STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP1115-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONDALE DARMON TENNER,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Has Defendant-Appellant Rondale Darmon Tenner proven that trial counsel was ineffective for not impeaching a witness for the State with her prior convictions?

The trial court held, after an evidentiary hearing, that counsel had sound strategic reasons for not impeaching Tenner's former girlfriend with her eight prior convictions. The court did not address whether Tenner proved prejudice.

This Court should affirm.

2. Did Tenner prove that he is entitled to a new trial based on newly-discovered evidence?

The trial court held that Tenner failed to prove the supposed confession to the murder by a third party (Jenkins) to a fellow prisoner (Boyd) created a reasonable probability of a different outcome because Boyd was not credible.

This Court should affirm.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case involves the application of established principles of law to the facts. It may be appropriate for summary affirmance. Wis. Stat. § (Rule) 809.21.

INTRODUCTION

1. Trial counsel had sound strategic reasons for deciding not to impeach Tenner's girlfriend, Misty Bielke, with her eight prior convictions. She was not an occurrence witness and knew nothing about the robbery until after Tenner was arrested in her home the next day. Much of her testimony involved undisputed points, and some of it was exculpatory. Tenner was able to challenge the inculpatory aspects of her testimony on cross-examination and explain

them away in his own testimony. Tenner also failed to prove a reasonable probability of a different outcome had she been impeached with those prior convictions, in light of the overwhelming evidence of his guilt.

2. The trial court properly found that the proffered newly-discovered evidence from Tenner's fellow prisoner (Ivan Boyd), relating a purported third-party pre-trial confession to the murder and robbery, was not credible. The affidavit, sworn out four years after the supposed confession, had all the earmarks of a fraud. Boyd's postconviction testimony fared no better. The trial court properly held that Tenner failed to prove a reasonable probability of a different outcome at a trial with both the old overwhelming evidence of Tenner's guilt, along with new incredible evidence of this ilk.

STATEMENT OF THE CASE

On September 19, 2014, a Milwaukee County jury found Tenner guilty of first-degree reckless homicide while using a dangerous weapon, armed robbery, and possession of a firearm by a convicted felon. (R. 117; 201:8.) The court imposed consecutive sentences totaling 35 years in prison followed by 23 years of extended supervision. (R. 202:50–51.) The judgment of conviction was entered on October 29, 2014. (R. 126.)

Tenner filed a postconviction motion on June 22, 2017, raising the same claims as here: ineffective assistance of trial counsel for failure to impeach a State's witness with prior convictions, and newly-discovered evidence. (R. 142.) Attached was an affidavit sworn out by Tenner's fellow inmate at Dodge Correctional Institution, Ivan Boyd, dated February 20, 2017. (R. 142:29–33.) Boyd stated in the affidavit that Derrel Jenkins confessed to him when they were together in the Milwaukee County jail on February 15, 2013,

that he, Jenkins, robbed and killed Hank Hagen. (R. 142:29–33.) The trial court held evidentiary hearings on January 19, 2018, and March 2, 2018. (R. 203; 204.) The trial court denied the postconviction motion in an oral decision on June 8, 2018. (R. 207; A-App. 110–127.) It issued a written order denying the motion on June 11, 2018. (R. 174; A-App. 108.) Tenner appeals from the judgment of conviction and from the order denying his motion for a new trial. (R. 175.)

The trial testimony

The State proved to the jury's satisfaction that Tenner robbed and fatally shot Hagen on Valentine's Day, February 14, 2013. Tenner arranged two drug deals with Derrel Jenkins that day. The first deal, in the late morning or early afternoon, resulted in Tenner's purchase of $50 worth of marijuana in the basement of the home where Jenkins lived with his mother. (R. 197:36–42.) Tenner called Jenkins shortly thereafter, asking if he could buy three more ounces, as he knew of other people who were interested in buying marijuana. (R. 197:43.) Jenkins said he knew of someone who could provide that amount: his "guy," Hank Hagen, also known as "Jeff," who was his supplier and dated Jenkins's sister at the time. (R. 197:44, 78–79.) Jenkins contacted "Jeff," who later arrived with the marijuana. Jenkins then used his girlfriend Audreanna Meriwether's cell phone to call Tenner and tell him the marijuana he ordered had arrived. (R. 197:44–46.)

When Tenner returned around 3:00 p.m., Jenkins again took him down to the basement and showed him the marijuana. Tenner was pleased with its quality and started negotiating a price with "Jeff" Hagen. Acting as if to pull cash out of his pocket, Tenner suddenly reached into an inside coat pocket, produced a gun, and announced a robbery. (R. 197:46–48.) After Jenkins handed Tenner $250 and Meriwether's cell phone, Tenner ordered Jenkins to take off his shirt and pants,

and ordered both Jenkins and Hagen to lie on the floor. He also threatened to shoot Meriwether, who remained lying on the couch. (R. 197:49–52.)

As Jenkins lay on the floor, he heard Tenner yell at Hagen to "stop reaching." (R. 197:51.) Jenkins again heard Tenner order Hagen to "stop reaching." He then saw Tenner lean down toward Hagen and heard a shot. (R. 197:53.) Jenkins dove toward Meriwether on the couch and he heard more gunshots; it was the wounded Hagen firing back at Tenner as he fled up the stairs. (R. 197:54–55.) Jenkins went to assist the wounded Hagen who collapsed on the stairs. (R. 197:58.) Jenkins said he took Hagen's gun from him before rendering first aid. (R. 197:56–57, 104.)

Jenkins consistently described the details of the robbery and shooting by Tenner on both cross and redirect examination. (R. 197:100–02, 110.) Jenkins insisted that Tenner shot "Jeff" Hagen. (R. 197:118.) Jenkins denied robbing and shooting Hagen, insisting that they were friends who trusted each other. (R. 197:61, 117.) Jenkins identified Tenner's photo as that of the robber and shooter in a police photo array. (R. 197:64–67.) Jenkins knew Tenner only as "Rock," whom he met a week earlier at the "Fast and Friendly" convenience store. (R. 197:62.) According to Jenkins, "Rock" arrived in a small, gold, four-door Ford or Chevy. (R. 197:63–64.) Jenkins identified police photos of items of clothing, including shoes and a jacket, as being similar to those worn by "Rock" that day. (R. 197:68–70; 198:68.)

Jenkins was arrested after the shooting and charged with selling drugs and keeping a drug house. (R. 197:68.) The charges were dismissed before trial when Jenkins successfully completed a deferred prosecution agreement and agreed to testify for the State at Tenner's trial. (R. 197:118–122.)

