a voicemail with that information. (77:33).

Officer Paul Taylor testified generally about his investigation at the scene of the crime. (77:62-110). Officer Lucas Binter testified regarding his investigation at the Days Inn, where he viewed surveillance videos, spoke with witnesses who saw suspicious activity, and obtained a license plate for the burgundy or brown Ford Explorer shown on video leaving the scene after one white female and two black males entered it. (78:13, 17-19, 28-29, 32-33). Binter testified a matching vehicle was located the next day by the Greendale police at the Southridge Mall. (78:47-48). In the vehicle were Parker, Cooper, and Mr. Dunn. (78:49-50). The vehicle was towed to the police station and searched, and Binter identified photos taken of Mr. Dunn's ID card from within the interior of the vehicle, along with a sweatshirt matching that seen on the suspects in the surveillance video. (78:50-55). Binter testified the listed owner of the vehicle was named Dana Ganske. (78:56).

The Days Inn manager testified that on the date in question, he opened the safe in room 228 twice, and that he observed one white female and one black male. (78:72-74). He testified he saw two people in the room one time, and the other time he only saw one or two people. (78:73-74).

Dana Ganske testified she owned a red Ford Explorer, and she testified Mr. Dunn was her boyfriend at the time of the offense. (78:83-85). She testified Mr. Dunn had used her vehicle on Friday, April 3, 2015, and that he told her if police asked, she should tell them she had the vehicle on April 3rd. (78:85-87, 90, 93-94). Ganske testified that when the police came to her house on April 4th, she told them she had the

vehicle the whole day. (78:94-95). She testified that was not the truth, but that she was scared and she did not want Mr. Dunn to get in trouble. (78:95). Ganske further testified that she went to the police station to watch surveillance videos. (78:96). She testified she identified Mr. Dunn in the surveillance video, and then she made an in-court identification of both Mr. Dunn and the Ford Explorer as the State introduced Exhibit 1, the surveillance video from the Days Inn. (78:97-100; 65). She testified her identification was based on his walk, clothing, and shoes. (78:99-100).

On cross-examination, Ganske testified she watched the surveillance video while she was under arrest two to three months after the incident. (78:103). She testified two detectives had told her Social Services would take her two-year-old child if she did not cooperate, and that she could be charged with harboring or aiding a felon and could go to prison for a long time. (78:104-106).

On redirect, Ganske testified she originally lied in her first statement to police, and that Detective DiTorrice had told her to tell the truth, not what to say. (78:114-15). She testified she told the truth after learning the legal consequences for lying. (78:115-16).

Officer Nick Stachula testified he was dispatched to look for V.S.'s phone a few days after the robbery at Mr. Dunn's mother's address. (78:119-20). He testified he spoke to Mr. Dunn's mother, and she gave him consent to search her residence. (78:122). He testified he located the Apple iPhone with matching serial number that he was looking for. (78:123-24). He testified the phone was located in a basket of laundry in an upstairs bedroom. (78:123). Lastly, Detective DiTorrice testified about his role in the investigation, including his interview of Ganske. (78:130-50).

At the conclusion of the trial, the jury found Mr. Dunn guilty of one count of robbery by use of force, as a party to a crime, as charged in the Information. (4; 79). On May 9, 2016, Mr. Dunn was sentenced by the Honorable William S. Pocan to eight (8) years of initial confinement and four (4) years of extended supervision, consecutive to any other cases. (82:43-44).

Mr. Dunn filed a postconviction motion, arguing (1) he was deprived of the effective assistance of counsel by his trial attorney's failure to cross-examine Dana Ganske's identification testimony, and (2) the exclusive use of Department of Transportation lists deprived him of his right to a jury drawn from a representative cross-section of the community. (51:1-18).

The postconviction court, the Honorable David A. Hansher, ordered briefing, after which it denied Mr. Dunn's motion without a hearing. (53; 62; App.101-103). The postconviction decision concluded there was "no reason to hold a ***Machner***[2] hearing" on the ineffective assistance of counsel claim because "even if deficient performance was a possibility, there was absolutely no probability of a different outcome. Consequently, trial counsel cannot be deemed ineffective." (62:2; App.102).

Regarding Mr. Dunn's fair cross-section challenge, the postconviction court explained that, "Trial counsel made a specific objection to the jury pool at the time of trial in this case, and the record speaks for itself with respect to the challenge that was made. Postconviction counsel's more general objection to the jury selection process in Milwaukee

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

County is not the proper subject of a postconviction motion here as the postconviction court does not have jurisdiction over Milwaukee County's jury selection process. In this regard, counsel is obliged to raise her challenge in another forum." (62:3; App.103).

This appeal follows. (63). Additional facts will be included as necessary below.

## ARGUMENT

I. The exclusive use of Department of Transportation lists deprived Mr. Dunn of his right to a jury drawn from a representative cross-section of the community.

A. Standard of review and relevant law.

The Sixth Amendment ensures criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross-section of their community. ***Berghuis v. Smith***, 559 U.S. 314, 319 (2010). In ***Duren v. Missouri***, 439 U.S. 357 (1979), the United States Supreme Court set forth the contemporary test to determine whether there has been a prima facie violation of the fair cross-section requirement. Under that test, a defendant must show: (1) the group alleged to be excluded is a distinctive group in the community; (2) the group's representation in the jury pool is not fair and reasonable in relation to the number of such persons in the population; and (3) the underrepresentation results from systematic exclusion of the group in the jury selection process. ***Id.*** at 364. Once the defendant has established a prima facie violation of the fair cross-section requirement, the burden shifts to the state to provide a compelling justification for the systematic exclusion of the distinctive group. ***Id.*** at 368.

This Court reviews de novo whether a prima facie violation of the fair cross-section requirement occurred. *See* ***United States v. Sanchez-Lopez***, 879 F.2d 541, 546 (9th Cir. 1989).

