STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP942-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross Petitioner,

v.

ROBERT DARIS SPENCER,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE STEPHANIE ROTHSTEIN, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-CROSS PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT

I. A postconviction court may deny a sufficiently pled ineffective-assistance claim without an evidentiary hearing where the record conclusively disproves the defendant's allegations.

The parties agree that a sufficiently pled ineffective-assistance claim may be denied without a hearing on record-conclusively-shows grounds. (Spencer's Br. 9.) They disagree on whether lower courts still need guidance on this well-established legal principle. (Spencer's Br. 7–13.)

On the latter point, Spencer accuses the State of manufacturing confusion where there's none. (Spencer's Br. 7–13.) His argument relies on conclusory statements like, "Nowhere in its opinion did the court of appeals indicate that it read [*Sholar*] as requiring that a properly pled motion could not be denied, without a hearing, on record-conclusivity grounds." (Spencer's Br. 9.) Spencer also cherry-picks boilerplate language from the opinion to contend that the court of appeals understands the law governing the granting of *Machner*[1] hearings perfectly well. (Spencer's Br. 9.)

In its brief-in-chief, the State identified exactly where the court of appeals' opinion indicates that an evidentiary hearing is required whenever a defendant sufficiently pleads his ineffective-assistance claim. (State's Br. 15–17.) The court of appeals should have searched the record for reasons to sustain the circuit court's discretionary decision to deny Spencer an evidentiary hearing, yet it didn't say a single word about whether the circuit court erred in its record-conclusively-shows analysis. (State's Br. 6–7, 17.) Instead, the court of appeals solely considered whether Spencer

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

adequately pled his claim. (State's Br. 6–7.) And we know why: because in *State v. Sholar*, 2018 WI 53, ¶ 51, 381 Wis. 2d 560, 912 N.W.2d 89, this Court said, "When a circuit court summarily denies a postconviction motion alleging ineffective assistance of counsel without holding a Machner hearing, the issue for the court of appeals reviewing an ineffective assistance claim is whether the defendant's motion alleged sufficient facts entitling him to a hearing." *Sholar*, 381 Wis. 2d 560, ¶ 51; (State's App. 113–14.)

Spencer's failure to address any of this in his response brief exposes the weakness of his position that the court of appeals is not confused about when a hearing is required on an ineffective-assistance claim. (Spencer's Br. 7–13.) By ignoring what happened here and why, it's easy to say things like, "the State assigns to the court of appeals an interpretation of *Sholar* that is unsupported by the record," or "the court of appeals never held that *Sholar* precluded a record-conclusivity argument," or "there is no reason to interpret the record as showing that the court of appeals 'refused' to analyze the trial court's determination that the evidence was overwhelming." (Spencer's Br. 9, 11.)

Though Spencer faults the State for needing to make an educated guess as to why the court of appeals limited its analysis to whether he sufficiently pleaded his claim, he encourages this Court to adopt a far more speculative theory: that the court of appeals secretly analyzed and rejected the circuit court's decision to deny him a hearing on record-conclusively-shows grounds. (Spencer's Br. 9–11, 13–14.) There's zero basis in the record to believe that that occurred. The header of the pertinent section of the opinion reads, "Spencer pled sufficient facts entitling him to a hearing on his claim for ineffective assistance of counsel." (State's App. 111.) The issue was framed as "whether the defendant's motion alleged sufficient facts entitling him to a hearing." (State's App. 114.) And after solely analyzing Spencer's pleadings, the

court of appeals held that the circuit court was "*required* to grant Spencer a *Machner* hearing" because he "provided the who, what, where, why, when, and how of his allegations of ineffective assistance." (State's App. 113 (emphasis added).)

In fact—as both parties agree—the circuit court was only required to grant a hearing if Spencer sufficiently pleaded his claim, *and* the record didn't conclusively disprove his allegations. *See State v. Howell*, 2007 WI 75, ¶ 77 n.51, 301 Wis. 2d 350, 734 N.W.2d 48. Under Spencer's argument, we're to assume that the court of appeals meant to say that. We're also to figure that while the court of appeals spent time combing through the jury trial transcripts to decide whether the circuit court erred in finding no *Strickland*[2] prejudice, it didn't feel the need to incorporate a single sentence into its opinion indicating as much.

