STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP1665-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHESTER J. MASS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT AND ORDER
ENTERED IN KENOSHA COUNTY CIRCUIT COURT,
THE HONORABLE CHAD G. KERKMAN PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUE PRESENTED

Chester Mass killed his girlfriend, Helen,[1] by shooting her in the head. He claimed it was an accident. After Mass' prior counsel withdrew, Mass' successor trial counsel independently assessed Mass' claim of accident and investigated prior counsel's consultation with a forensic pathologist, who could not opine that Mass' claim of accident was feasible. Based on that review and investigation, successor counsel decided to not consult with another forensic pathologist.

Has Mass proven that his successor trial counsel performed ineffectively?

The circuit court answered "no."

This Court should answer "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The briefs adequately present the parties' arguments. This Court's opinion is unlikely to warrant publication.

INTRODUCTION

Mass' argument consists of impermissible hindsight and speculation.

Trial counsel decided not to consult another forensic pathologist before his trial in 2015. This Court must evaluate her decision based on the facts and circumstances present at that time. From that perspective, counsel made a professionally reasonable decision.

Throughout his brief, Mass freely speculates about how a forensic pathologist's testimony might have helped him in

[1] A pseudonym used to protect her family's privacy.

2015. His speculation stems from information he received from a forensic pathologist in 2017 and 2018.

But Mass has failed to prove that his newly discovered forensic pathologist—or another identified pathologist with comparable opinions and conclusions—stood ready, willing, and available to testify on his behalf in 2015. And Mass has not proven that trial counsel knew or should have known about the possible existence of such a witness.

Finally, any deficient performance did not result in actual prejudice. Overwhelming evidence proved that Mass shot Helen with intent to kill.

STATEMENT OF THE CASE

Mass does not challenge the sufficiency of the evidence supporting his conviction for first-degree intentional homicide by use of a dangerous weapon.[2] (R. 140.) The State proved to a jury's satisfaction that on December 4, 2013 Mass intentionally shot and killed Helen in their home. (R. 1; 74; 140.)

Mass' explanations for Helen's death.

Mass has given at least three versions of the events surrounding Helen's death.

First, during a police standoff following the shooting, Mass told the police negotiator "that he and [Helen] were having sex; specifically that she was performing oral sex on him and that he wanted to change positions and during this time also they were using the gun as a prop for kinky sex. He said that he wasn't aware of it, but she had pulled the hammer back on the gun and that when they were repositioning while having sex that the gun went off and he had taken it from her hand." (R. 211:218.) He said the bullet

[2] An additional conviction for being a felon in possession of a firearm is not at issue on appeal.

struck Helen "in the back of the head." (*Id*.) According to the negotiator, Mass said "I didn't mean to do it, bro, I didn't know the gun was cocked. She was giving me head, bro. I fucked it up." (*Id*. at 224.)

Mass later gave a second version during a police interview, in which he claimed that he was out shopping on the night of the murder when someone provided him with two guns: a handgun and a shotgun. (*Id*. at 176.) When he returned home, Helen was not there, and Mass claimed that he

> lied to [Helen] through phone and text messages, telling her he had a woman at the house and he was boxing up her clothes. He knew that would get her home, and he called those bitch mind games. He knew that she would return home quickly.

(*Id*.). Mass then told police that Helen came home and they went into the bedroom and argued, which then turned into sexual activity, during which Mass showed Helen the guns and the two played with them. (*Id*. at 177.) Mass said that after "they were done with the first portion of the sexual activity, they began to tussle over the handgun." (*Id*.) According to Mass, Helen "wanted to keep the smaller handgun." (*Id*.)

> [H]e ultimately demonstrated what they were doing, but the way that he described it is that she had the handgun and he went to grab the handgun simultaneously while she rammed her buttock into him, pushing him away, and as that happened he pulled the gun and shot her in the back of the head.

(*Id*.) The record contains a video recording of Mass illustrating this version. (R. 96.)

