STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP1771-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT C. WASHINGTON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did Defendant-Appellant Robert C. Washington receive ineffective assistance of counsel during the plea stage?

The circuit court answered "no."

This Court should answer "no."

2. Does newly discovered evidence entitle Washington to plea withdrawal?

The circuit court answered "no."

This Court should answer "no."

3. Did Washington receive ineffective assistance of counsel at sentencing?

The circuit court answered "no."

This Court should answer "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the briefs adequately set forth the facts and applicable precedent. *See* Wis. Stat. § (Rule) 809.22(2)(b). Publication might be warranted because this Court's decision here may apply "an established rule of law to a factual situation significantly different from that in published opinions." Wis. Stat. § (Rule) 809.23(1)(a)2.

INTRODUCTION

Washington pled guilty to shooting his two sons and killing one of them. The surviving son told police that Washington started shooting right after he came outside their house. Washington told police that the gun accidentally fired because one of his sons threw a basketball at the other son, who fell into Washington.

Washington seeks plea withdrawal on grounds of ineffective assistance of counsel and newly discovered evidence. He also seeks resentencing on grounds of ineffective assistance of counsel. Specifically, Washington argues that his lawyer was ineffective by not advising him that he could request jury instructions on lesser-included offenses at trial and by not making a better sentencing argument. Washington contends that his lawyer's performance was so inadequate at sentencing that he was constructively denied counsel. Washington further argues that his son's postconviction statement—that he threw a basketball toward Washington right before the shooting—is newly discovered evidence.

This Court should affirm. Washington's first claim of ineffective assistance is contrary to the circuit court's factual findings and credibility determinations. And all three of his claims fail under the applicable law.

STATEMENT OF THE CASE

Washington shot his two sons, Robert and William, when they were outside of his house.[1] (R. 1:2.) Washington went outside while William and Robert were playing basketball. (R. 1:2.) Washington, who appeared to be intoxicated, got into Robert and William's way. (R. 1:2.) William ran into Washington, knocking him over. (R. 1:2.) Washington threatened William, went inside the house, and came outside with a gun. (R. 1:2.) Washington shot William in the leg and Robert in the chest. (R. 1:2–3.) Robert died as a result. (R. 1:3.)

Washington admitted to police that he had drunk vodka before the shooting. (R. 1:3.) Washington said that his

[1] The State uses the pseudonym "William" to protect W.W.'s identity pursuant to Wis. Stat. § 809.86. The State uses Robert, Jr.'s real name because this victim-privacy rule does not apply to homicide victims. Wis. Stat. § 809.86(3).

children and wife had been bullying and disrespecting him, and this incident "was the last straw." (R. 1:2.) Washington further said that the gun had "accidentally" fired because William had thrown a basketball at Robert, causing Robert to fall into Washington. (R. 76:4.)

William gave a different account of the shooting. William told police that Washington came outside with a gun, Washington shot William in the leg, Robert tackled Washington, and William then heard another gunshot. (R. 76:1.) William also told police that Washington fired two shots as William and Robert "moved to 'charge him.'" (R. 77:3.)

The State charged Washington with one count of first-degree reckless homicide and one count of first-degree reckless injury—with each count carrying a sentence enhancer for use of a dangerous weapon. (R. 1:1.) The State withdrew the sentence enhancer pursuant to a plea agreement. (R. 101:2.) Washington pled guilty to both counts. (R. 101:11.) On the homicide count, the court sentenced Washington to 32 years of initial confinement and 8 years of extended supervision. (R. 102:31.) On the reckless-injury count, the court imposed a consecutive sentence of nine years of initial confinement and three years of extended supervision. (R. 102:31.)

Washington filed a motion for postconviction relief. (R. 48.) He argued that he was entitled to plea withdrawal because his lawyer, Robert Taylor, was ineffective by failing to tell him that he could seek jury instructions at trial on lesser-included homicide offenses. (R. 48:1.) Washington alternatively argued for resentencing because Attorney Taylor was ineffective at the sentencing hearing. (R. 48:1.) Washington later filed a supplemental motion alleging that he was entitled to plea withdrawal on grounds of newly discovered evidence—William said that he threw a basketball toward Washington just before the shooting. (R. 73:1.)

The circuit court held a *Machner*[2] evidentiary hearing where Attorney Taylor, Washington, and William testified. (R. 103; 104.) Attorney Taylor testified that he advised Washington before the plea hearing that they could have requested jury instructions on lesser-included offenses at trial. (R. 103:13, 14–15, 17, 18.) Attorney Taylor did not remember specifics about the discussion on lesser-included offenses. (R. 103:13, 17.) Washington testified that Attorney Taylor had not discussed with him the possibility of going to trial and requesting jury instructions on lesser-included offenses. (R. 104:38–44.) William testified that he threw a basketball at Washington before the shooting, heard gunshots "almost instantly," heard "a little tussle," and saw Robert tackling Washington and throwing the gun. (R. 104:19.) The court asked Attorney Taylor to look through his files for information about Washington's allegations. (R. 103:53.)

Attorney Taylor wrote a letter to the circuit court. (R. 84; 85.) Attorney Taylor noted that he had been asked to provide "specific notes" about lesser-included offenses and that he did "not recall if [he] specifically" addressed lesser-included offenses with Washington. (R. 84:1.) But Attorney Taylor reiterated that he had met with Washington 19 times and that they had "exhaustively discussed every aspect of a possible jury trial as well as all sentencing possibilities and court proceedings." (R. 84:1.) Attorney Taylor further explained that "Washington was adamant in his desire to not have a [j]ury trial on this matter . . . because of the additional pain a [j]ury [t]rial would cause his family." (R. 84:1–2.)