B. Additional relevant facts.

Prior to voir dire, Mr. Dunn's trial attorney explained:

> I note that the 2010 census as reported by the Wisconsin Blue Book indicates that the total population of Milwaukee County, according to the 2010 census, was 947,735. And of that nine hundred forty-seven thousand seven hundred thirty-five (947,735), two hundred fifty-three thousand seven hundred sixty-four (253,764) were listed as black or African American. That would be twenty-six point seven (26.7) percent.
>
> I also did a little further checking. … I also got from that same Blue Book, Your Honor, that according to the 2010 census, the voting age population of Milwaukee County was…seven hundred eleven thousand three hundred fifty-eight (711,358).
>
> And of that, the black/African American population was one hundred sixty-eight thousand two hundred eighty (168,280). That's twenty-three point six (23.6) percent.
>
> I have looked at the jury panel….it appears to me that only three out of the thirty prospective jurors are of African American descent. … I acknowledge that I don't have enough to meet the standards of the ***Batson versus Kentucky*** case which dealt with a case where the county in that particular matter used an improper method for selecting jurors, a method that resulted in underrepresentation by minorities. And I don't have the statistics or the numbers, et cetera, to do that. But I do think that the Court has an inherent authority to assure any defendant including this defendant … gets a fair trial. I think the Court has inherent authority to make

> sure that things are done fairly and that Mr. Dunn gets a fair trial of his peers. I would indicate to the Court that my client is African America[n] as the Court can easily see.
>
> And that in a panel where only ten percent of the possible jurors are of African-American descent, that does not represent a fair trial and does not represent a fair cross-section of Milwaukee County. It's not a jury of his peers.

(76:7-9; App.105-106).

After the jury was selected, trial counsel renewed his previous objection and asked the Court to strike the entire jury panel. (76:159; App.143). Trial counsel noted the State struck two of the three black potential jurors, reducing the number from 3 black jurors out of 30, to one black juror out of 14. (76:160; App.143). Trial counsel argued:

> I told the Court earlier that upon looking at Blue Book, even if you look at just voting age [residents] of Milwaukee County according to the 2010 census, twenty-three point six (23.6) percent of the Milwaukee County is made up of persons who call themselves either black or African-American.
>
> I would point out that the State knocked out two (2) of the three (3) black— potential black jurors that we had.
>
> And, so, we went from three (3) out of thirty (30) to one (1) out of fourteen (14).
>
> That's only seven (7) percent unless my math fails me.
>
> That is far short of being a truly representative panel.
>
> I told the Court earlier that I do not have grounds at this point to raise a ***Batson*** challenge because I haven't been

> able to see how that Milwaukee County picks its perspective jurors.
>
> But I think the Court has an inherent authority to ask that the defendant be tried by a jury of his peers and to make sure that that happens.
>
> And I think the Court has an inherent authority to make sure that the trial is done fairly and properly and that there's no appearance of impropriety or appearance of unfairness.
>
> And I think having one (1) juror out of fourteen (14) is far below what the voting age population is of African-Americans in Milwaukee County and … even further below the percentage of African-Americans that make up Milwaukee County. I think it's not something that indicates fairness and propriety.
>
> And I would ask that the panel be struck and that a different panel be chosen.

(76:159-160; App.143).

The Court noted trial counsel was "sort of making an equity-type argument." (75:161; App.144). Trial counsel responded:

> Your Honor, if this was a matter where it was even close, let's say there were four or five jurors which would end up being something in the neighborhood of about 25 or 30%, three jurors even out of 14 would be 21%. Again, even that's less than the makeup of Milwaukee County and in terms of African-Americans, that is less than the makeup of Milwaukee County in terms of voting age of African-Americans. But one out of fourteen is ridiculously low. It doesn't even come close to matching the makeup—the racial makeup of Milwaukee County as a whole. It's not even close.

(76:163-164; App.144).

The circuit court denied trial counsel's motion to strike the jury panel. (76:165; App.145). Postconviction, Mr. Dunn argued he was deprived of his right to a jury drawn from a representative cross-section of the community, because of Milwaukee County's exclusive use of Department of Transportation lists in compiling their juries. (51:11-18). Mr. Dunn also asserted that, to the extent trial counsel failed to sufficiently raise and preserve this issue, he deprived Mr. Dunn of the effective assistance of counsel. (51:18).

In its order denying the postconviction motion without a hearing, the postconviction court agreed that "trial counsel made a specific objection to the jury pool at the time of trial in this case, and the record speaks for itself with respect to the challenge that was made." (62:3; App.103). Nevertheless, the postconviction court believed the "more general objection to the jury selection process in Milwaukee County is not the proper subject of a postconviction motion here as the postconviction court does not have jurisdiction over Milwaukee County's jury selection process." (62:3; App.103).

### C. Mr. Dunn met his burden to show a prima facie violation of the fair cross-section requirement.

Mr. Dunn's postconviction motion sufficiently demonstrated a prima facie violation of the fair cross-section requirement. As such, the burden should have shifted to the state to provide a compelling justification for the systematic exclusion of the distinctive group.

1. The group alleged to be excluded is a distinctive group in the community.

Milwaukee County's jury pool underrepresents black and Hispanic residents. Regarding the first prong, black and Hispanic residents are "distinctive" racial groups in the community. ***Duren***, 439 U.S. at 364; *see also* ***State v. Coble***, 95 Wis. 2d 717, 728-29, 291 N.W.2d 652 (Ct. App. 1980)("This excluded group must be properly characterized as a particular age, sexual, economic, social, religious, racial, geographical or other group.").

2. The groups' representation in the jury pool is not fair and reasonable in relation to the number of such persons in the population.

Regarding the second prong, black and Hispanic representation in the Milwaukee County jury pool is not fair and reasonable in relation to the number of such persons in the population. According to Milwaukee County's Basic Jury System Evaluation Report, ["the Jury Report"] for 2015, which was attached to Mr. Dunn's postconviction motion, there were 85,142 Hispanic residents in Milwaukee County who were 18 years or older, totaling 11.78% of all Milwaukee County adult citizens. (51:25-30). The jury year master list, for distributing jury summons, indicates there were only 45,004 Hispanic residents (7.87% of the master list total), whose names were included on the master list by nature of having been issued either a driver's license or a state identification card from the Department of Transportation. (51:25-30). Out of those, there were 8,731 Hispanic residents (8.75% of the prospective juror list total) who were qualified potential jurors on the prospective juror list, i.e., U.S. citizens over the age of 18, proficient in English, without a felony

conviction, and who had not been granted a deferral or were not excused on request. (51:25-30).