And third, Mass told his sister-in-law "they were fooling around and [Helen] must have cocked the gun and he put it to her head and fired" while she performed oral sex on him. (R. 212:20, 21.)

The State's explanation for Helen's death.

The State alleged Mass intentionally shot Helen once in the upper left portion of her head, downward, as she knelt facing him while performing oral sex. (R. 211:91–92.)

The evidence that Mass intended to shoot and kill Helen.

The State presented substantial evidence of Mass' intent to kill Helen.

First, Mass fired the fatal shot at close range into a vital part of Helen's body—her head and brain. (R. 212:193–95.)

Second, Mass and Helen had a physically and emotionally abusive, violent relationship. (R. 211:151, 160; 212:164–67, 172–76.) Mass himself testified that "[e]veryone knows that about us - we fight, we fuck." (R. 213:57.)

Third, in the two weeks before the homicide Mass had threatened to shoot and kill Helen, saying "[t]est me, Bitch. I'll kill you" while pointing a gun at her face. (R. 212:9–12.) Mass had threated to kill Helen many times before. (*Id*. at 31.)

Fourth, Mass and Helen argued shortly before the homicide. Helen's mother spoke to her on the telephone: "[W]hen she first called me I was at work. It was around 4:30 in the afternoon. And I could tell in her voice things were bad and they were screaming at each other and I told her to get out of that house. Just please get out of that house because I was afraid for her." (R. 212:167.)

Fifth, Mass bought the murder weapon—a small, 5-shot, single-action .22 caliber revolver—shortly before the homicide. (R. 211:100–05, 114–17; 212:45–57, 63–82.) The revolver was in good condition. (R. 212:71.)

Sixth, by design, firing the revolver required Mass to take two separate and distinct actions. He had to pull the hammer back to cock the revolver, and then had to pull the trigger to fire the bullet. (*Id*. at 70.)

Seventh, Mass believed Helen had recently set him up as the target for an armed robbery. (R: 211:110, 126–131.)

Eighth, Mass told his brother and Helen's daughter that if he found out Helen had set him up, he would beat and kill her. (R. 212:31, 176–78.)

Ninth, Mass believed Helen had been sexually unfaithful to him, including with the man who attempted to rob him. (R. 211:130–31, 184–85.)

Tenth, Helen had decided to leave Mass. She had started a new job and had arranged to stay at a different house. (R 211:152; 212:12, 40–41.)

Eleventh, Mass lured Helen back to their house with a lie—that he and another woman were boxing up her clothes and throwing them away. (R. 211:153, 176, 186, 193; 212:18, 34–35, 39.)

And twelfth, Mass' behavior after shooting Helen reflected consciousness of guilt. He moved her body. (R. 211:114–15.) He did not call 911. (*Id.* at 115.) He told his brother they would dispose of her corpse: "[W]e're going to chop her up, put her in the toilet, I will throw her in the creek, leave her outside of some drug dealer's house, do this, do that. What the heck." (*Id.* at 115, 119–121.) Mass also admitted making phone calls and sending text messages from Helen's phone to set an alibi. (R. 213:70–71.)

The official autopsy report.

Milwaukee County Chief Medical Examiner Brian Peterson performed Helen's autopsy. (R. 21; 24.) She died from a single, penetrating gunshot wound to the top of her head. (R. 21:2, 3.) The bullet entered her head 4 ½ inches above—and slightly behind—her left ear. It traveled downward, slightly left to right, and lodged in her brain stem. (R. 21:5; 24:4.)

The defense's pretrial consultation with forensic pathologist Robert Corliss.

One of Mass' original trial attorneys, Matthew Perz, consulted Dr. Corliss regarding Mass' version of events as depicted in the visual recording. (R. 96; 174:2–3.) Corliss told Perz the recording was "too choppy to watch or be of any real value to me." (R. 174:2.)

Attorney Perz and his co-counsel withdrew from representation in July 2014. (R. 35.) Attorney Marcella De Peters took over in August 2014. (R. 37.)

As more fully discussed below, De Peters did not consult another pathologist. Mass went to trial in 2015. (R. 210; 211; 212; 213.)