The circuit court denied Washington's postconviction motion. (R. 92:3.) The court adopted the State's proposed factual findings and legal conclusions. (R. 92:2; *see also* R. 90.)

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

It also gave additional reasoning. (R. 92:3.) The court found Attorney Taylor's testimony credible and Washington's testimony not credible. (R. 90:3.)

SUMMARY OF ARGUMENT

I. Attorney Taylor was effective during the plea stage.

I.A. Washington's first claim of ineffective assistance is contrary to the circuit court's factual findings and credibility determinations. The circuit court found that Attorney Taylor had advised Washington about the possibility of requesting jury instructions on lesser-included offenses at trial. That factual finding is dispositive of this ground for relief. Attorney Taylor's letter did not recant his *Machner* hearing testimony. And even if it did, Washington's ineffective assistance claim would still fail. Washington had the burden of proof at the *Machner* hearing, but he failed to provide any credible evidence to support his claim.

I.B. Even if Attorney Taylor did not discuss jury instructions on lesser-included offenses with Washington, he still performed adequately. A criminal defense lawyer does not have a clear duty to advise a client about jury instructions on lesser-included offenses during the plea stage. Further, given Washington's adamant desire to plead guilty to avoid causing his family further pain, it would have been reasonable for Attorney Taylor not to advise Washington about possible jury instructions at trial.

I.C. Further, Attorney Taylor did not prejudice the defense by allegedly failing to discuss lesser-included offenses with Washington. Washington would have pled guilty regardless of whether he knew about the possibility of requesting lesser-included instructions at trial. He was adamant about pleading guilty to avoid causing his family further pain.

II. William's postconviction statement about throwing a basketball at Washington is not newly discovered evidence warranting plea withdrawal for three reasons. First, it is not newly discovered because Washington knew before he was convicted that William allegedly threw a basketball at him just before the shooting. Second, William's postconviction statement is cumulative with Washington's own statements to police. Third, William's postconviction statement is a recantation of his initial statements to police and thus requires corroboration by other newly discovered evidence—but Washington has not provided any corroboration.

III. Attorney Taylor was effective at sentencing. Prejudice is not presumed because Washington was not constructively denied counsel at sentencing. To get relief on this claim, Washington must prove both deficient performance and prejudice, but he has not made either showing. Many of his allegations of deficient performance are conclusory or forfeited. And Washington cannot prove prejudice because the circuit court was aware of everything that Attorney Taylor allegedly should have said.

STANDARD OF REVIEW

When reviewing an ineffective assistance of counsel claim, this Court upholds the circuit court's factual findings unless they are clearly erroneous, but it independently determines whether counsel was ineffective. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695.

This Court upholds a circuit court's ruling on a motion for plea withdrawal based on newly discovered evidence if the circuit court properly exercised its discretion. *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

ARGUMENT

I. Attorney Taylor was effective during the plea stage.

A. A defendant bears a heavy burden to prove ineffective assistance of counsel.

"Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant is guaranteed the right to effective assistance of counsel." *State v. Balliette*, 2011 WI 79, ¶ 21, 336 Wis. 2d 358, 805 N.W.2d 334. A defendant who asserts ineffective assistance of counsel must show that (1) counsel performed deficiently and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "The defendant has the burden of proof on both components" of this test. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Id.* at 689. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.*

To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. *Strickland*'s prejudice standard "does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011) (quoting

Strickland, 466 U.S. at 693, 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* (citing *Strickland*, 466 U.S. at 693).

"If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which [the Supreme Court] expect[s] will often be so, that course should be followed." *Strickland*, 466 U.S. at 697.

B. Attorney Taylor advised Washington about lesser-included offenses.

Washington's ineffective assistance claim for plea withdrawal fails because he did not meet his burden of proof. A defendant has the burden of proof at a *Machner* hearing. *State v. Burton*, 2013 WI 61, ¶¶ 7, 89, 349 Wis. 2d 1, 832 N.W.2d 611. A defendant's claim fails if the circuit court finds his *Machner* hearing testimony incredible. *See State v. Provo*, 2004 WI App 97, ¶ 19, 272 Wis. 2d 837, 681 N.W.2d 272. This Court is "not empowered to substitute [its] own credibility determinations for those made by the trial court." *State v. Hampton*, 217 Wis. 2d 614, 623, 579 N.W.2d 260 (Ct. App. 1998).

Indeed, a circuit court's finding that an appellant's testimony was incredible "eliminates any necessity of this court's review of the quantum of evidence." *Posnanski v. City of W. Allis*, 61 Wis. 2d 461, 466, 213 N.W.2d 51 (1973). In other words, an appellate court "is not obliged" to review findings for clear error "when the finder of fact chooses to find incredible the testimony upon which an appellant relies." *Id.*

Washington's first claim of ineffective assistance fails under those principles. At the *Machner* hearing, Washington testified that Attorney Taylor had not discussed with him the possibility of going to trial and requesting jury instructions on lesser-included offenses. (R. 104:38–44.) But the circuit court found "the testimony of defendant Robert Washington to not be credible." (R. 90:3; *see also* R. 92:2.) That credibility finding

disposes of this claim of ineffective assistance. This Court is not empowered to reverse that credibility finding. Without any credible evidence to support his claim, Washington has failed to meet his burden of proof at the *Machner* hearing.