In addition, the Jury Report indicates that in 2015, there were 175,954 black residents of voting age in Milwaukee County, totaling 24.35%. (51:25-30). The jury year master list indicates there were 128,411 black residents (22.46% of the master list total), who were issued either a driver's license or a state identification card from the Department of Transportation. (51:25-30). Further, there were only 24,922 black residents (24.98% of the prospective juror list total) who were qualified potential jurors on the prospective juror list as U.S. citizens over the age of 18, proficient in English, and without a felony conviction, who had not been granted a deferral or were not excused on request. (51:25-30).

In comparison to these numbers, there were 428,723 (59.33%) voting age white residents of Milwaukee County. *Id.* The jury year master list includes 374,495 (65.50% of the master list total) who had been issued a driver's license or state ID card. (51:25-30). Then, the prospective juror list includes 61,413 (61.56% of the prospective juror list total) of qualified potential jurors on the prospective juror list who were U.S. citizens over the age of 18, proficient in English, and without a felony conviction, who had not been granted a deferral or were not excused on request. (51:25-30).

In jury year 2015, the absolute disparity[3] between the census population and the jury year master list number for

3 The absolute disparity is the absolute difference between the source list and the population percentages. *See* ***Berghuis v. Smith***, 559. U.S. 314, 323 (2010) ("'Absolute disparity' is determined by subtracting (continued)

black Milwaukee residents was -1.89%. (51:25-30). For Hispanic Milwaukee residents, the absolute disparity was -3.91%. *Id.* In contrast, the absolute disparity for white Milwaukee residents was +6.18%. (51:25-30). In terms of comparative disparity,[4] the black Milwaukee resident percentage was -7.76%. (51:25-30). For Hispanic Milwaukee residents, the comparative disparity was -33.19%. (51:25-30). For white Milwaukee residents, the comparative disparity between the census year population percentage and the jury year master list population percentage was +10.41%. (51:25-30). White Milwaukee residents were the only race with a positive absolute or comparative disparity percentage. (51:25-30).[5]

3. The underrepresentation results from systematic exclusion of the group in the jury selection process.

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the percentage of African-Americans in the jury pool from the percentage of African-Americans in the local, jury-eligible population.").

4 Comparative disparity in the source list is the absolute disparity expressed as a percentage of the relative size of the group in the population. It is calculated by subtracting a group's percent of the adult population from its percent of the source list, then dividing the absolute value of that difference by the group's percent of the population, and finally multiplying that quotient by 100 in order to express the rest as a percentage. *See* ***id.*** ("'Comparative disparity' is determined by dividing the absolute disparity by the group's representation in the jury-eligible population).

5 Disparities for other minorities in Milwaukee County are: -0.16% absolute disparity for Native Americans/Alaskan natives, while the comparative disparity is -23.10%. (51:25-30). For Asians/Pacific Islanders, the absolute disparity is -0.22% and the comparative disparity is -5.66%. (51:25-30)..

Turning to the third prong of the ***Duren*** test, it is the *system* of solely using Department of Transportation lists that results in underrepresentation of black and Hispanic residents compared to their proportions in the community.

WISCONSIN STAT. § 756.04(2) establishes the sources from which circuit courts may draw names for jury pools. The statute provides that the Department of Transportation shall compile a yearly list including the "name, address, county, date of birth, race, gender, identification number and renewal date of each person residing in the state who is licensed as a motor vehicle operator under ch.343 or who has received an identification card under s.343.50 or 343.51, and social security number…." WIS. STAT. § 756.04(2)(b). The master list of potential jurors may be supplemented by a list of registered voters, a list of persons who filed a state income tax return, a list of child support payors and payees, a list of recipients of unemployment compensation, and a list of residents with licenses or approvals from the department of natural resources. WIS. STAT. § 756.04(2)(c).

On the Milwaukee County Courts website, under "Jury Management" is a section including answers to frequently asked questions.[6] The first question posed and answered is, "How did you get my name?" The website explains, "The names used for our jury pool are obtained from the Wisconsin Department of Transportation list. This includes drivers and those with identification cards. Milwaukee County does NOT currently use voter lists for names."

Thus, Milwaukee County's pool of potential jurors ("the master jury wheel") consists of drivers and people with identification cards issued by the Department of

6 Available at http://county.milwaukee.gov/Courts/Jury/FAQ.htm.

Transportation. From that group, Milwaukee winnows the list to those qualified to serve: Milwaukee County residents who are U.S. citizens over the age of 18, proficient in English, and without a felony conviction. WIS. STAT. § 756.02; *see* http://www.county.milwaukee.gov/ImageLibrary/Groups/cntyCourts/Jury_Service_General_Information.pdf; ***State v. Carlson***, 2003 WI 40, 261 Wis. 2d 97, 661 N.W.2d 51. Then, a jury "venire" is created from the qualified jury wheel: the venire consists of qualified potential jurors who have not been granted a deferral or are not excused on request. *See* Milwaukee County Basic Jury System Evaluation Report, footnote 1. (51:25).

However, Milwaukee County's qualified jury wheel, as compiled by the Department of Transportation's source list, does not provide fair and reasonable representation of minorities, specifically, black and Hispanic residents, in jury panels for Milwaukee County. This underrepresentation results in systematic exclusion of African American residents and Hispanic residents in the jury selection process. By creating a master jury wheel only from persons with driver's licenses or photo IDs, Milwaukee County excludes the considerable number of residents who do not have a driver's license or photo ID.

As the University of Wisconsin-Milwaukee's Employment and Training Institute ("ETI") has researched and reported in the context of voter ID laws, there are disparate racial impacts that stem from using driver's licenses and photo identification cards. *See* Pawasarat, John and Quinn, Lois M., "ETI Research on Disparate Racial Impacts of Using Driver's Licenses for Voter IDs" (2017). *ETI*

*Publications*. Paper 185, available at http://dc.uwm.edu/eti_pubs/185.[7]

As of January 1, 2016, 75% of white 18-year-olds in Wisconsin had driver's licenses, compared to only 34% of black 18-year-olds, and 33% of Hispanic 18-year-olds. Semuels, Alana, "No Driver's License, No Job." *The Atlantic*. (June 15, 2016)(referencing research from UWM's ETI); *see also* "The DMV Class of 2016" p.2.