Dr. Peterson's trial testimony.

Consistent with his autopsy findings, Dr. Peterson testified that Helen died from a penetrating gunshot wound that entered her skull high on the left side of her head and slightly above her ear. (R. 212:193.) The bullet traveled downward from the top of her head and moved left to right through her brain. (*Id*. at 194–95.)

The State's explanation for Helen's death—that Mass shot Helen by holding the gun in his right hand and firing into the top of her head as she knelt facing him—was consistent with Dr. Peterson's autopsy findings. (*Id*. at 198–99.)

Dr. Peterson also watched the video recording where Mass claimed he fired the fatal bullet into the back of Helen's head as she faced away from him. (*Id*. at 196–97.) Peterson agreed with Mass' estimate that the muzzle of the gun was more than a foot away from Helen's head. (*Id*. at 197, 208.)

But Dr. Peterson disagreed with the rest of Mass' version of events, opining that based on the actual trajectory of the bullet, Mass could not have shot Helen in the manner he claimed:

> The way I understood that, what he's describing is somebody bending down in front. He's demonstrating the gun in his right hand pointing downwards and towards the front. If you were to shoot somebody at that angle, not only would the entrance wound be in the back of the head, but given the angle the entrance wound would be lower, the bullet would end up higher towards the front. In this case the bullet did not move from back to front. It moved from left to right and it moved downward. And it came in from the left. So I can't make my arm -- I'm trying to think if I could bend my arm in a position like that. It just doesn't work.

(*Id*. at 197–98.)

The prosecutor asked Dr. Peterson: "So if Chester Mass has the gun in his right hand and the way he's describing it [Helen's] in front of him facing away from him, is it possible for him to make this entry wound on the top left portion of her head?" Peterson answered no. (*Id*. at 198.)

The guilty verdict and sentence.

The jury received instructions on first-degree intentional homicide and first-degree reckless homicide. (R. 210:17–23.) It found Mass guilty of first-degree intentional homicide. (R. 74.) He received a mandatory life sentence with eligibility for release to extended supervision beginning January 1, 2050. (R. 140.)

The postconviction motion.

Mass filed a postconviction motion alleging De Peters performed ineffectively "by not obtaining and presenting the opinion of an expert forensic pathologist who would have countered the centerpiece of the State's case, which was its theory that the forensic evidence . . . showed Chester lied to police and that the shooting occurred in a brutal and heinous manner." (R. 173:1–2.)

Mass provided an unsworn letter dated December 21, 2017, from forensic pathologist Andrew Baker. (R. 174:4–10.) Dr. Baker expressed concern over "how the autopsy findings were used in testimony to categorically exclude ("It just doesn't work") *any* possibility that Mass' explanation of the positions of [Helen's] and his bodies could be true." (*Id.* at 9.)

Dr. Baker claimed he "could picture a hypothetical position in which [Helen] is in front of Mass, 'facing' away from him but with her head turned to the left and tilted upward, which could account for the bullet pathway in her head." (*Id.*)

But he quickly qualified that statement: "This is not to say that I know (or necessarily even believe) this is what transpired, but rather to point out that such a scenario is not ruled out by the autopsy findings." (*Id.*)

He concluded that "[t]he autopsy findings cannot categorically rule out the hypothetical positions of Mass and [Helen] as portrayed in the police interrogation video, particularly if the position of [Helen's] head at the time the weapon discharged cannot be known." (*Id.* at 9–10.)

Neither the motion nor the letter specifically alleged that Dr. Baker—or any other identified forensic pathologist with comparable qualifications and opinions—had been ready, willing, and available to testify to these matters at Mass' 2015 trial. (R. 173; 174:4–10.)

And while Mass' motion faulted De Peters for not presenting "an opinion like Dr. Baker's" at trial, it did not allege facts explaining why De Peters should have known in 2015 about Dr. Baker specifically or another identified forensic pathologist with comparable opinions and conclusions. (R. 173:17.)