Further, Washington's ineffective assistance claim fails even if this Court reviews the circuit court's factual findings and credibility determinations. Again, Washington had the burden of proving at the *Machner* hearing that Attorney Taylor did not discuss lesser-included offenses with him. *See Burton*, 349 Wis. 2d 1, ¶¶ 7, 89. The State did not have a burden of proving that such a discussion took place. In any event, the State met that nonexistent burden, the circuit court's factual findings support this conclusion, and those findings are not clearly erroneous.

At the *Machner* hearing, Attorney Taylor testified that he had advised Washington before the plea hearing that they could have requested jury instructions on lesser-included offenses at trial. (R. 103:13, 14–15, 17, 18.) Attorney Taylor did not remember specifics about the discussion on lesser-included offenses. (R. 103:13, 17.) Attorney Taylor remembered discussing the possibility of requesting a lesser-included instruction on homicide by intoxicated use of a firearm, but Washington had said "that he was not intoxicated" during the shooting. (R. 103:18.) Attorney Taylor did not specifically remember discussing the lesser-included offense of second-degree reckless homicide, but he testified that he had "probably" discussed it with Washington. (R. 103:17.) When Attorney Taylor was asked whether he had discussed with Washington the lesser-included offense of homicide by negligent handling of a firearm, he said that they had "discussed every possibility. I can't recall exactly specifically." (R. 103:19.) The circuit court found "the testimony of Attorney Taylor to be credible." (R. 90:3; *see also* R. 92:2.)

Yet Washington argues that the circuit court's findings were clearly erroneous because Attorney Taylor's letter "corrected his testimony." (Washington's Br. 23.) Washington is wrong to suggest that Attorney Taylor's letter was a recantation of his *Machner* hearing testimony. At the *Machner* hearing, the court asked Attorney Taylor to look through his file for relevant information. (R. 103:53.) Attorney Taylor stated in his letter that he was responding to that request. (R. 84:1.) Attorney Taylor noted that he had been asked to provide "specific notes" about lesser-included offenses and that he did "not recall if [he] specifically" addressed lesser-included offenses with Washington. (R. 84:1.) But Attorney Taylor reiterated that he had met with Washington 19 times and that they had "exhaustively discussed every aspect of a possible jury trial as well as all sentencing possibilities and court proceedings." (R. 84:1.) "[R]easonable inferences drawn from the evidence can support a finding of fact." *State v. Gomez*, 179 Wis. 2d 400, 406, 507 N.W.2d 378 (Ct. App. 1993) (citation omitted). The circuit court could reasonably infer from this letter that Attorney Taylor and Washington had discussed jury instructions on lesser-included offenses, although Attorney Taylor did not remember the specifics of that discussion.

Washington's contrary arguments have no merit.

First, Washington argues that, because Attorney Taylor's letter is documentary evidence, this Court should review the letter de novo rather than reviewing the circuit court's findings for clear error. (Washington's Br. 22, 24.) Washington is wrong. "[W]here the underlying facts are *in dispute*, the circuit court resolves that dispute by exercising its fact-finding function, and its findings are subject to the clearly erroneous standard of review *even if they are based solely on documentary evidence*." *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶ 38 n.10, 319 Wis. 2d 1, 768 N.W.2d 615 (emphases added). The so-called "'documentary evidence

exception' to the clearly erroneous standard of review" does not apply in that situation. *Id.* Instead, "the documentary evidence exception applies to *inferences* the circuit court draws from 'established or undisputed facts' based solely on a documentary record." *Id.* An appellate court thus "normally" reviews de novo "the *sufficiency* of documentary evidence," such as the sufficiency of a criminal complaint. *Id.* ¶ 37 n.9. But an appellate court applies the clear-error standard when reviewing the circuit court's resolution of a *disputed* factual issue. *Id.* ¶ 38 n.10. This Court thus owes deference to the circuit court's factual findings, even if they were partly based on Attorney Taylor's letter.

Second, Washington argues that the circuit court ignored Attorney Taylor's letter. (Washington's Br. 23–24.) But Washington has not explained how this omission, even if true, would make the circuit court's findings clearly erroneous. In any event, the circuit court mentioned the letter twice in its postconviction decision. (R. 92:1–2.) Washington also faults the circuit court for not "say[ing] why it thought Mr. Taylor's in-court testimony should trump his later written statements" and for not "offer[ing] any alternative interpretation about the letter's meaning." (Washington's Br. 23.) The most likely explanation is that the circuit court did not think that the letter could plausibly be interpreted as a recantation of Attorney Taylor's testimony. And a circuit court is not required to explain its findings and credibility determinations. *See State v. Young*, 2009 WI App 22, ¶¶ 18–20, 316 Wis. 2d 114, 762 N.W.2d 736.

Third, Washington argues that the evidence was "effectively uncontradicted" that Attorney Taylor had not advised him about possible jury instructions on lesser-included offenses. (Washington's Br. 22.) Washington is wrong for the reasons stated above. Attorney Taylor's testimony and letter, as well as reasonable inferences from those two things, support the circuit court's finding that

Attorney Taylor had advised Washington on lesser-included instructions.