After reading the entire court of appeals' analysis in this case—not just its fleeting reference to a legal principle it never applies—it doesn't "make[ ] more sense to credit the court of appeals" with a correct "understanding of the law." (Spencer's Br. 13.) Spencer doesn't dispute that the court of appeals should have searched for reasons to sustain the circuit court's discretionary decision to deny him a hearing.[3] *See State v. Sulla*, 2016 WI 46, ¶ 23, 369 Wis. 2d 225, 880 N.W.2d 659; *State v. Dobbs*, 2020 WI 64, ¶ 48, 392 Wis. 2d 505, 945 N.W.2d 609. It's illogical to conclude that the appellate court performed this duty in secret, opting instead to expressly address an issue that the circuit court didn't touch. Given the language excised from *Sholar*, it makes more sense that the court of appeals thought that its hands were

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[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

[3] If he did, he wouldn't need to argue that the court of appeals secretly addressed the basis for the circuit court's discretionary decision.

tied once it concluded that Spencer sufficiently pleaded his claim.

To support his theory that "the court of appeals understands the law very well," Spencer notes that in *State v. Ruffin*, No. 2019AP1046-CR, 2021 WL 870593 (Wis. Ct. App. Mar. 9, 2021) (unpublished), the court of appeals expressly disposed of one of Ruffin's ineffective-assistance claims—failing to object to an erroneous jury instruction—on record-conclusively-shows grounds. (Spencer's Br. 11–13.) True, but irrelevant. The court of appeals didn't say anything about whether Ruffin sufficiently pleaded that claim in his postconviction motion. *See Ruffin*, 2021 WL 870593, ¶¶ 20–30. So, it's decision on that claim isn't an indicator of whether it believes a sufficiently pled ineffective-assistance claim mandates a hearing regardless of whether the record conclusively disproves the defendant's allegations.[4]

By contrast, on Ruffin's third ineffective-assistance claim—that counsel was ineffective for failing to argue self-defense—the court of appeals expressly held that Ruffin's pleadings were sufficient. *See Ruffin*, 2021 WL 870593, ¶¶ 41–47. For this reason alone, it held that Ruffin was "entitled to a *Machner* hearing addressing his claim." *Id.* ¶ 42; *see also* ¶ 53 (White, J., dissenting) (emphasis added) ("The Majority concluded *only* that Ruffin alleged sufficient material facts to be entitled to a *Machner* hearing."). The court of appeals said *nothing* of the circuit court's discretionary decision to deny Ruffin a hearing on that claim—a decision that the dissent would have affirmed

[4] Ruffin also argued a second ineffective assistance claim, namely, that trial counsel was ineffective for failing to provide authority supporting the submission of an accident instruction. *See State v. Ruffin*, No. 2019AP1046-CR, 2021 WL 870593, ¶ 40 (Wis. Ct. App. Mar. 9, 2021) (unpublished). The court of appeals rejected this argument because Ruffin was not entitled to the accident instruction as a matter of law. *Id.* ¶¶ 33–40.

because there's "no view of the evidence under which the jury could have found" that Ruffin was acting in self-defense when he tore out a piece of his pregnant girlfriend's labia during an argument.[5] *See id.* ¶¶ 3, 14, 41–47, 53. Comparatively, on one of Ruffin's other ineffective-assistance claims (where the court of appeals was silent on whether he sufficiently pleaded his claim), it fully embraced the circuit court's record-conclusively-shows analysis. *See id.* ¶¶ 20–26.

Thus, it's not true that "nothing in the *Ruffin* opinion" "indicates that the court of appeals felt it was required to remand for a hearing in spite of the state of the record."[6] (Spencer's Br. 13.) Spencer believes that *Ruffin* is just another example of the court of appeals performing a phantom analysis on whether the circuit court erred in its record-conclusively-shows determination. (Spencer's Br. 13.) Not only is that an illogical interpretation for the reasons explained above, but Judge White's dissent also refutes the argument. *See Ruffin*, 2021 WL 870593, ¶ 53. Since we know that the *Ruffin* majority's remand decision was based solely on its conclusion that Ruffin sufficiently pleaded his claim, and because we know that no reasonable juror could have found that Ruffin was acting in self-defense, it certainly sounds like the majority "felt it was required to remand for a hearing in spite of the state of the record." *See Ruffin*, 2021 WL 870593, ¶ 53; (Spencer's Br. 13.)

Finally, it seems that the underlying message of Spencer's nothing-to-see-here argument is that there's no

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[5] That one (dissenting) member of the *Ruffin* panel recognized that a sufficiently pled ineffective-assistance claim may be denied without a hearing on record-conclusively-shows grounds doesn't mean that lower courts aren't in need of guidance on this issue.