Despite these deficiencies, the circuit court ordered a postconviction evidentiary hearing at which Dr. Baker and Attorney De Peters testified.

Dr. Baker's postconviction testimony.

Mass retained Dr. Baker "to address whether the autopsy findings might plausibly be explained" by Mass' video-recorded version of events and his testimony. (R. 215:8.)

Referring to the recording, Dr. Baker explained that he understood Mass' version to be that Helen was in front of him with her back to him, that he took the firearm from her right hand, and that "[a]s she is in front of him, she pushes into him with her buttocks and he . . . reflexively thrusts his pelvis forward, knocking her forward. And at some point during that the gun discharged." (*Id*. at 13–14.) Baker testified that "[b]ased on the autopsy findings I would not be able to categorically exclude his explanation as being possible." (*Id*. at 14.)

Under cross-examination, Dr. Baker explained that Mass retained him at a cost of $3500. (*Id*. at 17.) And apart from very slight disagreement over the precise location of the entry wound in relation to Helen's left ear, Baker agreed with Dr. Peterson's autopsy findings. (*Id*. at 19–21, 23–24.)

Significantly, Dr. Baker also testified that the autopsy findings were consistent with the State's theory that Mass—holding the gun in his right hand—shot Helen in the upper left portion of her head as she knelt facing him. (*Id*. at 27.)

Neither side asked Dr. Baker if he—or any other identified forensic pathologist with comparable qualifications and opinions—had been ready, willing, and available to testify at Mass' 2015 trial.

Attorney De Peters' postconviction testimony.

De Peters testified that she and Mass disagreed over the theory of the case. Mass insisted that De Peters "go with the idea that it was a purely accidental shooting. I didn't think that was a good theory. I thought it was more of a reckless shooting." (R. 216:4.) Mass refused to allow De Peters to try

negotiating pleas to reckless homicide and only decided to request a lesser-included offense instruction on first-degree reckless homicide "right at the end of the trial." (*Id*. at 5.)

De Peters believed the evidence did not support Mass' version of events. (*Id*. at 5–9.) This included his claim in the video recording that Helen faced away from him—having been knocked down by his pelvis—when the gun accidentally discharged. (*Id*. at 6–8.) With an associate's help, De Peters tried to recreate the shooting scenario as Mass described it. His description did not explain the location of Helen's gunshot wound. (*Id*. at 8–9.) "Because, ultimately, if he won't give me a logical alternative explanation for how that gunshot occurred, . . . I can't do anything with that. So I have to have some other version that makes sense and he was never able to . . . give me a version that made sense." (*Id*. at 9.)

De Peters considered and rejected hiring a different expert forensic pathologist. (*Id*. at 9–10.) De Peters talked with her predecessor, Attorney Perz, about Dr. Corliss's possible involvement as a defense expert. (*Id*. at 10, 12, 13.) "What I remember is talking to him about the e-mail and asking him if he thought that any -- that -- that, essentially what Corliss and he had talked about was going to be of any help and he indicated no." (*Id*. at 17.) After that, she concluded Corliss could say nothing helpful for the defense. (*Id*. at 10.)

De Peters did not think a different forensic pathologist could have provided useful assistance because Mass could not provide a logical alternative explanation for the shooting:

> Because if [Mass] isn't telling me some logical alternative way that it happened, then what is hiring an expert going to do? I mean, you use experts in criminal cases where you have a theory of the defense that's well defined and now you're looking at someone to help support that. You don't hire an expert to try to get the defendant to say something that something happened in a certain way. In order to do that -- I

> mean, when I hire experts in my own cases, I have a theory and then I'm looking to support that theory.
>
> Here Mr. Mass never was able to adequately explain how this shooting happened in terms of where that entrance wound is and where that exit wound is and the angle of which the bullet goes through her skull. We tried to get him to demonstrate it. He never was able to demonstrate it. So what was an expert going to do to me?

(*Id*. at 10–11.)