Even if Washington is correct that the evidence was uncontradicted, he still would not be entitled to relief on this ineffective assistance claim. "A trial court can properly reject even uncontroverted testimony if it finds the facts underpinning the testimony are untrue." *State v. Kimbrough*, 2001 WI App 138, ¶ 29, 246 Wis. 2d 648, 630 N.W.2d 752. This principle is well-established. *See, e.g.*, *State v. Krieger*, 163 Wis. 2d 241, 256–57, 471 N.W.2d 599 (Ct. App. 1991) (rejecting the argument "that the trial court erred in not considering the uncontradicted evidence," because "the finder of fact is free to disbelieve the evidence presented by either side"); *Laribee v. Laribee*, 138 Wis. 2d 46, 52 & n.1, 405 N.W.2d 679 (Ct. App. 1987) (noting that a circuit court may reject "uncontradicted testimony" that it expressly finds incredible). The circuit court expressly found Washington's *Machner* hearing testimony not credible. (R. 90:3; *see also* R. 92:2.) The court was not required to believe Washington's testimony, even if it was uncontradicted about lesser-included offenses.

And, to reiterate, Washington had the burden of proof at the *Machner* hearing. He cannot meet that burden because the circuit court found incredible the testimony on which this claim of ineffective assistance relies. Washington has not even tried to explain how he could meet his burden of proof without any credible evidence to support his claim. Even if Washington's *Machner* hearing testimony about lesser-included offenses was uncontradicted, he failed to meet his burden of proof because the circuit court found his testimony incredible.

In short, Washington's first claim of ineffective assistance has no merit because it conflicts with the circuit court's factual findings and credibility determinations.

C. In any event, counsel was not required to advise Washington about lesser-included offenses.

Even if Attorney Taylor had no discussion with Washington about jury instructions on lesser-included offenses, his performance was adequate for two reasons.

First, a lawyer has no clear duty to discuss possible jury instructions on lesser-included offenses during the plea stage. "[I]neffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *State v. Maloney*, 2005 WI 74, ¶ 29, 281 Wis. 2d 595, 698 N.W.2d 583 (citation omitted). "At a plea hearing, a record is made to establish that a defendant enters his plea knowingly, intelligently, and voluntarily. Trial counsel must provide enough information to a defendant that any plea is made with a constitutionally-required degree of understanding and willingness." *Burton*, 349 Wis. 2d 1, ¶ 65. A defendant is not required to be aware of lesser-included offenses for his guilty plea to be knowing, intelligent, and voluntary. *See State v. Duychak*, 133 Wis. 2d 307, 314–15, 395 N.W.2d 795 (Ct. App. 1986). It follows that a criminal defense lawyer need not advise a client about lesser-included offenses before a guilty plea.

Attorney Taylor thus performed adequately even if he failed to inform Washington about possible jury instructions on lesser-included offenses. An attorney has no clear duty to discuss this issue with a client before a guilty plea.

Second, even if such a duty might exist in some cases, Attorney Taylor had no such duty under the facts of this case. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. As explained in Attorney Taylor's letter, "Washington was adamant in his

desire to not have a [j]ury trial on this matter . . . because of the additional pain a [j]ury [t]rial would cause his family." (R. 84:1–2.) Attorney Taylor similarly testified that "Washington adamantly wanted to go to have a plea in this matter" and "didn't want to go to trial." (R. 103:14, 15.) Given Washington's adamant desire to plead guilty and avoid a trial, it would have been reasonable for Attorney Taylor not to discuss possible jury instructions on lesser charges at trial.

Washington argues that a lawyer has a duty to advise a client about lesser-included offenses before a guilty plea. He relies on an American Bar Association (ABA) Model Rule about advising clients as well as non-binding federal cases holding that an attorney performed deficiently at trial by not requesting instructions on lesser-included offenses. (Washington's Br. 28–29.) But this ABA Model Rule does not mention lesser-included offenses, and, in any event, "the Constitution does not codify the ABA's Model Rules." *Montejo v. Louisiana*, 556 U.S. 778, 790 (2009).

The federal cases on which Washington relies are not analogous to his situation. The better analogy is that a lawyer need not consult with a defendant before declining to request instructions on lesser-included offenses at trial. *See, e.g.*, *State v. Eckert*, 203 Wis. 2d 497, 509–11, 553 N.W.2d 539 (Ct. App. 1996); *see also State v. Ambuehl*, 145 Wis. 2d 343, 355–56, 425 N.W.2d 649 (Ct. App. 1988) (holding that a lawyer need not discuss lesser-included instructions with a defendant multiple times at trial, rejecting ABA Model Rule commentary stating that a defendant gets to decide whether to request such instructions). Washington has failed to show that Attorney Taylor violated a clear duty if he did not discuss lesser-included instructions.

Washington also argues that Attorney Taylor performed deficiently because his failure to discuss lesser-included instructions "resulted from oversight rather than a reasoned defense strategy." (Washington's Br. 30.) But even

if an attorney's act or omission resulted from oversight, a court must still determine whether it would have had a reasonable basis had it been a strategic decision. *See Kimbrough*, 246 Wis. 2d 648, ¶¶ 31–32; *see also Murray v. Carrier*, 477 U.S. 478, 488, 492 (1986) (noting that the distinction between an attorney's oversight and strategic miscalculation is "tenuous" and has "uncertain dimensions"). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (citing *Strickland*, 466 U.S. at 688). "So, regardless of defense counsel's thought process, if counsel's conduct falls within what a reasonably competent defense attorney could have done, then it was not deficient performance." *State v. Jackson*, 2011 WI App 63, ¶ 9, 333 Wis. 2d 665, 799 N.W.2d 461. Even if Attorney Taylor did not discuss lesser-included instructions with Washington due to an oversight, that omission was reasonable because of Washington's adamant desire to avoid a trial to spare his family more pain.