As it specifically concerns Milwaukee County, ETI reported that only 47% of black adults and 43% of Hispanic adults held valid driver's licenses, in contrast to 73% of white adults in June 2005. "The Driver License Status of the Voting Age Population in Wisconsin," p.22.

In 2012, ETI reported that over the three-year period from 2009 through 2011, there were 92,172 Milwaukee County residents who had received suspensions and/or revocations. Only 50,133 (54%) of these residents had a current driver's license, while 15,360 (17%) had an expired license, and 26,679 (29%) had no record of ever having obtained a Wisconsin driver's license. Pawasarat, John and Quinn, Lois M. "Drivers Status Report for Milwaukee County" (Employment & Training Institute, University of

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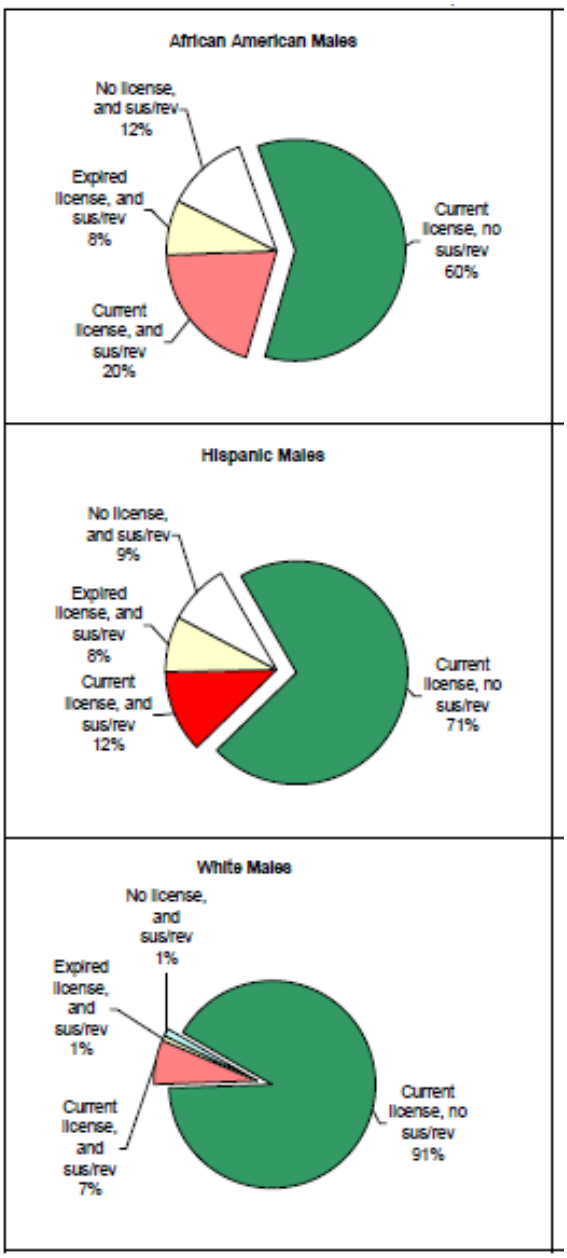
7 *See also* Pawasarat, John, "The Driver License Status of the Voting Age Population in Wisconsin" (2006). *ETI Publications*. Paper 68, available at http://dc.uwm.edu/eti_pubs/68; Quinn, Lois M. and Pawasarat, John, "The DMV Class of 2016: Readiness of Milwaukee 18-Year-Olds for Employment, Citizenship and Adulthood" (2016). *ETI Publications*. Paper 182, available at http://dc.uwm.edu/eti_pubs/182; Miller, James D. "Jury Reform in Wisconsin: Where We Have Been, Where We Are Now, and Where We Are Going." (Wisconsin Committee of Chief Judges, Subcommittee Juror Treatment and Selection, Madison, Wis., May 2006).

Wisconsin-Milwaukee, June 2012), available at https://www4.uwm.edu/eti/2012/DriversStatusReport.pdf. In this same report, Pawasarat and Quinn identified African American males as the population most seriously affected by licensing problems in Milwaukee County:

- Of the 70,848 African American males in the DOT population:
    - 8,584 (12%) had no licenses,
    - 5,454 (8%) had expired licenses,
    - 14,098 (20%) had current licenses but had received suspensions and or revocations in the past three years.
- Of the 29,755 Hispanic males in the DOT population:
    - 2,707 (9%) had no licenses,
    - 2,402 (8%) had expired licenses, and
    - 3,621 (12%) had current licenses but had received suspensions or revocations in the past three years.
- By contrast, of the 197,977 white males in the Milwaukee County DOT population:
    - only 947 (1%) had no licenses,
    - 2,817 (1%) had expired licenses, and
    - 13,685 (7%) had current licenses but had received suspensions or revocations in the past three years.




Pawasarat and Quinn, "Drivers Status Report for Milwaukee County," p.14.

According to a 2007 report auditing the jury selection process in the Milwaukee County circuit court system, in

2005, there were 145,854 black voting-age citizens and 39,267 Hispanic voting-age citizens. Committee on Finance and Audit, "An Audit of the Jury Selection Process in the Milwaukee County Circuit Court System." (Milwaukee County Department of Audit, July 2007).[8] This report indicated at the outset that its recommendations "focus[ed] on strategies to improve the probability that jury pools assembled for the Milwaukee County Circuit Court are representative cross-sections of the community." The report indicated that the 145,854 black voting-age citizens constituted 23.6% of the total voting-age citizens in Milwaukee County in 2005. *Id.* In contrast, there were 798 black sworn jurors in 2006, constituting 16.3% of the total sworn jurors. *Id.* The report noted there were 39,267 Hispanic voting-age citizens constituting 6.3% of the total voting-age citizens in Milwaukee County in 2005. *Id.* In contrast, there were 158 sworn jurors in 2006, constituting 3.2% of the total sworn jurors. *Id.*

The audit report offered several suggestions to explain the disparity between the racial compositions of sworn juries and the general population of qualified jurors in Milwaukee County, including issues related to the use of the Department of Transportation list as the sole source of information for generating jury summons, along with problems with the delivery of jury summons and persons failing to respond or report, and variations in the rates at which prospective jury pool members are legally disqualified and excused from jury duty. *Id.*, p.2.