De Peters had no reason to doubt Dr. Peterson's findings at autopsy. (*Id*. at 17–18.) Mass clung to his version of events, despite its improbability considering the location of Helen's fatal wound. (*Id*. at 18.) There was no reasonable explanation for how the gun could have accidentally discharged. (*Id*. at 18–19.)

And while De Peters wanted to try to negotiate a plea to a lesser offense, Mass would not permit it. (*Id*. at 19.)

Faced with such facts and circumstances, De Peters' options were extremely limited. As she testified "there just wasn't a lot" for her to work with. (*Id*.)

The circuit court found that, if presented to the jury, Dr. Baker's testimony would not have changed the outcome at trial (R. 217:3.) The court found no deficient performance and denied Mass' motion. (R. 193; 217:3.) Mass appeals.

STANDARD OF REVIEW

Ineffective assistance claims present mixed questions of fact and law. *State v. Alexander*, 2015 WI 6, ¶ 15, 360 Wis. 2d 292, 858 N.W.2d 662. Findings of fact receive clearly erroneous review. *Id*. The existence of deficient performance and actual prejudice receive de novo review. *Id*.

ARGUMENT

Mass failed to prove that Attorney De Peters performed ineffectively in 2015 by deciding not to consult with another forensic pathologist.

A. Controlling principles of law.

To establish ineffective assistance of counsel, Mass must prove both deficient performance and actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Erickson*, 227 Wis. 2d 758, 773–74, 596 N.W.2d 749 (1999). This Court must reject his claim if he fails to prove either prong of *Strickland*. *See State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719.

Deficient performance. De Peters performed deficiently only if her representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 687–88.

This Court should conduct a highly deferential review. That review should eliminate the distorting effects of hindsight. It should reconstruct the circumstances of De Peters' challenged conduct in 2015 and evaluate it from her perspective at the time of trial. *Id.* at 689.

Mass contends on appeal that De Peters performed deficiently by failing "to obtain the opinion of a forensic pathologist who would have countered the State's expert that Mass' explanation of the offense was not possible." (Mass' Br. 1.) That contention brings several additional principles of law into play.

First, "[t]he selection of an expert witness is a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough investigation of [the] law and facts,' is 'virtually unchallengeable.'" *Hinton v. Alabama*, 571 U.S. 263, 275 (2014) (per curiam) (alterations in original)

(citation omitted). De Peters' duty was not necessarily to make a successful investigation and find such an expert, but rather to make a reasonable investigation or decision not to investigate considering the circumstances existing at the time. *See State v. Hubert*, 181 Wis. 2d 333, 344, 510 N.W.2d 799 (Ct. App. 1993).

Second, De Peters did not perform deficiently merely because she "did not investigate enough to find the right expert." *Id.* at 343. "Where a claim is made of counsel's ineffectiveness for failing to call witnesses, it is the appellant's burden to show that the witness existed and was available; counsel was aware of, or had a duty to know of the witness; the witness was willing and able to appear; and the proposed testimony was necessary in order to avoid prejudice to the [defendant]." *Commonwealth v. Wayne*, 720 A.2d 456, 470 (Pa. 1998).

Third, presentation of defense expert testimony is not automatically required, even if the State offers its own expert. "*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expect an equal and opposite expert from the defense." *Harrington v. Richter*, 562 U.S. 86, 111 (2011).

And fourth, effective representation does not require acquittal. *State v. Koller,* 87 Wis. 2d 253, 263, 274 N.W.2d 651 (1979).

Actual prejudice. Deficient performance results in actual prejudicial when the probability of a different result, absent the error, is sufficiently strong to undermine this Court's confidence in the reliability of the existing outcome. *Strickland*, 466 U.S. at 694; *Erickson*, 227 Wis. 2d at 773.

"The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. Mere speculation about possible prejudice does not satisfy *Strickland*. *Erickson*, 227 Wis. 2d at 773–74. When, as here,

a defendant alleges ineffectiveness based on a failure to act, he must show with specificity what the act would have accomplished if it had been taken, and how its accomplishment would have probably altered the result of the proceeding. *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477.