To be sure, "ineffective assistance can consist of counsel's conduct that 'resulted from inattention, not reasoned strategic judgment.'" *State v. McDowell*, 2003 WI App 168, ¶ 62, 266 Wis. 2d 599, 669 N.W.2d 204 (quoting *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)), *aff'd*, 2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d 500. But saying that an oversight *can be* ineffective assistance does not mean that it necessarily *is* ineffective assistance.

In sum, Washington's first claim of ineffective assistance fails because he has not met his burden of proving that Attorney Taylor never discussed lesser-included instructions with him. And even if Washington met that burden, his claim still fails because Attorney Taylor had no clear duty to discuss lesser-included instructions and because his failure to discuss this issue was reasonable under the facts of this case.

D. Washington has not proven prejudice.

Further, even if it was deficient performance, Attorney Taylor's alleged failure to discuss lesser-included instructions did not prejudice the defense. "In the context of guilty pleas," "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985). Washington would have pled guilty regardless of whether he knew about the possibility of requesting lesser-included instructions at trial. Again, "Washington was adamant in his desire to not have a [j]ury trial on this matter . . . because of the additional pain a [j]ury [t]rial would cause his family." (R. 84:1–2.) In exchange for Washington's guilty pleas, the State agreed to dismiss a weapon-related sentence enhancer. (R. 101:2; 103:7.) And courts often give lighter sentences to defendants who plead guilty compared to defendants who get convicted of the same crimes after trial. *Provo*, 272 Wis. 2d 837, ¶ 18.

So, Washington's guilty pleas allowed him to try to minimize his sentence while not causing his family the pain of going through a trial. Had he gone to trial, there was a chance that the jury would have convicted him of the offenses charged, including the sentence enhancer—and he would have lost the hope for sentence leniency that often comes with guilty pleas. Given his adamant desire not to put his family through the stress of a trial, the possibility of being convicted of a lesser-included offense at trial would not have motivated Washington to insist on going to trial.

Washington argues that his desire to get a reduced charge shows that he would have insisted on going to trial in the hope of getting a conviction for a lesser-included offense. (Washington's Br. 31–32.) That logic does not hold up. Unlike going to trial, getting a reduced charge during the plea-

bargaining stage carried no risk of conviction on a greater offense. And a charge reduction would not have put Washington's family through the ordeal of a trial—stress that he did not want to cause.

In a footnote, Washington argues that "the procedural history of the case"—specifically, this case being set for trial—shows that he wanted to go to trial. (Washington's Br. 33 n.6.) But an argument is forfeited if it is raised only in a footnote. *State v. Santana-Lopez*, 2000 WI App 122, ¶ 6 n.4, 237 Wis. 2d 332, 613 N.W.2d 918. In any event, that argument has no merit. Attorney Taylor explained that the case had been set for trial so that he would have more time to "review discovery in greater detail" and "do more negotiations" with the prosecutor. (R. 103:48.)

In another footnote, Washington argues that he is entitled to withdraw both of his pleas, even though his ineffectiveness claim relates only to the homicide count. (Washington's Br. 35 n.7.) Washington forfeited that argument by raising it only in a footnote. Further, when one conviction is invalid, whether to allow plea withdrawal on other counts is left to the circuit court's discretion. *State v. Roou*, 2007 WI App 193, ¶¶ 13, 26, 305 Wis. 2d 164, 738 N.W.2d 173. This Court should thus not decide this issue.

In short, Washington has failed to prove that Attorney Taylor prejudiced the defense by allegedly not discussing the possibility of requesting lesser-included instructions at trial.

II. Washington's son's recantation does not justify plea withdrawal.

A. A defendant faces a high hurdle when seeking to withdraw a plea based on newly discovered evidence.

A defendant must satisfy five requirements to obtain relief based on newly discovered evidence. To meet the first

four requirements, a defendant must show by clear and convincing evidence that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." *State v. Avery*, 2013 WI 13, ¶ 25, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted).

If a defendant establishes those four factors, then a court must consider the fifth requirement, "whether a reasonable probability exists that a different result would be reached in a trial." *Avery*, 345 Wis. 2d 407, ¶ 25 (citation omitted). "A reasonable probability of a different result exists if there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt." *Id.* A defendant need *not* prove this prong by clear and convincing evidence because the reasonable-probability standard itself is the burden of proof. *State v. Armstrong*, 2005 WI 119, ¶ 162, 283 Wis. 2d 639, 700 N.W.2d 98.

A newly discovered evidence claim fails unless it meets all five of those requirements. *Eckert*, 203 Wis. 2d at 516.