Jenkins testified that his girlfriend, Audreanna Meriwether, was with him in the basement the entire day, and was there when the robbery and shooting occurred. She was there for both drug deals with Tenner that day, lying on the couch under the covers. (R. 197:82, 88.) Meriwether confirmed this in her testimony. (R. 198:6–8.)

Meriwether also confirmed that Jenkins used her cell phone to make a call that day. (R. 198:8.) She was lying on the couch when the first drug deal occurred. (R. 198:10–12.) Meriwether said she recognized the buyer from somewhere, but could not place him. (R. 197:12.) She said Jenkins again used her cell phone later on to make a deal with a guy he met at the "Fast and Friendly" store. She fell asleep and awoke to a lot of noise. (R. 198:13–15.) Meriwether said that Jenkins, "Jeff" and Rondale were there when she awoke. (R. 198:16.) She said Jenkins and Rondale were struggling and she was ordered not to move or she would be shot. (R. 198:16–17.) She said Rondale was holding a black handgun. (R. 198:17.) Both Jenkins and "Jeff" were on the floor. (R. 198:18–19.) Meriwether heard Rondale order Jenkins to take off his clothes and heard him yell at "Jeff" to stop "reaching." She said Jenkins told Rondale that "Jeff" was "not reaching." (R. 198:20.) Meriwether stayed still underneath the blanket. (R. 198:21.) She said Rondale fired a shot. She then heard more gunshots. (R. 198:22.) She jumped up as Jenkins ran toward her. (R. 198:23.) Jenkins then ran to Hagen and she noticed he was bleeding. (R. 198:24.) Hagen's cousin then came down the steps. (R. 198:26.) Police soon arrived.

Meriwether denied that she and Jenkins discussed what to tell police. (R. 198:27–28.) Meriwether identified Tenner's photo in a police photo array as that of the robber, and of the man she knew as Rondale. She said that Rondale was her cousin's father. (R. 198:31–34; 199:243–45.) Meriwether positively identified photos of Tenner's clothing, including his jacket and pants, as similar to the clothing worn

by the robber. (R. 199:244.) Meriwether positively identified Tenner in court as the robber and shooter. (R. 198:34–35.) She also identified Tenner as the same person she saw make the separate drug purchase earlier that day. (R. 198:37.)

Jenkins testified that Hagen's cousin, Gilbert Perry, who was waiting for Hagen outside, rushed into the house. Jenkins yelled for Perry to call police because they had just been robbed and "Jeff" was shot. Jenkins and Perry carried Hagen up the stairs to the kitchen, where he began coughing up blood and they laid him on the floor. (R. 197:58, 107, 116.) Police arrived within three minutes of the call. (R. 197:108.)

Gilbert Perry testified that he arrived with his step-cousin, Hagen, at the Jenkins's home so Hagen could sell marijuana to someone there. Jenkins's sister, who was Hagen's girlfriend, also lived there. Perry waited outside the house in his blue Chevy Impala and dozed off while Hagen went inside to complete the deal. (R. 197:126–30.)

Perry awoke to the sound of a thump. Perry ran toward the house as a man ran out and fled in a small, gold, 4-door Ford or Chevy with two passengers. (R. 197:132–34.) Perry ran to the house and hollered inside. Jenkins, looking terrified, came up the stairs dressed only in his boxers and holding what Perry believed to be Hagen's .40 caliber pistol in his hand. (R. 197:135–36, 150, 155.) When Perry asked where his cousin was, Jenkins answered that he was in the basement and "[w]e just got stripped" (robbed). (R. 197:136–37.) Perry went to the basement, found his wounded cousin hunched over the stairs and bleeding. He called "911." (R. 197:137.) He and Jenkins tried to move Hagen upstairs. When Hagen began coughing up blood, they laid him down near the kitchen. (R. 197:138–39, 152, 156.) According to Perry, Jenkins was upset and crying, (R. 197:137), and Meriwether was still downstairs crying. (R. 197:140.) When Perry asked who did this, Jenkins answered that he did not know: "He just called his phone." (R. 197:140.)

Police soon arrived, Perry cooperated, and he gave consent to search his car. (R. 197:140–41; 198:47.) Police found in the trunk of Perry's Chevy an empty gun case for the .40 caliber Smith and Wesson handgun that, Perry said, Hagen owned and likely carried into the house that day. (R. 197:141–42; 198:47–49.)

When police arrived, they found Hagen's body on the first floor partially in the kitchen and living room area. (R. 199:12, 18.) There was blood on the basement floor and along the stairway. There were blood splatters on the wall. (R. 199:12, 26.) It appeared that several shots had been fired from the bottom of the stairs. (R 199:37–38.) Police recovered several .40 caliber Smith and Wesson casings. (R. 199:53–54.) They also found one brass casing for a .380 caliber bullet. (R. 199:50, 53.)

On a card table in the basement, police found a .40 caliber Smith and Wesson handgun. (R. 199:56–58, 73, 102.) Seven or eight shots had been fired from it, one misfired, and one bullet remained in the chamber. (R. 199:59–60.) Four of the shell casings found at the bottom of the stairs came from a .40 caliber gun. They corresponded with four bullet holes along and at the top of the stairs. (R. 199:74.) Tenner was excluded as a source of the DNA recovered from the .40 caliber gun. DNA tests were inconclusive as to either Jenkins or Hagen. (R. 199:163.) Police also recovered on the stairs a white, plastic grocery bag with blood on it next to a cell phone. (R. 199:27–28, 103.) The bag contained $274 in cash and 0.81 grams, or just short of three ounces, of marijuana. (R. 199:50, 84, 199.) Tenner's fingerprints were recovered from the white bag containing the cash and marijuana. (R. 199:127–29.)

Hagen was shot in the back with one .380 caliber bullet. (R. 199:98, 135–37.) The lone shot was fired at extremely close range, less than one-half inch away from his back. (R. 199:137–38.)

Two handguns were fired: a .40 caliber and a .380 caliber weapon. Police believed that only one shot was fired from the .380 handgun. (199:90.) The .380 handgun fired by the killer was never recovered. (R. 199:89, 93.)

A neighbor identified Tenner and the gold, four-door Ford he drove that day as having been at Jenkins's house shortly after 1:00 p.m. on February 14, 2013. She saw two passengers in the car. (R. 198:74–84; 199:177–79.)

Tenner, or someone using his phone, made several calls to the Jenkins's home phone and to Meriwether's cell phone throughout the day on February 14. The first call from Tenner's phone was at 10:57 a.m. The second was at 11:18 a.m. Other calls were placed between 1:40 and 2:48 p.m. The last call from Tenner's phone was placed at 3:36 p.m. (R. 197:124; 198:55; 199:191–92.) Cell tower records revealed that someone carrying Tenner's cell phone was near the scene of the crime from approximately 2:50 p.m. until the phone left the area at 3:09 p.m. on February 14. (R. 199:229–32.) Tenner told his girlfriend, Misty Bielke, that he lost his cell phone some time on February 14 or 15. (R. 198:104–05.)