When determining the existence or absence of actual prejudice, this Court should review the totality of the evidence. *Strickland*, 466 U.S. at 695.

B. Mass failed to prove that De Peters performed deficiently in 2015.

1. Mass failed to prove that a qualified forensic pathologist stood ready, willing, and able to testify at the 2015 trial that Dr. Peterson's autopsy results did not categorically exclude Mass' version of events.

Mass bases his claim of deficient performance on hindsight and speculation. Having discovered Dr. Baker's prospective testimony in 2017 and 2018, he freely speculates as to what an expert forensic pathologist might have contributed to his defense in 2015.

But Mass' claim of deficient performance is fundamentally flawed. He has not proven that Dr. Baker—or another qualified forensic pathologist with comparable opinions and conclusions—stood ready, willing, and able to testify in 2015 that Dr. Peterson's autopsy results did not categorically exclude Mass' version of events.

Mass' 2018 postconviction motion, Dr. Baker's 2017 unsworn letter, and Baker's testimony at the 2018 postconviction motion hearing do not confirm Baker's availability and willingness to assist Mass in 2015. Nor do

they identify another pathologist with comparable opinions and conclusions who stood ready, willing and able in 2015 to provide such assistance.

An attorney may perform deficiently "by failing to present available alternative testimony" to expert testimony presented by the State. *State v. Zimmerman*, 2003 WI App 196, ¶ 42, 266 Wis. 2d 1003, 669 N.W.2d 762. But a defendant fails to prove that his attorney performed deficiently when, as here, he fails to show the actual availability of the alternative testimony at the time of trial. The record of this case contains no such proof. Mass' complaint on appeal mimics the complaint this Court rejected in *Hubert*—"Hubert's true complaint is not that trial counsel did not investigate but that he did not investigate enough to find the right expert." 181 Wis. 2d at 343.

This Court judges the reasonableness of an attorney's acts deferentially on the facts of the case viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. *State v. Maloney*, 2005 WI 74, ¶ 25, 281 Wis. 2d 595, 698 N.W.2d 583.

But Mass' claim of deficient performance flows directly from such distortion. Hindsight and speculation are all Mass offers. They are not enough. "Where a claim is made of counsel's ineffectiveness for failing to call witnesses, it is the appellant's burden to show that the witness existed and was available; counsel was aware of, or had a duty to know of the witness; the witness was willing and able to appear; and the proposed testimony was necessary in order to avoid prejudice to the [defendant]." *Wayne*, 720 A.2d at 470. Mass has not discharged any of these burdens.

2. Mass has failed to prove that De Peters' decision not to personally consult with a forensic pathologist before trial fell below an objective standard of reasonableness.

Strickland permits trial counsel "to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. That happened here. De Peters' decision not to directly consult with a forensic pathologist before trial did not stem from oversight, inadequate preparation, or ignorance of the relevant law. It was a deliberate, considered decision, reasonable under prevailing professional norms and the facts of this case.

The decision resulted in part from a consultation between De Peters and one of Mass' original trial attorneys, Perz, who had himself sought out assistance from pathologist Corliss. (R. 216:9–10.) Corliss had no useful help to offer. (*Id*. at 10.)

Deficient performance is "necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quoting *Strickland*, 466 U.S. at 688). It was manifestly reasonable for De Peters to consult with her professional colleague, who had already explored—and rejected—the possibility of using an independent forensic pathologist to deal with the autopsy results and to find support for Mass' theory of events surrounding Helen's death. To do so falls within the wide range of professionally reasonable assistance required by the Sixth Amendment and *Strickland*.

It also resulted from certain facts confirmed at the postconviction motion hearing and cited above. Mass had provided different explanations for how Helen died. The fatal shot was fired into the top of her head, downward. And Mass

failed to provide De Peters with a logical, plausible, persuasive explanation for how the gunshot wound occurred considering his version of events. De Peters tried unsuccessfully to recreate the shooting scenario provided by Mass considering the autopsy findings, which themselves were not subject to reasonable challenge.