When newly discovered evidence is a recantation, it must meet a sixth requirement—it must be corroborated by other newly discovered evidence. *State v. Ferguson*, 2014 WI App 48, ¶ 24, 354 Wis. 2d 253, 847 N.W.2d 900.[3]

B. Washington did not discover the evidence in question after he was convicted, and he was negligent in seeking it.

"[T]he test to determine if evidence is newly discovered is not what counsel knows or is aware of, but what the

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[3] The State will assume for the sake of argument that Washington has met the materiality and reasonable-probability prongs of the five-part *Avery* test.

client . . . is or should be aware." *State v. Williams*, 2001 WI App 155, ¶ 21, 246 Wis. 2d 722, 631 N.W.2d 623 (citing *Kocinski v. Home Ins. Co.*, 147 Wis. 2d 728, 744, 433 N.W.2d 654 (Ct. App. 1988), *aff'd*, 154 Wis. 2d 56, 452 N.W.2d 360 (1990)). This test does not focus on a litigant's awareness of a *statement or document* but rather looks at whether the litigant was (or should have been) aware of the *information* contained within the statement or document.

In *Williams*, for example, the State argued that a psychologist's report was newly discovered evidence that justified reconsideration of a circuit court's decision. *Williams*, 246 Wis. 2d 722, ¶ 7. This Court stated, "Under the State's logic, if the report itself is new, the report constitutes newly discovered evidence, regardless of the content of the report. We disagree." *Id.* ¶ 13. This Court concluded that the State had failed to prove that the report was newly discovered because the State "had in its possession all of the information contained in [the] report" before the circuit court's decision in question. *Id.* ¶ 21.

This Court in *Kocinski*, 147 Wis. 2d at 743–44, likewise concluded that a report was not newly discovered because the appellant previously knew the information that was contained in the report. The appellant thus failed the discovery and negligence prongs of the five-part *Avery* test. *Id.* at 744.

Courts have similarly held that affidavits were not newly discovered because the defendant knew about the *content* of the affidavits before trial. In *State v. Shanks*, the defendant argued that two affidavits were newly discovered evidence. 2002 WI App 93, ¶ 14, 253 Wis. 2d 600, 644 N.W.2d 275. The affiants said that they were with the defendant during a timeframe when he allegedly sexually assaulted a child. *Id.* ¶¶ 15–16. This Court concluded that the defendant failed to show "that the evidence came to the attention of the defense after trial and that the defendant was not negligent

in seeking to discover it." *Id.* ¶ 20. This Court reasoned that "it was within Shanks's own personal knowledge that he [and the two affiants] had been together the night [in question]. Shanks fails to explain why he was unaware, until after trial, of his own whereabouts on [that night]." *Id.* ¶ 21.

The supreme court reached a similar conclusion regarding new testimony in *State v. Vennemann*, 180 Wis. 2d 81, 98, 508 N.W.2d 404 (1993). The defendant there argued that the testimony of four people who were implicated in his crimes was newly discovered evidence. *Id.* The supreme court rejected that argument, reasoning that, "[t]hough Vennemann may have been unaware of the exact testimony each witness would give, the evidence was in existence at the time of the trial." *Id.*

Under those precedents, Washington fails the discovery and negligence prongs of the five-part *Avery* test. The purported newly discovered evidence is that William allegedly threw a basketball toward Washington right before Washington fired a gun. (Washington's Br. 36–41.) But long before Washington was convicted, he told police that his gun accidentally fired because William threw a basketball at Robert, who fell into Washington. (R. 76:4–5.) This account of the shooting is not newly discovered evidence.

In arguing that he met the discovery and negligence prongs, Washington incorrectly focuses on William's *postconviction testimony* as being the newly discovered evidence. (Washington's Br. 38.) That approach conflicts with *Williams*, *Kocinski*, *Shanks*, and *Vennemann*—all of which focused on the *content* of the new testimony or new document, rather than focusing on the testimony or document itself. If the content is not newly discovered, then the litigant fails the discovery and negligence prongs of the analysis. Here, the content of William's postconviction testimony—that William allegedly threw a basketball toward Washington right before the gunshots—is not newly discovered. Washington knew

that information before he was convicted. Indeed, Washington had "personal knowledge" of the shooting because he was the person who fired the shots. *Shanks*, 253 Wis. 2d 600, ¶ 21.

C. Washington's son's postconviction testimony is cumulative.

To justify plea withdrawal based on newly discovered evidence, "the defendant must prove, by clear and convincing evidence, that . . . the [new] evidence is not merely cumulative." *Ferguson*, 354 Wis. 2d 253, ¶ 24. "Newly discovered evidence is cumulative where it tends to address 'a fact established by existing evidence.'" *State v. McAlister*, 2018 WI 34, ¶ 37, 380 Wis. 2d 684, 911 N.W.2d 77 (citation omitted), *reconsideration denied*, 2018 WI 90, 383 Wis. 2d 146, 918 N.W.2d 77, *cert. denied*, No. 18-6556, 2019 WL 113357 (U.S. Jan. 7, 2019). Stated differently, cumulative evidence is defined as "additional evidence of the same general character, to some fact or point, which was subject of proof before." *Id.* ¶ 39. "Recantation testimony is often termed cumulative because it 'serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction.'" *Id.* (citation omitted).

William's postconviction testimony is cumulative with Washington's statement to police. Washington told police that William threw a basketball at Robert, the ball hit Robert in the back and knocked him into Washington, and the gun accidentally fired as Washington was falling. (R. 76:4.) Similarly, William testified at the postconviction hearing that he threw a basketball at Washington and then "almost instantly" heard gunshots. (R. 104:19.) Washington argues that this postconviction testimony "corroborates" his account of the shooting. (Washington's Br. 39.) In other words, William's postconviction testimony is cumulative with Washington's account of the shooting. This conclusion is a "sufficient" basis for rejecting Washington's claim for plea

withdrawal based on newly discovered evidence. *McAlister*, 380 Wis. 2d 684, ¶ 51.