Misty Bielke, an exotic dancer, testified that she dated Tenner at the time of the murder, and he spent the night with her on occasion. (R. 198:90–92.) Bielke also regularly let Tenner drive her gold Ford Focus. (R. 198:93.) According to Bielke, Tenner stayed with her overnight on February 13–14, and left with two other men in her Ford Focus around 9:00 a.m. on February 14. He returned around 4:00 p.m. that day. (R. 198:94–95.) When Tenner returned, Bielke said he "seemed a little nervous." He took a shower, shaved, and changed clothes. (R. 198:96, 107.) Bielke said it was not unusual for Tenner to shower and shave at her home, but this time he shaved off his sideburns. (R. 198:96–97.) He then left on foot. (R. 198:97–98.)

Bielke testified that the next day, February 15, Tenner called and asked her to pick him up on Hopkins Street. She did so and they returned to her house where, according to Bielke, they smoked marijuana and police soon arrived. (R. 198:98.) When Bielke saw police officers approaching the house, she asked Tenner why they were there. She said Tenner just stared out the window, appearing to be "nervous." (R. 198:99.) Bielke also testified that Tenner "hid" his coat in a laundry basket and this seemed strange. (R. 198:100–03, 108–09.) According to Bielke, Tenner told her not to open the door for the police. When she asked him what he did, Tenner repeated: "Don't open the door." Bielke opened the door anyway. (R. 198:101.) Bielke explained that she opened the door because Tenner said he "didn't want to go back and that he would die before he goes back." Bielke said she "didn't want to die with him" and let police inside. (R. 198:102, 110.) Bielke testified that Tenner was standing right behind her when she opened the door and police entered. She said he did not run or try to hide. (R. 198:108.) Bielke showed police where Tenner hid his coat. (R. 198:110, 120.) Police indeed recovered Tenner's coat from the laundry basket and photographed it. (R. 198:103, 114–117.) Jenkins said this coat was similar to the one worn by the robber. (R. 197:69–70; 198:66–68.) Police saw Bielke's gold, four-door Ford Focus parked outside. (R. 198:117–118.)

Tenner testified that he stayed with Misty Bielke on occasion, kept his clothes at her home in a container, often used her four-door Ford Focus, stayed with her on the night of February 13–14, 2013, and drove her Ford during the day on February 14. (R. 200:6–8, 47.) Tenner admitted that he picked up two friends and drove around with them in her Ford throughout the day. (R. 200:16.) Tenner admitted to arranging the two drug deals on his cell phone with "Rel" (Derrel Jenkins), whom he met a week earlier at the "Fast and Friendly" store. (R. 200:17–21.) He admitted to making the

earlier purchase from Jenkins in the basement, where he saw a woman sleeping on the couch. (R. 200:21–25.)

Tenner then arranged the second deal for a larger amount of marijuana later that day. Jenkins told Tenner he would check with his "guy." (R. 200:28–29.) Tenner admitted that he called Jenkins later, arranged the second deal, and returned to the house. (R. 200:30–31.) When he arrived at the house, Tenner noticed a blue Impala parked in front. (R. 200:36.) Tenner testified that, as he negotiated a price with Hagen in the basement, he handled the white plastic bag containing the zip-lock baggie of marijuana. (R. 200:38–41.) The same woman he saw during the earlier drug deal was still lying on the couch during the second deal. (R. 200:42.)

Tenner claimed that he left the house without incident after completing the second deal. (R. 200:43, 46.) Tenner testified that he returned to Misty Bielke's house later that afternoon, shaved his sideburns, smoked a marijuana blunt with her, and left for a date with another woman. (R. 200:49–51, 95.) Bielke picked him up the next day, February 15, and they returned to her house shortly before police arrived. They smoked another blunt. (R. 200:56–57.) When he looked out the window and saw police arriving, Tenner said he was nervous because he was smoking a blunt in violation of his probation and he did not want to return to jail. (R. 200:58–59, 99.) Even so, Tenner did not run, hide or resist when police came inside. (R. 200:58–59.) Tenner denied robbing or killing Hagen. He insisted that Hagen was alive when he left. (R. 200:61.)

On cross-examination, Tenner admitted that police also came to Misty Bielke's house on February 13, the day before the murder, and did not arrest him even though he admitted to them that he had not seen his parole officer. (R. 200:62–63, 98.) Tenner denied telling Bielke not to open the door for police when they arrived at her house on the 15th. He also denied hiding his jacket. (R. 200:99–100.) Tenner testified

that the jacket police found in the laundry container was not the same jacket he wore to Jenkins's house. (R. 200:101.) Tenner confirmed that he told Bielke he lost his cell phone after he arranged the drug deals with Jenkins. (R. 200:101.)

The jury found Tenner guilty of first-degree reckless homicide while armed with a dangerous weapon, armed robbery, and being a felon in possession of a firearm. (R. 117; 201:8.)

The postconviction hearing testimony

The trial court held evidentiary hearings on January 19, 2018, and March 2, 2018. (R. 203; 204.)

The facts relevant to the ineffective assistance claim.

Tenner's trial attorney, Charles Glynn, testified at the hearing. He gave the following strategic reasons for deciding not to impeach Misty Bielke with her eight criminal convictions and for rejecting the trial court's suggestion of a stipulation to put her convictions before the jury: (a) there was no need to attack Bielke's credibility because much of her testimony was helpful to his client; and (b) he wanted to avoid the potential negative spillover effect on Tenner's credibility if the jury heard that he was dating a woman with eight convictions on the day of the murder. (R. 204:7, 10–11.)

Glynn explained that he got Bielke to admit at trial that Tenner did not run, hide or resist when police came to her house on February 15, and instead stood right behind her when she let police enter the house. Bielke also testified that it was normal for Tenner to shave and clean up at her house. (R. 204:11–12.) Glynn believed that he got "good stuff" out of Bielke, and did not want to indirectly hurt Tenner's credibility by revealing to the jury that he was romantically involved with someone who had eight convictions. (R. 204:13.)

The facts relevant to the newly-discovered evidence claim.

Ivan Boyd testified that when he and Jenkins were held together in the Milwaukee police jail's "bullpen" on February 15, 2013, Jenkins tearfully confessed to him that he robbed and killed his "best friend" Hagen because he needed money for Valentine's Day and Hagen owed him money. (R. 203:11.) According to Boyd, Jenkins explained that an argument ensued after Tenner left and Jenkins shot Hagen, he "didn't mean to," but it was "in the heat of the moment." (R. 203:12–13.) Boyd testified that Jenkins told him he hid the gun in the basement, perhaps inside the furnace. Jenkins did not tell him what kind of gun he used. (R. 203:13.)