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8 Undersigned counsel has not found another similar audit more recent than the 2007 report. In its opening summary, the report indicated it was generated in response to public outrage over an all-white jury's verdicts in the case of three former Milwaukee police officers charged in the "brutal beating of a biracial man [Frank Jude, Jr.] in October 2004[.]"

Nevertheless, more than ten years later, Milwaukee County is still drawing solely from the Department of Transportation's list to compile their source list for the jury wheel from which jury pools are drawn.[9] While the jury pool does not need to be a "statistical mirror of the community," ***State v. Pruitt***, 95 Wis. 2d 69, 78, 289 N.W.2d 343 (Ct. App. 1980), and courts have noted that "discrepancies of less than ten percent, standing alone, cannot support a claim of underrepresentation," ***United States v. McAnderson***, 914 F.2d 934 (7th Cir. 1990)—here, the discrepancies are not standing alone, but are given context through the systemic exclusion Mr. Dunn has shown, in the form of Milwaukee County's exclusive reliance on the DOT list.

When black and Hispanic residents of Milwaukee are underrepresented on the Department of Transportation's source list, because they are demonstrably less likely to have driver's licenses and identification cards, their representation in the jury pool is not fair and reasonable in relation to the number of such persons in the population. The use of the DOT list as the sole source for the pool of jurors leads to the

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[9] Notably, in February of 2008, an attorney general opinion considered whether Wisconsin law permitted courts to deliberately summon a greater number of potential jurors from some geographic areas than from others in an attempt to ensure that the racial and ethnic makeup of the juries that hear cases in the court better reflects a representative cross section of the community served by the court. The opinion answered no, but concluded: "If greater representation of minorities on juries is sought, it must be by means that maintain a non-discriminatory random selection procedure, such as the suggestion of the federal court of appeals to supplement the lists from which the names of prospective jurors are obtained with other lists that are more likely to include the names of those minority individuals which do not appear in the most commonly used sources." *See* https://docs.legis.wisconsin.gov/misc/oag/recent/oag3_08

systematic exclusion and significant underrepresentation of African Americans and Hispanics, because of the low percentage of those populations who have driver's licenses and identification cards compared to the white population. It is worth noting that, unlike in Equal Protection analyses, when a defendant alleges a violation of the Sixth Amendment's fair cross-section principle, no showing of intent to discriminate is required. ***Duren***, 439 U.S. 357, 368 fn.26 ("in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section. The only remaining question is whether there is adequate justification for this infringement."). Regardless of any intent to discriminate, the result of the exclusive reliance of the DOT list is a prima facie showing of a disparity resulting in a violation of Mr. Dunn's right to an impartial jury drawn from a fair cross-section of the community.

The postconviction court erred in denying Mr. Dunn's postconviction motion where he met his burden to show a prima facie violation of the fair cross-section requirement. The court erroneously concluded that it did "not have jurisdiction over Milwaukee County's jury selection process" and suggested counsel "is obliged to raise her challenge in another forum." However, the relief Mr. Dunn requested is consistent with that requested in other fair cross-section cases. *See* ***Pruitt***, 95 Wis. 2d 69, 73 (a fair cross-section challenge in which the defendant filed a pretrial motion challenging the jury array and requesting a new jury panel); *see also* ***Duren***, 439 U.S. at 360 (in which the defense moved to quash the petit jury panel because of the fair cross-section violation).

Mr. Dunn was deprived of his constitutional right to be tried by an impartial jury drawn from sources reflecting a fair

cross-section of his community. His trial attorney argued that the jury panel be stricken, and postconviction, he argued he sufficiently met his burden to show a prima facie violation of the fair cross-section requirement. Because, as demonstrated above, he met his burden to show a prima facie violation of the fair cross-section requirement, the burden shifts to the state to provide a compelling justification for the systematic exclusion of the distinctive group.

## II. The state's peremptory strike of two African American jurors violated the Equal Protection Clause.

### A. Standard of review and relevant law.

The Equal Protection Clause protects a defendant throughout the "proceedings bringing him to justice." ***Batson*** 477 U.S. at 88 (quoting ***Hill v. Texas***, 316 U.S. 400, 406 (1942)); U.S. CONST. amend. XIV. The Wisconsin Supreme Court has interpreted Article 1, sec. 1 of the Wisconsin Constitution to provide the same right to equal protection. ***State v. Cissell***, 127 Wis. 2d 205, 223, 378 N.W.2d 691 (1985) (quoting ***State ex rel. Sonneborn v. Sylvester***, 26 Wis. 2d 43, 49-50, 132 N.W.2d 249 (1965)).

In the context of jury selection, the Equal Protection Clause places limits on the use of peremptory challenges. Parties cannot exercise peremptory challenges to eliminate potential jurors based on the juror's race or the assumption that the juror's race would keep him or her from being impartial. ***Batson***, 477 U.S. at 89. A jury selected in contravention of the Equal Protection Clause denies the defendant the very "protection that a trial by jury is intended to secure." ***Id.*** at 86.

Notably, the defendant is not the only person harmed when consideration of or assumptions about race invade the

jury selection process: the state unconstitutionally discriminates against a citizen who is denied jury service on account of his or her race. ***Id.*** at 87; *see* ***State v. Lamon***, 2003 WI 78, ¶35, 262 Wis. 2d 747, 664 N.W.2d 607. The United States Supreme Court has noted that a prospective juror who is excused from service because of race suffers a "profound personal humiliation heightened by its public character." ***Powers v. Ohio***, 499 U.S. 400, 413-414 (1991). Further, the excluded juror may lose confidence in the court system on account of his or her race-based disqualification. ***Id.*** at 414.

Likewise, society at large may lose confidence in the fairness of judicial proceedings when prospective jurors are excluded from jury service based on race. ***Lamon***, 262 Wis. 2d at ¶35. When race is considered in the selection of a jury, it "invites cynicism" about the jury's neutrality and whether the jury's decision is based on the law, undermining public confidence in "the fairness of our system of justice." ***Powers***, 499 U.S. at 412; ***Batson***, 477 U.S. at 87.