To reiterate: De Peters concluded that a different forensic pathologist was unlikely to prove useful assistance because Mass's version of events was not logically sound:

> Because if [Mass] isn't telling me some logical alternative way that it happened, then what is hiring an expert going to do? I mean, you use experts in criminal cases where you have a theory of the defense that's well defined and now you're looking at someone to help support that. You don't hire an expert to try to get the defendant to say something that something happened in a certain way. In order to do that -- I mean, when I hire experts in my own cases, I have a theory and then I'm looking to support that theory.
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> Here Mr. Mass never was able to adequately explain how this shooting happened in terms of where that entrance wound is and where that exit wound is and the angle of which the bullet goes through her skull. We tried to get him to demonstrate it. He never was able to demonstrate it. So what was an expert going to do to me?

(R. 216:10–11.) Mass simply provided De Peters little to work with. (*Id*. at 19.)

Strickland teaches that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at 691. De Peters determined—based on her assessment of the information Mass had given her regarding his version of events—that consultation with another independent forensic pathologist would not contribute to her defense of her client. Viewed as of the time of De Peters' conduct—as this Court must, per *Strickland*—her

determination falls within the wide range of professionally reasonable assistance contemplated by *Strickland*.

Mass' appellate argument does not support a different conclusion.

He claims that De Peters performed deficiently by not obtaining "an opinion to counter the State's expert about the position of the firearm at the time of the shooting." (Mass' Br. 15–17.) He claims that she should have consulted an expert to determine whether Mass' theory of accident "could be supported by science." (*Id*. at 17–19.) And he claims that she decided to forgo consultation with another independent pathologist because she considered him a "difficult client." (*Id.* at 19–21.)

These claims all fail for the dispositive reason discussed by the State *supra*. Mass has failed to prove that Dr. Baker—or another qualified forensic pathologist with comparable opinions and conclusions—stood ready, willing, and able to testify in 2015 that Dr. Peterson's autopsy results did not categorically exclude Mass' claim of accident.

And considering the facts of record, De Peters made a decision that fell well within the range of reasonably professional conduct *Strickland* requires.

C. Even if De Peters performed deficiently by failing to consult with and present the testimony of Dr. Baker—or another qualified forensic pathologist with comparable opinions and conclusions—Mass failed to prove actual prejudice.

If this Court agrees with Mass' criticism of De Peters' performance—or if it prefers not to consider the issue of deficient performance—the State should still prevail on appeal because Mass has failed to prove actual prejudice.

In order to prove actual prejudice, Mass must prove the existence of a reasonable probability that, but for De Peters' deficient performance, the result of his trial would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability undermines this Court's confidence in the outcome. *Id*.

Only for purposes of this argument, the State will assume that De Peters performed deficiently by failing to identify Dr. Baker—or another qualified forensic pathologist with comparable opinions and conclusions—in 2015 and failing to call him as a trial witness to rebut Dr. Peterson's testimony. The State will also assume for argument that this witness would have testified in 2015 to the same opinions and conclusions Baker expressed in 2017 and 2018.

These assumptions do the State no harm. To prove actual prejudice, the likelihood of a different result with such testimony must be substantial and not just conceivable. *Richter*, 562 U.S. at 112. Given this requirement, this Court should quickly conclude that Mass has failed to prove actual prejudice.

The State argued that Mass intentionally shot Helen once in the upper left portion of her head, downward, as she knelt facing him while performing oral sex. (R. 211:91–92.)

Mass testified that he took the gun out of Helen's hand during sexual horseplay, that he "booted her forward" and down while she faced away from him, and the gun somehow went off. (R. 213:19, 22.)

Had De Peters done what Mass claimed she should have done, a forensic pathologist would have testified for the defense at trial that Dr. Peterson's autopsy findings could not categorically rule out Mass' version of events. (R. 215:14.)

But that witness would also have made clear—as did Dr. Baker—that he or she did not know, "(or necessarily even believe) this is what transpired." (R. 174:9.)