According to Boyd, Jenkins's confession came back to him in minute detail when he met Tenner while working together in the kitchen at Dodge Correctional Institution some time in 2016. (R. 203:15–16.) Boyd denied that he received anything from anyone for this information, and said he would be willing to testify to this at trial. (R. 203:20–21.)

Boyd also testified that police interviewed Jenkins shortly after Jenkins confessed to him in the bullpen. When he returned, Jenkins told Boyd that he believed he convinced police that "Rock" committed the murder, and Jenkins discussed the matter no further with Boyd. (R. 203:29.)

Boyd admitted on cross-examination to swearing out a similar affidavit for a defendant in a federal sexual assault case and wanted money in exchange for his exculpatory testimony in that case. (R. 203:21–22.) Boyd also sent a letter on December 1, 2017, to a circuit judge in support of a friend/defendant in another case, proclaiming himself a "bishop" in something called the "Nations of Fire Ministries" in Chandler, Arizona. The letter suggested that Boyd was

located at the religious site in Arizona rather than in prison. (R. 203:25–27, 30, 32.) Boyd admitted that he did not join this "church" until after January 2017.

Milwaukee Police Detective Graham testified that Boyd gave a similar account of Jenkins's supposed confession when police interviewed him on January 8, 2017. (R. 203:46–48.) Graham also interviewed Jenkins before the hearing. Jenkins denied to Graham having had any such conversation with Boyd in the bullpen or anywhere else. Graham believed it was unlikely that the two men could have had a conversation of this nature while being held with others in the bullpen. (R. 203:65–66.)

The trial court's decision.

The trial court denied the postconviction motion in an oral decision on June 8, 2018. (R. 207; A-App. 110–127.)

The court rejected Tenner's newly-discovered evidence claim because Boyd was not credible. The court described Boyd as a "pure hustler" and like a "used car salesman." It did not believe a word he had to say. (R. 207:15, A-App. 113.) The court found that Boyd's credibility was "very near zero" (R. 207:16, A-App. 114), and "pretty close to zero." After having listened to his answers and seen his demeanor on the stand, the court stated: "I don't believe a word he had to say." (R. 207:27–28, A-App. 125–26.)

In denying the motion, the court relied on the Wisconsin Supreme Court's recent decision in *State v. McAlister*, 2018 WI 34, 380 Wis. 2d 684, 911 N.W.2d 77. It held that Boyd's affidavit and testimony did not qualify as newly-discovered evidence in light of *McAlister* because Boyd presented neither a newly-discovered motive for Jenkins to accuse Tenner nor any circumstantial guarantees of trustworthiness in Boyd's testimony. (R. 207:25–26, A-App. 123–24.) The court held that the motive for the robbery had not changed since trial: money and marijuana. The motive for Jenkins to accuse Tenner had

not changed since trial: to shift criminal responsibility from himself to Tenner who, as established at trial, was present with Jenkins and Hagen in the basement during or at least shortly before the robbery and shooting. (R. 207:7–8, 27.) In light of its credibility findings, the court concluded that there was no reasonable probability the jury would have reached a different verdict had it considered both the old evidence and Boyd's not-credible new testimony. (R. 207:27–28, A-App. 125–26.)

The trial court rejected Tenner's ineffective assistance challenge. It found Attorney Glynn's testimony to be credible. (R. 207:17, A-App. 115.) It concluded that Glynn made a reasonable strategic decision not to impeach Misty Bielke with her eight criminal convictions. (R. 207:13, 17, 19–21, A-App. 111, 115, 117–19.) The trial court entered a written order denying the motion on June 11, 2018. (R. 174; A-App. 108.)

STANDARDS OF REVIEW

1. On review of an ineffective assistance of counsel challenge, this Court is presented with a mixed question of law and fact. The trial court's findings of historical fact and credibility determinations will not be disturbed unless clearly erroneous. The ultimate determinations based upon those findings of fact and credibility determinations—whether counsel's performance was constitutionally deficient and prejudicial—are questions of law subject to independent review. *State v. Trawitzki*, 2001 WI 77, ¶ 19, 244 Wis. 2d 523, 628 N.W.2d 801.

2. The decision whether the defendant has proven sufficient grounds for a new trial based on newly-discovered evidence rests in the trial court's sound discretion giving great deference to its findings of fact and credibility determinations. *State v. Plude*, 2008 WI 58, ¶ 31, 310 Wis. 2d 28, 750 N.W.2d 42; *State v. Boyce*, 75 Wis. 2d 452, 457, 249 N.W.2d 758 (1977).

ARGUMENT

I. The trial court correctly held that Tenner failed to prove trial attorney Glynn was ineffective for strategically deciding not to impeach Tenner's former girlfriend with her prior convictions.

A. The law applicable to an ineffective assistance of trial counsel challenge.

Tenner bore the burden of proving at the postconviction hearing that his trial counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To prove deficient performance, Tenner had to overcome a strong presumption that counsel acted reasonably within professional norms. *Id*. at 690. There is a strong presumption that counsel exercised reasonable professional judgment, and that counsel's decisions were based on sound trial strategy. *State v. Maloney*, 2005 WI 74, ¶ 43, 281 Wis. 2d 595, 698 N.W.2d 583. "Strategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer,* 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland*, 466 U.S. at 690).

This Court should not evaluate counsel's conduct in hindsight, but must make every effort to evaluate counsel's conduct from counsel's perspective at the time. *McAfee*, 589 F.3d at 356. Tenner was not entitled to error-free representation. Trial counsel need not even be very good to be deemed constitutionally adequate. *Id.* at 355–56. *Accord State v. Wright*, 2003 WI App 252, ¶ 28, 268 Wis. 2d 694, 673 N.W.2d 386. Ordinarily, a defendant will not prevail unless he proves that counsel's performance sunk to the level of professional malpractice. *Maloney*, 281 Wis. 2d 595, ¶ 23 n.11.

To prove prejudice, Tenner had to prove that counsel's errors were so serious they deprived him of a fair trial, a trial

whose result is reliable. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). He had to prove a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. *McAfee*, 589 F.3d at 357; *see also Trawitzki*, 244 Wis. 2d 523, ¶ 40. Tenner could not speculate. He had to affirmatively prove prejudice at the hearing. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433. "The likelihood of a different outcome 'must be substantial, not just conceivable.' [*Harrington v.*] *Richter*, 131 S. Ct. at 792." *Campbell v. Smith*, 770 F.3d 540, 549 (7th Cir. 2014).