D. Washington's son's recantation fails the corroboration requirement.

"[W]itness recantations 'must be looked upon with the utmost suspicion.'" *Haouari v. United States*, 510 F.3d 350, 353 (2d Cir. 2007) (citation omitted) (collecting cases). Some reasons why are that recantations frustrate the finality of convictions and are "very often unreliable and given for suspect motives." *Id.* (citation omitted). The suspicion toward recantations is further supported by the fact that defendants routinely attempt to attack their convictions with recantations. *Id.* Wisconsin recognizes that "[r]ecantations are inherently unreliable." *McAlister*, 380 Wis. 2d 684, ¶ 33 (alteration in original) (quoting *McCallum*, 208 Wis. 2d at 476).

Before a recantation can allow a defendant relief from a criminal conviction, it "must be corroborated by *other newly discovered evidence*." *Ferguson*, 354 Wis. 2d 253, ¶ 25 (quoting *McCallum*, 208 Wis. 2d at 476). "Corroboration requires newly discovered evidence of both: (1) a feasible motive for the initial false statement; and (2) circumstantial guarantees of the trustworthiness of the recantation." *McAlister*, 380 Wis. 2d 684, ¶ 58.

A person's statement is a recantation requiring corroboration if it is "presented after" the person gave a previous statement and it "attack[s] the veracity" of the previous statement. *McAlister*, 380 Wis. 2d 684, ¶ 55. In *McAlister*, the supreme court held that the corroboration requirement applied to two witnesses' statements that were allegedly made before trial because (1) the defendant presented the statements after the witnesses testified at his trial and (2) the statements attacked the veracity of the witnesses' trial testimony. *Id.* ¶¶ 52–55. The supreme court

noted that the affiants' statements "differ[ed] from classic recantation testimony" because the statements were first made before trial and because the witnesses did not formally or publicly renounce their trial testimony. *Id.* ¶ 54. But the court held that the corroboration requirement applied because, "as with classic recantation testimony, the witnesses' statements are presented after the witnesses' trial testimony and attack the veracity of the witnesses' own testimony." *Id.* ¶ 55.

In *State v. Mayo*, this Court also applied the corroboration requirement to a statement that was not a classic recantation. At the defendant's trial in *Mayo*, a witness testified that she and the defendant were not involved in a murder. *State v. Mayo*, 217 Wis. 2d 217, 220, 579 N.W.2d 768 (Ct. App. 1998). After the defendant was convicted of the murder, the witness said that "she killed [the victim] and that Mayo played no part in the murder." *Id.* at 221. This Court noted that the witness's postconviction statement did "not recant former accusations" against the defendant but did recant her own denial of involvement in the murder. *Id.* at 227. This Court held that "the corroboration rule is equally applicable in such a situation." *Id.*

Here, William's postconviction account of the shooting is a type of recantation that must be corroborated to entitle Washington to plea withdrawal. This account is being "presented after" William gave statements to police and "attack[s] the veracity" of those statements. *McAlister*, 380 Wis. 2d 684, ¶ 55. Washington recognizes that, "[i]n both statements, William told police that Mr. Washington started shooting almost immediately after he came back outside with the gun." (Washington's Br. 4.) At a postconviction hearing, however, William testified that he threw a basketball at Washington and that the gun then fired multiple times. (R. 104:15–19.) As Washington acknowledges, William's statements to police "certainly suggested" that William did

not throw a basketball at Washington before the shooting. (Washington's Br. 38.) And, as Washington further recognizes, William's statements to police "appeared to contradict Mr. Washington's account" of the shooting having been an accident caused by a basketball. (Washington's Br. 39.) Washington contends that William's postconviction testimony "corroborates the most important aspect of Mr. Washington's account—that he shot [Robert] accidentally because [William] threw a basketball in his direction." (Washington's Br. 39.)

Washington is thus trying to use William's postconviction testimony to attack the veracity of William's statements to police. Those police statements indicated that Washington started shooting almost immediately when he came outside—and they strongly implied that the shooting was *not* an accident caused by a basketball being thrown at Washington. (R. 76:1; 77:3.) William's postconviction testimony conflicts with those crucial aspects of his prior statements to police.

Corroboration is required here even though William's postconviction testimony might not be a "classic recantation." *McAlister*, 380 Wis. 2d 684, ¶ 55. A classic recantation involves a formal or public renunciation of former testimony or statements, but the corroboration requirement can apply even without such renunciation. *Id.* ¶¶ 53–55. It is thus immaterial whether William formally renounced his statements to police. The corroboration requirement still applies.

Two other facts are also immaterial. First, it does not matter that Washington's more-recent statements were under oath but his statements to police were not. A recantation is unreliable regardless of whether the initial statement or recantation was under oath. *See State v. Kivioja*, 225 Wis. 2d 271, 293–94, 592 N.W.2d 220 (1999). Second, it is irrelevant that William's postconviction testimony suggests

that Washington fired the fatal gunshot. The corroboration requirement applies if a witness's statement recants one aspect of his previous "claim," even if the new statement "do[es] not recant former accusations" against the defendant. *Mayo*, 217 Wis. 2d at 227. So, William's postconviction account of the shooting requires corroboration even though it does not recant his previous accusation that Washington shot him and Robert. William's newer account of the shooting effectively recants his suggestion that Washington started *intentionally* shooting *right after* he came outside. The corroboration requirement thus applies to William's postconviction statements about the shooting.