And perhaps most importantly, that witness would have agreed that the autopsy results "would also be consistent with [Helen] being -- kneeling on the ground facing Mr. Mass, who is standing in front of her with the murder weapon or the firearm that was used here in his right hand facing down towards the top of her head, correct?" (R. 215:27.)

Had Mass offered such testimony at trial, it would have suggested only that the autopsy results did not categorically exclude Mass' theory of events. It would have proven only that his theory of events was possible.

Such testimony would not have made his theory of events or claim of accident more credible, more reasonable, or more likely.

And such testimony would not have weakened or undermined the State's substantial and powerful evidence supporting the conclusion that Mass intentionally shot and killed Helen.

Strickland directs courts to review the totality of the evidence when deciding the question of actual prejudice. 466 U.S. at 695. The totality of evidence fully establishes that Mass shot Helen with the intent to kill her.

At pages 4–6 of this brief, the State set out in detail the evidence presented at trial proving Mass' intent to kill Helen. It will not lengthen this brief by repeating that evidence here. The State will simply ask this Court to review it considering the following:

First, findings of guilt may rest on circumstantial evidence. *State v. Poellinger,* 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

Second, as here, circumstantial evidence is often more persuasive and powerful than direct evidence. *Id*.

Third, a jury may properly "infer intent from the circumstances surrounding one's acts since direct proof of intent is rare." *State v. Weeks,* 165 Wis. 2d 200, 210, 477 N.W.2d 642 (Ct. App. 1991). The circumstantial evidence supports the inference that Mass intentionally killed Helen. When a person intentionally points a loaded firearm at a vital part of the body of another person and fires it, "that fact alone establishes intent to kill, in the absence of evidence rebutting this presumption." *State v. Webster*, 196 Wis. 2d 308, 323, 538 N.W.2d 810 (Ct. App. 1995) (citation omitted); *see also State v. Dix*, 86 Wis. 2d 474, 483, 273 N.W.2d 250 (1979) ("Where the act is an assault with a deadly weapon the presumption is that there was an intent to kill.").

And fourth, Mass chose not to challenge the legal sufficiency of the evidence supporting his conviction for first-degree intentional homicide. He thereby implicitly acknowledges the inculpatory strength of the inference arising out of the State's evidence—that Mass intentionally shot and killed Helen.

If De Peters performed deficiently, Mass suffered no actual prejudice. No reason exists for this Court to lack confidence in the verdict.

Again, Mass' corresponding appellate argument fails to persuade. (Mass' Br. 21–25.)

And again, he bases his argument on an unproven assumption—that Dr. Baker or another qualified forensic pathologist with comparable opinions and conclusions was ready, willing, and able to testify in 2015 that Dr. Peterson's autopsy results did not categorically exclude Mass' version of events. He confidently asserts that "Dr. Baker would have opined for the jury that Mass' explanation was possible." (*Id*. at 22.) We do not know that because Mass failed to prove that Dr. Baker was ready, willing, and able to provide that opinion in 2015.

Mass focuses on the slight disagreement between Dr. Baker and Dr. Peterson regarding the wound track inside Helen's skull and brain, suggesting it may have led the jury to discount Peterson's testimony. (*Id*. at 21–24.) The State is skeptical. The fact that Baker himself called the disagreement *slight*, *not important*, *not significant*, *not critical*, and *minor* suggests that Mass grossly overstates its importance. (R. 215:11, 16, 27, 28.)

Mass questions the logic of a man firing a gunshot into the top of the head of a woman while she performs oral sex on him. (Mass' Br. 23.) It is, perhaps, enough to note that she may have stopped fellating him momentarily, providing Mass time to kill her without risking injury. He also points to what he calls "counter fact[s]" that he claims weaken the conclusion that he intended to kill Helen. (*Id*. at 24–25.) They are simply musings driven by hindsight. Those "counter fact[s]" did not sway the jury. There is no reason they should undermine this Court's confidence in the jury's conclusion.

CONCLUSION

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

Dated at Madison, Wisconsin this 31st day of May, 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,079 words.

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 31st day of May, 2019.

_____
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