The court need not address both the deficient performance and prejudice components if Tenner failed to make a sufficient showing as to either one of them. *State v. Mayo*, 2007 WI 78, ¶ 61, 301 Wis. 2d 642, 734 N.W.2d 115.

B. Tenner failed to prove deficient performance.

Attorney Glynn reasonably decided not to impeach Tenner's former girlfriend, Misty Bielke, with her eight criminal convictions. As counsel explained, most of her testimony concerned undisputed facts, some of it helped the defense, and it would have only hurt Tenner's credibility if the jury learned he was dating someone with a long criminal record on the day of the murder.

It was undisputed that Bielke, an exotic dancer, was one of Tenner's girlfriends at the time of the murder with whom Tenner stayed overnight on occasion. (R. 198:90–92.) Tenner stayed with Bielke the night before the murder, returned to her house around 4:00 p.m. an hour after the murder, and was at her house the day after the murder. Bielke allowed Tenner to use her gold Ford Focus, and he drove it to Jenkins's house on February 14. (R. 198:93–95.) Bielke testified that it was not unusual for Tenner to shave

and shower at her house. When he returned to Bielke's house on the afternoon of February 14, Tenner shaved off his sideburns. Tenner was present as police approached Bielke's house on February 15 and he was nervous. (R. 198:96–97.) Tenner put his coat inside a laundry container in her basement and Bielke later directed police to it. (R. 198:100–03.) Bielke let police enter the house and Tenner stood right behind her as they entered; he did not try to hide or flee. (R. 198:108.)

Counsel saw no reason to impeach Bielke with her eight convictions because her testimony concerned these largely undisputed facts, and it exculpated Tenner to the extent that she testified he did not hide or flee when police arrived at the door.

Tenner claims that Bielke had a motive to falsify: Tenner was dating other women. (Tenner's Br. 29.) But, that does not make the undisputed facts disputed, and it does nothing to enhance the exculpatory aspects of her testimony. Tenner also made it clear in his testimony that he was dating several other women while staying with Bielke. (R. 200:6–14, 50–55, 95.) Bielke testified she knew but did not care that Tenner had other girlfriends. (R. 198:105.)

Counsel reasonably believed there was little to gain by impeaching Bielke with her eight convictions, and it could have indirectly harmed Tenner's credibility by telling the jury that he was dating a criminal with a lengthy record on the day of the murder. This, counsel believed, was an unnecessary risk to take, given that Bielke did not witness the crime, knew nothing about it, and most of her testimony concerned matters not in dispute. Her testimony helped Tenner to some extent, and Tenner was able to challenge the inculpatory aspects of her testimony when he testified.

The trial court properly held that Tenner failed to prove deficient performance. Counsel's strategic decision, even if

debatable in hindsight, was reasonable. It was not "irrational or based on caprice." *State v. Breitzman*, 2017 WI 100, ¶ 65, 378 Wis. 2d 431, 904 N.W.2d 93. Because the trial court found that trial counsel "had a reasonable trial strategy," counsel's strategic decision "is virtually unassailable" here. *Id.* (citation omitted). Tenner failed to overcome the strong presumption that trial counsel's performance was constitutionally adequate. *Id.* ¶¶ 65, 75.

C. Tenner failed to prove prejudice.

The trial court, having concluded that Tenner failed to prove deficient performance, did not reach the separate issue whether he proved prejudice.

This Court should affirm on de novo review because the record conclusively shows that Tenner failed to prove prejudice, even assuming counsel's strategic decision was unreasonable. *See Trawitzki*, 244 Wis. 2d 523, ¶¶ 43–45 (counsel's failure to impeach three prosecution witnesses with their prior convictions was non-prejudicial).

Proof that Bielke had eight criminal convictions would have done little to diminish her credibility. For starters, the jury learned that she was an exotic dancer, (R. 198:90–91; 200:97), a lifestyle that might cause the average juror to at least pause when assessing Bielke's credibility. More important, as discussed above, most of her testimony concerned matters not in dispute. Also, Tenner testified that he was seeing several other women while staying with Bielke, giving Bielke a reason to be angry at him. (R. 200:6–14, 50–55, 95.)

Moreover, the only inculpatory aspects of Bielke's testimony were not so much deliberate falsehoods, but her alleged misinterpretation of Tenner's actions on February 14 and 15. It is undisputed that Bielke knew nothing about Tenner's role in the murder and robbery.

Tenner's explanations for his change of appearance, his nervousness as police approached, his cooperation when they entered, and why Bielke might lie, had a better chance of diffusing any inference of guilt from the inculpatory aspects of Bielke's testimony than would the exotic dancer's admission to eight convictions. And, again, proof that Tenner's girlfriend had eight convictions could have spilled over to indirectly hurt his own credibility.

Finally, the evidence of Tenner's guilt was overwhelming. *See Trawitzki*, 244 Wis. 2d 523, ¶ 45 ("When there is strong evidence supporting a verdict in the record, it is less likely that a defendant can prove prejudice."). Conversely, Bielke was not an occurrence witness. She was not at the scene of the murder and, by all accounts, knew nothing about it until after Tenner was arrested the next day. Proof that Bielke had eight convictions would not have diminished one whit the powerful impact of the eyewitness testimony of Jenkins and Meriwether, as corroborated by the testimony of Perry, and by the physical evidence. *See State v. Manuel*, 2005 WI 75, ¶ 75, 281 Wis. 2d 554, 697 N.W.2d 811 (failure to impeach a prosecution witness with four prior convictions was non-prejudicial in light of the shooting victim's eyewitness testimony, corroborated by the physical evidence).

Based on this record, this Court should independently determine that Tenner failed to prove a reasonable probability of a different outcome had counsel impeached Bielke with her eight prior convictions.

II. The trial court properly exercised its discretion when it denied Tenner's motion for a new trial based on newly-discovered evidence.

The success or failure of Tenner's motion for a new trial based on newly-discovered evidence hinged entirely on the credibility of the sworn affidavit and sworn postconviction

testimony of Tenner's prison-mate, Ivan Boyd. Because Boyd's postconviction testimony was incredible, and his affidavit had all the earmarks of a fraud on the court, the trial court properly exercised its discretion in rejecting the motion.

A. The proof required to obtain a new trial based on newly-discovered evidence.

Tenner faced an uphill battle in seeking a new trial based on newly-discovered evidence. The newly-discovered evidence must be sufficient to show that the conviction was a "manifest injustice." *McAlister*, 380 Wis. 2d 684, ¶ 31; *Plude*, 310 Wis. 2d 28, ¶ 32.