In ***Batson***, the United States Supreme Court developed a three-pronged test for determining when a peremptory strike violates the Equal Protection Clause. First, the defendant must make a prima facie showing that the state acted with discriminatory intent in striking the prospective juror. ***State v. Gregory***, 2001 WI App 107, ¶7, 244 Wis. 2d 65, 630 N.W.2d 711. Second, if the defendant establishes a prima facie case, the burden shifts to the prosecution to provide a race-neutral explanation for the strike. ***Id.***, ¶8. If the state offers a neutral explanation, then the circuit court must weigh the testimony on both sides and determine whether a case of purposeful discrimination has been established. ***Id.***

Each of the three steps of the ***Batson*** test is reviewed on appeal under a clearly erroneous standard of review. ***State v. Lopez***, 173 Wis. 2d 724, 729, 496 N.W.2d 617 (1993).

B. Additional relevant facts.

During voir dire, trial counsel asked follow-up questions regarding jurors who worked night shifts:

| | |
|---|---|
| Trial counsel: | Now, juror number twelve (12), you mentioned that you work in a nursing home, correct? |
| Prospective juror 12: | Yes. |
| Trial counsel: | And you said that today that you don't have to do that. In other words, when you are done, you don't have to go to work today. What about if this case goes Tuesday and Wednesday, though? |
| Prospective juror 12: | Yes. Let's see, I have to work Tuesday, but if I—today, I just have to have paperwork. |
| Trial counsel: | Okay. |
| The Court: | Wait a minute. We can solve that for you. Because, basically, when you are on jury duty, just like people who work during the day and can't be here, we don't want you working at night. Because we want you to be wide awake. And my staff can assist you getting paperwork so that you won't have to work Tuesday night. |

(76:136-37; App.137-38).

Trial counsel then asked whether any other potential jurors worked a shift that would require them to go to work following daytime jury duty. (76:138; App.138). Prospective juror 25 raised his hand, and explained that he did winter services and whenever it started snowing, he had to work. (76:138; App.138). The circuit court told Juror 25, "Same thing would apply there." (76:138; App.138). Trial counsel explained, "I guess and I'm sure the Judge and [the prosecutor], we just don't want you to be in a position where you're so darn tired, it's hard to stay awake." (76:138-39; App.138).

The fourteen jurors chosen were: numbers 3, 5, 6, 10, 11, 13, 14, 16, 18, 21, 23, 24, 25, 26. (76:153; App.142).

After Mr. Dunn's jury was selected, trial counsel pointed out that the state struck two of the three black potential jurors. (76:159-160; App.143). Counsel argued that this took the jury from 3 black jurors out of 30, to one black juror out of 14. (76:160; App.143). The state responded, and asked the Court to deny trial counsel's request to strike the panel. (76:162; App.144). The state argued:

> Prosecutor: There's got to be some showing of something intentional from either the prosecuting agency or from, in some way, shape or form, the way jurors are polled. There's, certainly, no information either way to indicate that. I can tell the Court, because now I'm going to make a record, that I struck two African-American jurors. I struck juror number 2 for that because she was asleep and juror number 12 because she works third shift. And in general, I strike third shifters. So, there's your race

neutral explanation for the record on why those jurors got struck.

***

Trial counsel: And…I don't remember number 2 was falling asleep. I didn't notice that. And no record of it was made to the Court that could have been grounds for her to be excused for cause. And if the juror that worked third shift was excluded solely because she has to work third shift, I think she could well explain that that wouldn't be a problem that she could even get that day off. The Court would help her paperwork [sic], et cetera, necessary so that she wouldn't have to work third shift. And furthermore, there was another [juror] that indicated that he worked third shift as well, and that person was not struck.

So, Judge, I do think you have authority and the right to make sure that there's a fair trial. And that includes the fairness in terms of racial makeup of the jury. And I submit to you that you should use your inherent authority to strike this panel and start over again.

The Court: All right. Thank you. And I agree with [the prosecutor], there's not a basis here to—certainly, not under ***Batson***. But I don't think that based on what I've heard here and what I've seen here that there's any reason based on equity or other grounds to strike this jury panel. And, so, we are going to proceed. I do agree with the State.

(76:162-165; App.144-145).

C. The circuit court's finding that the prosecutor's striking of Jurors 2 and 12 was not purposeful discrimination was clearly erroneous.

The prosecutor's strike of Jurors 2 and 12 was the result of purposeful discrimination. As explained below, the prosecutor's reasons for striking two black jurors fail the ***Batson*** test.

Ordinarily, the first step in analyzing whether Mr. Dunn's equal protection rights were violated would be to evaluate whether he established a prima facie case of purposeful discrimination. However, Mr. Dunn is not required to make that showing in this case. "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." ***Hernandez v. New York***, 500 U.S. 352, 359 (1991).

The second step of ***Batson*** requires the prosecutor to offer a race-neutral explanation for striking the prospective jurors. He did so in this case, by offering explanations based on something besides the jurors' race. ***Hernandez***, 500 U.S. at 360.

However, the third step of ***Batson*** instructs that, if the state offers a neutral explanation, then the circuit court must weigh the testimony on both sides and determine whether a case of purposeful discrimination has been established. ***Gregory***, 244 Wis. 2d 65, ¶28. At this stage of the analysis, courts often must determine whether the explanation offered by the prosecutor for his or her strikes were actually a pretext

for racial discrimination. For example, in ***Hernandez***, the court had to determine whether the prosecutor's stated concern that some Spanish-speaking jurors would not accept the court interpreter's translations of the proceedings was actually an attempt to discriminate against Hispanic jurors. 500 U.S. 352. The ***Hernandez*** Court explained that courts can consider "disproportionate exclusion of members of a certain race" in evaluating whether the prosecutor's explanation is a pretext for discrimination. ***Id.*** at 363.

An analysis of the prosecutor's explanations in this case shows they are a pretext for discrimination. As trial counsel accurately pointed out in making his objection, Juror 12 was allegedly struck because of her work schedule—yet another juror who had responded to the inquiry about nightshift work schedules (Juror 25) was *not* struck by the prosecutor but was in fact selected for the panel. (76:153, 164-65; App.142, 144-45).