[6] This Court granted the State's petition for review in *Ruffin* on September 17, 2021.

problem with appellate courts silently overruling discretionary decisions of the circuit court. (Spencer's Br. 13–14.) There is: it leaves everyone wondering whether the appellate court addressed the issue, it provides zero guidance to circuit courts on where they went wrong, and it puts the losing party in the position of having to guess what might form the basis of a further appeal. So, even if Spencer convinces this Court that "the court of appeals understands the law" governing the granting of *Machner* hearings "very well" (Spencer's Br. 11), this Court must make clear that these phantom decisions are inappropriate.

For the above reasons, lower courts still need guidance on the well-established principle that a sufficiently pled ineffective-assistance claim may be denied without a hearing on record-conclusively-shows grounds

II. The record conclusively shows that Spencer suffered no prejudice from trial counsel's failure to object to hearsay.

Spencer defends what he views as a phantom decision reversing the circuit court's ruling that the record conclusively shows no prejudice from trial counsel's failure to object to hearsay at trial. (Spencer's Br. 13–18.) As already explained, the State does not agree that the court of appeals reached this issue. But since Spencer's argument can be viewed as an alternative ground to affirm, the State addresses it.

Although the circuit court's decision to deny Spencer a *Machner* hearing was discretionary, the underlying basis for that decision—that the record conclusively shows that Spencer is not entitled to relief—is an issue that this Court reviews de novo. *See Sulla*, 369 Wis. 2d 225, ¶ 23.

In his postconviction motion, Spencer alleged that his trial counsel was ineffective for failing to "object to hearsay testimony identifying Danny McKinney as returning fire to

protect [R.S.] at the time of the alleged robbery." (R. 147:7.) He claimed that the "testimony regarding Danny McKinney was key evidence in the State's theory of felony murder." (R. 147:10.) That is, Spencer viewed the testimony as "important" to establish "a causal link between the alleged robbery and the death of [T.M.]." (R. 147:11.)

The record conclusively shows that Spencer was not prejudiced by trial counsel's failure to object to hearsay. (R. 147:7.) More specifically, the record disproves Spencer's allegation that the challenged testimony "was key evidence in the State's theory of felony murder." (R. 147:10.)

The State has already detailed the overwhelming evidence of Spencer's guilt in its response brief in this matter. (State's Response Br. 10–13, 32–35.) Here, it focuses on the evidence establishing that an armed robbery caused T.M.'s death.

Sometime around 11 p.m., Towns witnessed an armed robbery outside R.S.'s home. (R. 181:134–40, 154.) He saw the suspects drag R.S. into the street, and within a minute, he heard "nothing but gunfire" coming from that direction. (R. 181:140–43.) The "ShotSpotter" recorded eight gunshots in a matter of seconds in that location at 11:27 p.m. (R. 181:94, 99–106.) Officer Ivy, who was in the vicinity, also heard several gunshots around 11:27 p.m. (R. 179:76–77.) And two neighbors in the area heard gunshots within a small timeframe that night. (R. 179:62, 64–65, 67–69.)

The gunshots came from two different guns in two different locations. Detective Rutherford testified that he found six bullet casings near R.S.'s residence at 3398 N. 23rd Street. (R. 180:14–27.) These all came from the same gun. (R. 181:225–26.) Roughly diagonally across the street from the six bullet casings, he found a bullet strike in a tree. (R. 36; 50; 52; 180:11–12, 30–31.) Further diagonally from the tree, police found two bullet holes in the residence at 3407 N. 23rd Street.

(R. 36; 52; 59; 179:80–81; 180:11.) This was close to where police discovered T.M.'s body in the street. (R. 36; 59; 179:79–81; 180:11, 31.)

The jurors heard testimony that Detective Hardrath searched the upper unit of 3398 N. 23rd Street.[7] (R. 180:79.) He had received information that someone may have fired shots from the kitchen window during the incident. (R. 180:82.) The view from the kitchen window shows that the tree with the bullet strike was within the line of fire. (R. 105; 180:85–86.) While it appeared to Detective Hardrath that someone had recently moved out of the unit at 3398 N. 23rd Street, he found a utility bill in Danny McKinney's name. (R. 180:92–93.) According to R.S.'s trial testimony, Danny lived with him and was home at the time of the armed robbery. (R. 182:27, 29.)