Tenner had to prove by clear and convincing evidence that: (1) the evidence was discovered after his conviction; (2) he was not negligent in learning of it for the first time after conviction; (3) the evidence was material to an issue in the case; and (4) the evidence was not merely cumulative. *State v. Armstrong*, 2005 WI 119, ¶ 161, 283 Wis. 2d 639, 700 N.W.2d 98.

Assuming Tenner proved by clear and convincing evidence that Boyd's evidence satisfied these four factors, he then had to convince the trial court that there is a reasonable probability of a different outcome at trial. A reasonable probability exists only if a jury looking at both the old evidence and the new evidence from Boyd would have a reasonable doubt as to Tenner's guilt. *McAlister*, 380 Wis. 2d 684, ¶ 32; *State v. Love*, 2005 WI 116, ¶¶ 43–44, 284 Wis. 2d 111, 700 N.W.2d 62. *See Plude*, 310 Wis. 2d 28, ¶¶ 32–33.

Even assuming Tenner proved the first four factors by clear and convincing evidence, "the hardest requirement to meet is that the offered evidence in view of the other evidence would have probably resulted in an acquittal." *Lock v. State*, 31 Wis. 2d 110, 117, 142 N.W.2d 183 (1966). If the new evidence would only serve to impeach the credibility of witnesses who testified at trial, it is insufficient as a matter

of law because it does not create a reasonable probability of a different result. *Simos v. State*, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972); *Lock*, 31 Wis. 2d at 117; *State v. Kimpel*, 153 Wis. 2d 697, 700–01, 451 N.W.2d 790 (Ct. App. 1989).

When the new evidence merely represents the defendant's effort to retry the credibility of a witness whose credibility was fully explored at trial, it is on balance with the old evidence less likely to cause the jury to have a reasonable doubt as to guilt. *McAlister*, 380 Wis. 2d 364, ¶¶ 35–36. Offering merely cumulative credibility evidence is not sufficient grounds for a new trial. *Id*. ¶ 37. "Where the credibility of a prosecution witness was tested at trial, evidence that again attacks the credibility of that witness is cumulative." *Id*. ¶ 39.

B. Tenner failed to prove a reasonable probability of a different outcome because the evidence in support of his motion was both cumulative and not credible.

1. The new evidence was cumulative on the fully tried issue of Jenkins's credibility.

Boyd's affidavit and postconviction testimony amounted to nothing more than Tenner's cumulative attack on Jenkins's credibility. At trial, Jenkins denied, and has consistently denied all along, that he robbed and killed his friend Hagen. (R. 197:117.) Tenner directly challenged Jenkins's denial both through cross-examination and through his own testimony claiming that he left Jenkins and Hagen behind in the basement before any shooting occurred. When interviewed by police in January 2018, Jenkins denied having any conversation with Boyd in the bullpen. (R. 203:65–66.)

In challenging Jenkins's credibility at trial, Tenner established that Jenkins: had been selling drugs for four years (R. 197:73); had one prior conviction (R. 197:118); and

was arrested and charged with keeping a drug house arising out of this incident, but the charge was eventually dismissed when he successfully completed a deferred prosecution agreement that included his agreement to testify against Tenner (R. 197:118–21; 198:66–67). Tenner also established that, when Detective Jacks interviewed Jenkins before trial, Jacks told Jenkins words to the effect that he would come off as more credible if the jury learned that he (Jenkins) had been charged with a drug offense. (R. 199:247–50.) Tenner directly challenged the credibility of Jenkins's account with his own sworn trial testimony. Tenner also established on cross-examination of Meriwether a possible financial motive for her boyfriend, Jenkins, to rob Hagen. (R. 198:41.)

This cumulative evidence, going as it does only to Jenkins's thoroughly-tested credibility, was insufficient as a matter of law to warrant the award of a new trial. The trial court properly exercised its discretion.

2. The new evidence was not credible.

A new witness's claim that a State's trial witness confessed to him *before* trial that he, not the defendant, committed the murder, is inherently unreliable. *McAlister*, 380 Wis. 2d 684, ¶¶ 56, 61. As such, it must be corroborated by other newly-discovered evidence. *Id.* ¶¶ 56–57. The other newly-discovered corroborative evidence must provide: (1) a feasible, newly-discovered motive for the initial false statement; and (2) circumstantial guarantees of trustworthiness of the confession. *Id.* ¶ 58.

Because Tenner presented Boyd's statement after trial claiming that Jenkins confessed to him before trial, Tenner had to provide both a feasible, newly-discovered motive for the initial false statement, and circumstantial guarantees of trustworthiness of his new statement. Boyd's sworn affidavit and postconviction testimony flunk both tests.

The *McAlister* decision is closely on point. There, two men named McAlister as their accomplice in a robbery and attempted robbery. *McAlister*, 380 Wis. 2d 684, ¶¶ 1, 6–7, 13–14. On Wis. Stat. § 974.06 postconviction review, McAlister presented affidavits from three men who claimed that the two accomplices told them while they were cellmates before trial that they planned to falsely testify at trial that McAlister was their accomplice. *Id.* ¶¶ 21–24. The trial court denied the motion without an evidentiary hearing and the court of appeals affirmed. *Id.* ¶ 24. The Wisconsin Supreme Court agreed with both lower courts that these affidavits did not even merit a hearing. The affidavits were only cumulative to evidence at trial challenging the credibility of the two accomplices. *Id.* ¶¶ 50–51. They were also uncorroborated by evidence of a new motive for the accomplices to falsely accuse McAlister. *Id.* ¶ 59. They lacked circumstantial guarantees of trustworthiness. *Id.* ¶¶ 60–61.

The reasoning of the *McAlister* decision applies with even greater force here, where there was an evidentiary hearing. There is no *newly-discovered* motive for Jenkins to accuse Tenner of the robbery and murder. His motive was no different at trial and it was fully explored then: Jenkins's supposed desire to steal money and marijuana from his drug-dealer Hagen, and to shift blame to Tenner ("Rock") who was also present. "[T]his motive was fully explored at trial and is not newly discovered." *McAlister*, 380 Wis. 2d 684, ¶ 59.