Moreover, the circuit court had already explained to Juror 12 that the court and its staff could provide paperwork to excuse her from her nightshift, so that tiredness from having to work after jury duty would not be a problem. (76:137; App.138). Juror 12 told trial counsel that she would be able to be excused from work if she provided her employer with the appropriate paperwork. (76:136-37; App.137-38). Thus, the prosecutor's justification that Juror 12 was struck for her work schedule is demonstrably false and was a pretext for purposeful discrimination.

In addition, the prosecutor's proffered reason for striking Juror 2 on the basis that she was sleeping, was essentially unreviewable, because no record of any observation of her sleeping was made to the circuit court. (76:164; App.144). Yet, if the prosecutor had drawn the

attention of trial counsel and the circuit court to the issue of a sleeping juror, the circuit court could have taken steps to ensure the juror could stay awake and focused, by taking a break, admonishing jurors about the importance of staying awake and focused, or further examination of the jury regarding whether any potential jurors had any medical or other conditions that might prevent them from staying awake or focusing. As trial counsel argued, he did not observe Juror 2 sleeping, and no such record was made when strikes for cause were discussed. (76:164; App.144). Accordingly, the strike of Juror 2 was also a pretext for purposeful discrimination.

The circuit court's conclusion to the contrary was clearly erroneous. Therefore, because two black prospective jurors were improperly struck by the prosecutor, Mr. Dunn respectfully requests a new trial.

III. Mr. Dunn was entitled to a hearing on his postconviction motion argument alleging that his attorney provided ineffective assistance when he failed to cross-examine Dana Ganske's identification testimony.

A. Standard of review and relevant law.

Both the United States and Wisconsin Constitutions guarantee a criminal defendant the right to counsel. U.S. CONST. amends. VI, XIV; WIS. CONST. art. 1, § 7. "This right includes the right to effective assistance of counsel." ***State v. Roberson***, 2006 WI 80, ¶ 23, 292 Wis. 2d 280, 717 N.W.2d 111.

To prevail on an ineffective assistance of counsel claim, the defendant must show (1) that counsel performed deficiently; and (2) that the deficient performance prejudiced

his defense. ***State v. Artic***, 2010 WI 83, ¶24, 327 Wis. 2d 392, 768 N.W.2d 430. To prove deficient performance, the defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To establish prejudice, the defendant 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." ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W. 2d 379 (1997) (citing ***Strickland***, 466 U.S. at 694).

A trial court must hold an evidentiary hearing if the defendant alleges facts which, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996) (quoting ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972)). When the circuit court denies a postconviction motion without an evidentiary hearing, this Court independently reviews whether the postconviction motion was sufficient to warrant a hearing. ***Bentley***, 201 Wis. 2d at 310.

This Court also reviews de novo "the legal questions of whether deficient performance has been established and whether it led to prejudice rising to a level undermining the reliability of the proceeding." ***Id***. And, this Court assesses prejudice "based on the cumulative effect of counsel's deficiencies." ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305.

If a defendant "alleges sufficient material facts that, if true, would entitle the defendant to relief," the defendant is entitled to an evidentiary hearing on the postconviction motion. ***State v. Love***, 2005 WI 116, ¶42, 284 Wis. 2d 111,

700 N.W.2d 62. In determining whether there are sufficient allegations to raise a question of fact, the court must assume the allegations are true. ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

B. Mr. Dunn's postconviction motion contained sufficient factual allegations to entitle him to an evidentiary hearing on his claim that he was prejudiced by trial counsel's deficient performance.

In his postconviction motion and postconviction reply, Mr. Dunn sufficiently argued that trial counsel's failure to attack Ganske's identification of him on the hotel's surveillance video constituted deficient performance and prejudiced him. (51:7-11). In his motion, Mr. Dunn noted that the red Ford Explorer's license plate is not visible in the footage, yet no questions were asked to establish whether Ganske could see the license plate of the red Ford Explorer in the video, in order to be certain it was actually her vehicle, rather than one that resembled her vehicle. (51:8). No questions were asked regarding whether Ganske's particular vehicle had any dents, scratches, or other identifying markers to distinguish it from other red Ford Explorers. (51:8).

In addition, Mr. Dunn argued that it is difficult to discern distinguishing characteristics of the men in the surveillance footage. (51:8). The men in the video were wearing dark clothing with their hoods up. (51:8). The clothes worn by the man Ganske identified as Mr. Dunn do not bear any logos, and the shoes are not distinctive. (51:8). Nevertheless, trial counsel did not ask Ganske any questions to undermine her actual identification of Mr. Dunn based on the graininess of the video, the lack of distinguishing characteristics in the suspect's clothing, or the inability to see

the suspect's face. (51:8-9). Counsel did not ask Ganske to describe why Mr. Dunn's walk is particularly noteworthy. (51:8-9).

To illustrate his point, Mr. Dunn appended stills from the surveillance footage, at the four precise moments the video was stopped and Ganske identified Mr. Dunn during trial. (51:20-23). The surveillance video was entered into evidence as State's Exhibit Number 1, and the particular angle in question was designated by the last numbers 067. (65; 78:98). The State showed the jury and Ganske a still frame at "1900 hours, 13 seconds" at which point she identified her vehicle. (65; 78:98-99). The video was paused at 19:01:46, 19:14:32, and 19:15:05 at which times Ganske identified Mr. Dunn. (65; 78:99-100).

Still of Exh.1 at 19:00:13, when Ganske identified her vehicle:

Still of Exh.1 at 19:01:46, when Ganske identified Mr. Dunn:


Still of Exh.1 at 19:14:32, when Ganske identified Mr. Dunn:

Still of Exh.1 at 19:15:05, when Ganske identified Mr. Dunn:


Mr. Dunn sufficiently argued that trial counsel's deficient performance prejudiced him in his trial. (51:8-11). He argued that trial counsel's cross-examination of Ganske demonstrated that he recognized she was an important witness for the State, with damaging testimony against Mr. Dunn, and that he knew he needed to undermine her credibility. (51:9). Indeed, in his closing argument to the jury, trial counsel argued that the State's case *rose and fell* on Dana Ganske's statements. (51:9).