As for the other gun involved that night, Officers found two additional bullet casings roughly diagonally across the street from 3398 N. 23rd Street, near where T.M.'s body was located. (R. 36; 56; 57; 180:33–35.) Both came from the same gun—a different gun than the one that fired the six bullet casings in front of 3398 N. 23rd Street. (R. 181:226–27.) Evidence showed that Spencer fired at least one shot from this area during the encounter, aiming toward 3398 N. 23rd Street. (R. 110; 181:138–43; 182:32–37.)

To recap, even if trial counsel had successfully objected to "testimony identifying Danny McKinney as returning fire to protect [R.S.] at the time of the alleged robbery" (R. 147:7), the evidence still demonstrated that: (1) successive gunfire occurred during an armed robbery that night, (2) two guns were used, (3) one shooter fired from R.S.'s residence, toward

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[7] Detective Hardrath testified that he searched the residence at 3396 N. 23rd Street. (R. 180:79.) Other parts of the record refer to this residence as 3398 N. 23rd Street. (R. 1:2; 36; 180:13–14.) The State uses 3398 N. 23rd Street for consistency.

where police found T.M's body, (4) the other shooter fired near T.M.'s body, toward R.S.'s residence, and (5) R.S.'s roommate, Danny McKinney, was home at the time of the armed robbery. In other words, even without the hearsay, it's clear that there was an armed robbery, which caused a shootout, which caused T.M.'s death. This isn't rocket science—the hearsay wasn't "key evidence in the State's theory of felony murder." (R. 147:10.) Had the court of appeals tested Spencer's allegation against the record, it would have reached that conclusion.

Spencer doesn't meaningfully confront any of this evidence. (Spencer's Br. 17–18.) He suggests that there was a big hole in the State's case about *when* shots were fired that night because Detective Rutherford couldn't tell the jury "when any of [the bullet] casings . . . found themselves to be at the places where [police] marked them." (Spencer's Br. 17; R. 180:46.) As detailed above, there was plenty of evidence establishing that there was successive gunfire during the armed robbery that night, all which Spencer ignores. (Spencer's Br. 17.)

Along similar lines, Spencer suggests that there was a hole in the State's case about "where anyone was when [shots] were fired" because Detective Rutherford couldn't tell the jury "where anybody was, based on casings." (Spencer's Br. 17; R. 180:46.) The jury was informed that semi-automatic guns eject bullet casings. (R. 180:22.) While those casings may bounce or roll (R. 180:23), it's common sense that a group of bullet casings in a particular area suggests that there was a shooter nearby. Moreover, the State didn't just rely on the location of the bullet casings (or the jurors' common sense) to prove where one of the shooters was that night. As noted, the jury learned that there was a clear line of fire from R.S.'s kitchen window to the tree with the bullet strike and the house with the bullet holes near where police found T.M.'s body. And the State elicited R.S.'s testimony that his

roommate, Danny, was home during the armed robbery. Spencer disregards this evidence, too. (Spencer's Br. 17.)

Finally, Spencer stresses the "foundational" nature of Detective Hardrath's testimony that police had information that someone may have shot a gun from R.S.'s kitchen window that night, arguing that this "was not substantive evidence of a shooting." (Spencer's Br. 17.) Even assuming the jury credited that legal nuance during its deliberations, what matters is what the jury learned from the detective's search: the clear line of fire described above. Ignoring this allows Spencer to represent that "the 'information' did not lead to any evidence." (Spencer's Br. 18.)

In the end, Spencer's claim that "there was no evidence, other than the unobjected to hearsay, that established that, at the time of the incident, Danny McKinney was firing a gun with the intent to protect R.S.," really amounts to an argument that circumstantial evidence can't support a conviction. (Spencer's Br. 18.)

But that's not true. *See State v. Johnson*, 11 Wis. 2d 130, 134, 104 N.W.2d 379 (1960) ("Circumstantial evidence may be and often is stronger and as convincing as direct evidence.").

For the above reasons, this Court should hold that the record conclusively shows that Spencer suffered no prejudice from trial counsel's failure to object to hearsay.

CONCLUSION

This Court should reverse the court of appeals' decision granting a *Machner* hearing.

Dated this 1st day of November 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) (2019-20) for a brief produced with a proportional serif font. The length of this brief is 2,996 words.

Dated this 1st day of November 2021.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12) (2019–2020)

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) (2019–20).

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 1st day of November 2021.

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