Unlike traditional recantation testimony, Jenkins recanted nothing here. *Id.* ¶ 54. This was "*pre*cantation" by Jenkins who, according to Boyd, admitted his own guilt *before* trial, but then accused Tenner at trial. *See id.* ¶ 54 ("The evidence here differs from classic recantation testimony in the temporal sense . . . and also because there was no formal or public renunciation . . ."). Jenkins has never recanted his trial testimony accusing Tenner. Jenkins, indeed, adamantly denied ever confessing to Boyd. (R. 203:65–66.) The inherent

lack of credibility in such precantation/non-recantation evidence should be obvious. *McAlister*, 380 Wis. 2d 684, ¶ 56 (even classic recantation testimony is inherently incredible).[1]

There are no circumstantial guarantees of trustworthiness in this evidence. Tenner came up with this affidavit four years after his trial. "[T]he length of time that passed between [Tenner's] trial and the submission of the affidavits cuts against concluding that the affidavits are trustworthy." *McAlister*, 380 Wis. 2d 684, ¶ 60. Jenkins's supposed pre-trial confession was corroborated by no one, and Jenkins has consistently denied confessing to Boyd.

Had Jenkins testified under oath at the postconviction hearing that he lied at trial and he, not Tenner, murdered Hagen, there would have been a true, formal recantation that in the right situation might have given Tenner a valid claim. Jenkins has never recanted. Like the supposed recanting witnesses in *McAlister*, Jenkins has not submitted an affidavit or any signed document recanting his trial testimony. *Id.* ¶ 55. Unlike classic recantation, Jenkins did not and will not admit under oath at trial that he killed Hagen. *Id.* ¶ 56. Boyd's account is uncorroborated by Jenkins or by any other newly-discovered evidence. *Id.* ¶ 57.

Unlike at trial, where Jenkins's credibility was fully tested and unshaken, Boyd's credibility was tested at the postconviction hearing and destroyed. Boyd's testimony was similar in detail and substance to what he averred in his affidavit. (R. 203:7–16.) Boyd believed it was "God's will" that he and Tenner met in 2016 at Dodge Correctional. (R. 203:16.)

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[1] Boyd's account of Jenkins's supposed confession is more in the nature of a prior inconsistent statement that Jenkins denied ever making, and no doubt would continue to deny making, if confronted with it at a trial. *See State v. McAlister*, 2018 WI 34, ¶ 99, 380 Wis. 2d 684, 911 N.W.2d 77 (Bradley, J., dissenting).

Boyd denied receiving anything in return for his testimony. (R. 203:20–21.)

The trial court was unwilling to take Boyd at his word. The trial court disbelieved everything Boyd said; this credibility determination is not clearly erroneous. The trial court, with the perspective of having listened to Boyd's answers and having observed his demeanor on the witness stand, properly chose not to believe Boyd. This case best explains why courts find evidence of this ilk to be "inherently unreliable," *McAlister*, 380 Wis. 2d 684, ¶ 56, and highly suspect. *Id.* ¶ 61. The court "had sound reasons to exercise its discretion and to deny [Tenner's] motion for a new trial." *Id.* ¶ 63.

Boyd's affidavit also has all the earmarks of a fraud on the court perpetrated by Tenner and Boyd. Here is why.

Boyd, apparently, has supernatural powers of recall that are triggered by the most insignificant of details. Boyd stated he first met Tenner in April 2016 in prison. (R. 142:29, ¶ 2.) When Boyd asked Tenner why he was in prison, Tenner answered that, "a guy he met at a store, Fast and Friendly, lied on him at his trial." (*Id.* ¶ 4.) The mere mention of the "Fast and Friendly" store triggered in Boyd ("rang a bell") the memory of many minute details from a conversation he supposedly had with Jenkins more than three years earlier, on February 15, 2013.

The mere mention of the name of the store caused Boyd to recall, supposedly without any prompting by Tenner, that the murder occurred on "Valentine's Day" and involved someone named "Rock."[2] (*Id.* ¶¶ 5–6.) Boyd recalled every minute detail of Jenkins's supposed confession, even that the victim was the boyfriend of Jenkins's sister; and Jenkins

[2] Tenner denied under oath at trial ever using the name "Rock." (R. 200:45.)

described the victim as "my best friend" and "my plug." (R. 142:30, ¶¶ 12, 15.)

Oddly, Jenkins supposedly told Boyd on February 15 that this happened "on Valentine's Day" (as opposed to "yesterday," (*id*. ¶ 17)), and that Jenkins blamed it on "Rock" whom he met and sold "weed" to a week earlier at the "Fast and Friendly" store (*Id*. ¶¶ 17–18). Boyd then recalled minute details of the drug deal involving Jenkins and Tenner "on Valentine's Day" (again, not "yesterday"), in which Jenkins said he agreed to sell "two ounces" of "loud" to "Rock." (*Id*. ¶¶ 18–19.) Boyd then specifically recalled that Jenkins contacted someone named "Jeff," who he said was the boyfriend of Jenkins's sister, to bring marijuana over to sell to "Rock." The transaction between "Rock" and "Jeff" took place in the basement, he recalled, "and 'Rock' left without incident," before Jenkins and "Jeff" went back downstairs. (R. 142:31, ¶¶ 20–21.) Boyd then recalled Jenkins telling him that they argued over the money from the sale because "Jeff" owed him money, and Jenkins also wanted to buy a Valentine's Day gift for his girlfriend. Boyd recalled Jenkins telling him he "got pissed off at Jeff" and decided to rob him. (*Id*. ¶ 22.) Boyd recalled Jenkins telling him that "Jeff" did not feel the need to pay him back because "Jeff" was dating Jenkins's sister and "they were sort of like family." (*Id*. ¶ 23.)

Boyd specifically recalled Jenkins telling him that he pulled out the gun and ordered the victim to "break himself." At that point, Boyd recalled, Jenkins said he decided to not just take the money and "weed," "but everything else Jeff had on him." (*Id*. ¶ 24.) Boyd specifically recalled Jenkins telling him that "Jeff" reached for his gun, "and Jenkins told Jeff to move his hand, but Jeff didn't do so, so Jenkins said he shot Jeff out of a reflex and accidentally." (*Id*.) Boyd recalled Jenkins telling him that he then walked toward the basement stairs, but "Jeff" pulled out his own gun "and started shooting back at Jenkins as he was going up the stairs." (*Id*. ¶ 25.) Boyd

recalled that Jenkins told him he then "just ran upstairs and was going to call the police." Jenkins then "took his shirt off and was distraught and went outside." (*Id.*) Boyd recalled Jenkins telling him that he saw "someone [who] had been in a car waiting outside for Jeff" and police arrived. (*Id.* ¶ 26.)

Boyd then recalled that Jenkins asked him whether he thought police "will buy my story" that "Rock" committed the murder. (R. 142:32, ¶ 27.) Boyd specifically recalled Jenkins telling him that this all occurred at his mother's house and his sister, Jeff's girlfriend, was upstairs when the shooting occurred. (*Id.* ¶ 28.) Boyd testified that he recalled police coming to take Jenkins from the cell "to show him some photos of people called 'Rock,'" and police took Jenkins out of the cell a second time later on to view more photos "of people called 'Rock.'" (*Id.* ¶ 31.) Boyd even used the same unusual slang that Jenkins used in his trial testimony, referring to marijuana as "loud." (R. 197:38–39, 73–74.)