Nevertheless, counsel focused his attack at closing solely on Ganske's motivation to lie, rather than *also* drawing the jury's attention to the fact that it was possible Ganske was—whether intentionally or accidentally—overinflating her identification testimony, and that it would actually be very difficult to make credible and accurate identifications of Mr. Dunn and Ganske's specific Ford Explorer because of the poor quality of the surveillance video and the lack of identifying markers to support her identifications. (51:9, 61:3).

Mr. Dunn explained in his postconviction motion that this was problematic because the jury never heard Ganske's identifications called into question, even during closing arguments. (51:9). No instruction was asked for, and consequently, none was given, regarding the potential shortcomings of eyewitness identification. Mr. Dunn argued trial counsel should have probed Ganske's certainty that the vehicle in the video belonging to her by questioning the number of red Ford Explorers that exist in Milwaukee. (51:9). Counsel should have asked how Ganske was so certain that she bought the plain dark clothing and shoes she identified with certainty in the video. (51:9).

Further, Mr. Dunn argued the failure to challenge Ganske's critical identification of Mr. Dunn and the Ford Explorer in the surveillance video was an irrational trial tactic that amounts to deficient performance. (51:9-10); *see* ***State v. Felton***, 110 Wis. 2d 485, 502-503, 329 N.W.2d 161 (1983). He observed that the state itself seized upon this failure, emphasizing in closing argument:

> The fight in this case is about who are those three people [responsible for attacking V.S.], and really, it's only about Michael Dunn. And the fight in this case is, is he the third man[?] Is Michael Dunn, the defendant, the third man[?] Because we know who these people are. This is the prostitute. This is Anna. Her real name is Sarah Parker. This is the guy who bought the room. This is Austin Cooper.... the guy who left his receipt, so we know who that guy is.

(79:26). The state argued in closing that the third person was Michael Dunn, and highlighted Dana Ganske's testimony, contending:

> How do we know that's Michael Dunn? Dana Ganske, who we'll circle back around to, pointed to him and said,

> that's Michael Dunn. How does she know it's Michael Dunn? Number one, she's known him for ten years. Number two, at this point they're dating. Number three, he is wearing the clothes that [Dana] bought him. ...On the surveillance videos how do we know it's Michael Dunn? This truck is Dana Ganske's truck. ... Michael Dunn's girlfriend [is] picking him out on the video saying, '[T]hat's him. Those are the clothes I bought him. That's my truck.'

(79:30, 32).

Mr. Dunn argued that trial counsel's failure to cross-examine Ganske about the reliability of her identification of Mr. Dunn and the red Ford Explorer prejudiced Mr. Dunn in a case in which identification was the only issue. (51:10). While there was other circumstantial evidence that connected Mr. Dunn with the crime, Ganske was the only witness at trial who was able to put Mr. Dunn at the Days Inn at the time of the robbery. While she was undoubtedly familiar with Mr. Dunn and with her vehicle, the surveillance video was not of such a quality that her identification should have gone unchallenged.

Mr. Dunn further argued that the fact that Ganske knew Mr. Dunn so well is all the more reason why it was important for trial counsel to attack the reliability of Ganske's identification of Mr. Dunn and of her vehicle in the surveillance footage. (61:2-3). Without any such attack, the jury was more likely to credit Ganske's testimony—that because of the nature of the relationship, *of course* her identification must be sound. As Mr. Dunn argued, there were reasons these identifications were not necessarily reliable, that should have been argued to the jury.

The state's response and the postconviction court's decision denying Mr. Dunn's motion without an evidentiary

hearing focused on the wrong inquiry. (58; 62:1-2; App.101-102). The state argued the sufficiency of the evidence standard, alleging "the record is replete with direct and circumstantial evidence sufficient to find the defendant guilty beyond a reasonable doubt" and citing ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). (58:1).

The postconviction decision similarly erroneously focused on the other evidence adduced at trial, noting:

> Ganske knew the defendant for almost ten years. She dated him for a significant period of time. Ganske testified that she recognized her Ford Explorer in the video and Michael Dunn by the way he walked and by the clothes he had on, which she said she had bought him. Even if counsel would have pursued a more intense attack on her identification of her vehicle and/or the person in the video, there is not a reasonable probability in the world that he would have been acquitted. Regardless of how badly Dana Ganske might have been raked across the coals in cross-examination, one perplexing question would be foremost in everyone's mind: What was the victim's iPhone doing in the defendant's mother's laundry basket???

(62:2; App.102) (punctuation reproduced to reflect the original).

Yet, in raising postconviction arguments identifying errors in the trial, the question is whether Mr. Dunn was deprived of a fair trial because of the alleged mistakes, and whether any such deficiencies undermine the court's confidence in the fairness of Mr. Dunn's trial. See ***State v. Pitsch***, 124 Wis. 2d 628, 645, 369 N.W.2d 711 (1985). "Although there is sufficient evidence in this case to sustain the conviction, the error allowing the defendant's credibility to be undermined in this way infected the trial. Because

credibility was the central issue in this case, we conclude that the error had 'a pervasive effect on the inferences to be drawn from the evidence' and alter[ed] the entire evidentiary picture.'" ***Id.*** (quoting ***Strickland v. Washington***, 104 S.Ct. at 2069). Further, "despite the strong presumption of the reliability of the outcome, our confidence in the result is undermined because of 'a breakdown in the adversarial process that our system counts on to produce just results.'" ***Id.***

A court *must* hold an evidentiary hearing on a postconviction motion if the motion alleges "sufficient material objective factual assertions that, if true, entitle [the defendant] to relief." ***Love***, 284 Wis.2d 111, ¶2. As Mr. Dunn's postconviction motion alleged facts which, if true, would entitle him to relief, the circuit court erred in denying his postconviction motion without a hearing. Therefore, this Court should reverse and remand for an evidentiary hearing.

## CONCLUSION

For the reasons stated above, Mr. Dunn respectfully requests this Court order a new trial, or reverse and remand for a ***Machner*** hearing.

Dated this 20th day of June, 2018.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,012 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

Dated this 20th day of June, 2018.

Respectfully submitted,

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## CERTIFICATION AS TO APPENDIX

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

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

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

Dated this 20th day of June, 2018.

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# A P P E N D I X

# I N D E X
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