The following are the only ways that Boyd would have been able to recall such minute details about a conversation he supposedly had four years earlier: (1) Boyd took meticulous notes during or immediately after his February 15, 2013, conversation with Jenkins in the jail and kept them all these years; (2) Boyd audio-recorded the conversation and kept the recording all these years; (3) Boyd has supernatural recall powers; (4) Boyd read a transcript of the trial testimony of both Jenkins and Tenner; (5) Tenner told Boyd in great detail what to put in his affidavit.

The first two options fall away because Boyd did not state in his affidavit or testify at the postconviction hearing that he took notes or recorded the conversation with Jenkins. He did not present any notes or a recording at the hearing. The third option is exceedingly unlikely, especially given that Boyd did not profess in his affidavit or testimony to having anything other than normal powers of recall. That leaves only

the last two options. Those are the only plausible ones: Tenner and Boyd fabricated this affidavit together.

Despite its detail, there were many gaping holes in the affidavit. As established at the postconviction hearing, Jenkins was arrested the day before, February 14, booked into the jail at 7:00 p.m., and held in the "bullpen" beginning at 8:59 p.m., before he was placed in a cell at 3:24 a.m. He was released at noon on February 16. (R. 203:38; 204:33–35.) There is nothing to indicate that Jenkins was returned to the bullpen at any time on February 15 or 16. So, as the trial court found, it is unlikely that he and Boyd were in the "bullpen" together conversing on either of those dates. (R. 207:13, A-App. 111.)

Boyd claimed in the affidavit that, as he spoke with Jenkins in the bullpen on February 15, he noticed that "Jenkins had bloody clothing on." (R. 142:30, ¶ 14.) Assuming they somehow did meet up and converse in the bullpen on the 15th or 16th, Tenner asks this Court to believe that: (a) Jenkins wore the same clothes in the bullpen on February 15 or 16 as he wore when arrested on February 14; (b) police did not have him change clothes at any point after his arrest on February 14; (c) police did not notice the blood that was so obvious to Boyd when they questioned Jenkins both at the scene and at the police station on February 14, or when they booked him into jail that night. (R. 197:59). Paragraph 14 of Boyd's affidavit is also directly contradicted by Paragraph 25, where Boyd asserted Jenkins told him "he took his shirt off" as he ran out of the house immediately after the shooting. So, Jenkins was not wearing his supposedly bloody shirt in the cell.

It gets even worse after Boyd's postconviction testimony. Boyd conceded that he might have spoken with Jenkins on February 16, or two days after the murder, rather than on February 15. (R. 203:10.) The 16th is more likely

because Boyd was not even booked into the jail until 9:50 p.m. on February 15, and was released on February 16 at 9:23 p.m. (R. 203:38–39; 204:30–32.) So, Tenner asks this Court to believe that Jenkins was still wearing his bloody clothes in jail two days after the murder but police failed to notice it. Preposterous.

Jenkins supposedly told Boyd that, once he ran outside, he saw someone waiting for "Jeff" in a car. (R. 142:31, ¶ 26.) But Jenkins had no way of knowing on February 15 that someone (Gilbert Perry) was waiting outside for Hagen when he spoke to Jenkins. That detail came out in Perry's trial testimony. Jenkins also did not identify the "someone" as being Hagen's cousin, Perry. Tenner may argue that Perry provided that detail in his statement to police at the scene on February 14. If so, Tenner (and Boyd in his affidavit) fail to explain how Jenkins would have become aware of Perry's statement a day later. Tenner may argue that he saw Perry outside, or that Hagen told him Perry was waiting outside, but the affidavit does not refer to Perry by name; it only refers to "someone" waiting in a car outside for Hagen.

Despite its detail, the affidavit is missing other critical details: any admission by Jenkins that he shot Hagen in the back at close range while he lay on the floor; any statement by Jenkins as to what he did with the .380 handgun after he shot Hagen in the back[3]; any explanation for Meriwether's eyewitness testimony identifying Tenner as the robber and killer, and fully corroborating Jenkins's trial testimony; any explanation for why Jenkins, if that is who Perry saw run outside, was carrying *Hagen*'s .40 caliber handgun and not the .380 Jenkins supposedly used to kill Hagen seconds earlier;

[3] In his postconviction testimony, deemed not credible by the trial court, Boyd recalled that Jenkins told him he hid the gun in the basement, perhaps in the furnace, but did not tell him what kind of gun he used. (R. 203:13.)

any explanation why the first man who Perry saw run out of the house, if it was not Tenner, would flee in the gold Ford Focus that Misty Bielke lent him and that Tenner drove to Jenkins's house that day; any explanation how or why Tenner left without Bielke's Ford Focus that he arrived in; any explanation what happened to his two passengers inside the Ford (R. 197:112—13); any explanation how *Tenner*'s fingerprints got on the bloody plastic bag found on the stairs containing the stolen marijuana and cash that *Jenkins* supposedly grabbed; or any explanation by Boyd how he was able to recall all of these minute details three years after his supposed conversation with Jenkins, and four years thereafter when he finally got around to swearing out the affidavit.[4]

Boyd's postconviction hearing testimony confirms that his affidavit was phony. Boyd admitted on cross-examination that he submitted a false affidavit accusing a prison guard of sexual assault in a federal court case, and he expected to be paid by the person for whom he falsely swore. (R. 203:21–22.) He also sent a letter to a judge December 1, 2017, in support of a friend in another case claiming to be the "bishop" of some "church" called the "Nation of Fire Ministries." He wrote the letter in such a way as to lead the reader to believe that Boyd was serving in the church's ministry in Chandler, Arizona at that time rather than, as he was, in prison. (R. 203:25–27, 31–32.) Boyd also admitted that he did not even join this "church" until after January 31, 2017. (R. 203:30.)

Because neither Boyd's affidavit nor his postconviction testimony was credible, Tenner failed to prove a reasonable

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[4] Boyd did not swear out the affidavit until February 20, 2017, (R. 203:18, 24–25), or ten months after he spoke about the case with Tenner. So, Boyd was somehow able to keep all of these details in his head for another ten months, and now a full four years, after his supposed February 15 or 16, 2013, conversation with Jenkins.

probability of a different jury verdict with such unreliable testimony, especially given the overwhelming evidence of Tenner's guilt discussed at Section I. B. above.

CONCLUSION

This Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 10th day of October, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,377 words.

Dated this 10th day of October, 2018.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 October, 2018.

_____
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