Washington has not met—or even acknowledged—the corroboration requirement. Again, "[c]orroboration requires newly discovered evidence of both: (1) a feasible motive for the initial false statement; and (2) circumstantial guarantees of the trustworthiness of the recantation." *McAlister*, 380 Wis. 2d 684, ¶ 58. Washington has not presented newly discovered evidence of either prong.

In short, because Washington is trying to use William's postconviction testimony to attack the veracity of William's statements to police, this postconviction testimony requires corroboration. Because Washington has failed the corroboration requirement, this Court should reject his claim of newly discovered evidence.

III. Attorney Taylor was effective at sentencing.

A. Prejudice is not presumed because Washington was not constructively denied counsel at sentencing.

"Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Burton*, 349 Wis. 2d 1, ¶ 49 n.17 (quoting *Strickland*, 466 U.S. at 692). This presumption "applies when circumstances exist

that are 'so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'" *State v. Anderson*, 2017 WI App 17, ¶ 18, 374 Wis. 2d 372, 896 N.W.2d 364 (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)). "When the defendant complains of errors, omissions, or strategic blunders, prejudice is not presumed; 'bad lawyering, regardless of how bad, does not support the [per se] presumption' of prejudice . . . ." *Jackson v. Johnson*, 150 F.3d 520, 525 (5th Cir. 1998) (alterations in original) (citation omitted).

This presumption of prejudice applies in three situations: (1) where a defendant "is denied the presence of counsel at 'a critical stage,'" (2) where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," and (3) "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not." *Bell v. Cone*, 535 U.S. 685, 695–96 (2002) (quoting *Cronic*, 466 U.S. at 659). This third category "involve[s] actions by the court as well as actions by the prosecutor." *State v. Erickson*, 227 Wis. 2d 758, 770, 596 N.W.2d 749 (1999).

Washington argues that Attorney Taylor's performance at sentencing fits within the second category. (Washington's Br. 45.) His argument fails under *Cone*.

"In the wake of [*Cone*], courts have rarely applied *Cronic*, emphasizing that only non-representation, not poor representation, triggers a presumption of prejudice." *Miller v. Martin*, 481 F.3d 468, 473 (7th Cir. 2007). In *Cone*, during the sentencing phase of a capital murder trial, Cone's lawyer merely (1) made a brief opening statement asking for mercy, (2) established that Cone had received the Bronze Star during his Vietnam service, and (3) successfully objected to the introduction of two photographs of the murder victims. *Cone*, 535 U.S. at 691. Cone's lawyer did not even "explain the significance of [the Bronze Star]." *Id.* at 708 (Stevens, J.,

dissenting). The Supreme Court concluded that Cone's challenge to his lawyer's performance at sentencing was "subject to *Strickland*'s performance and prejudice components." *Id.* at 697–98. The Court held that *Cronic*'s presumption of prejudice did not apply. *Id.* at 696–98. It emphasized that an "attorney's failure must be complete" before a court will presume "prejudice based on an attorney's failure to test the prosecutor's case." *Id.* at 697. It noted that Cone was challenging counsel's failure to introduce mitigating evidence and decision to waive a closing argument. *Id.*

By contrast, courts have found a constructive denial of counsel when a lawyer completely failed to participate in a sentencing hearing. *See, e.g.*, *Miller*, 481 F.3d at 473 (presuming prejudice where counsel just orally moved for a new trial and said "several times that neither he nor Miller would participate in the proceedings"); *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992) (presuming prejudice where the defendant was not aware of counsel's presence at the sentencing hearing and counsel did not say anything or confer with the defendant).

Washington was not constructively denied counsel at sentencing. His complaints with Attorney Taylor's performance are like the ones that were made in *Cone*. Unlike the lawyers in cases where prejudice was presumed, Attorney Taylor participated at sentencing. He, for example, said that Washington had "a number of physical and mental ailments," "regret[ted]" bringing a weapon outside, and was "a threat to no one but himself." (R. 102:21–23.) An attorney's "meager efforts" at sentencing will be enough to defeat a presumption of prejudice. *United States v. Theodore*, 468 F.3d 52, 57 (1st Cir. 2006) (citing *Cone*, 535 U.S. at 696–97). Further, Attorney Taylor had discussed matters of sentencing strategy with Washington, and Washington had decided to personally make the sentencing argument about the context behind the

shooting. (R. 103:34, 39–40.) Washington is not entitled to a presumption of prejudice because Attorney Taylor participated at the sentencing hearing.

B. Attorney Taylor did not perform deficiently at sentencing.

The bar for adequate assistance of counsel "is not very high." *State v. Westmoreland*, 2008 WI App 15, ¶ 21, 307 Wis. 2d 429, 744 N.W.2d 919. A court "do[es] not look to what would have been ideal, but rather to what amounts to reasonably effective representation." *State v. McMahon*, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

Washington argues that Attorney Taylor performed deficiently at sentencing in four ways, but his arguments are unavailing.

First, Washington faults Attorney Taylor for offering "nothing about the nature of the offense, nothing about Mr. Washington's character and background, and nothing about the need to protect the public." (Washington's Br. 43.) But "[a] defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." *State v. Prescott*, 2012 WI App 136, ¶ 11, 345 Wis. 2d 313, 825 N.W.2d 515 (citation omitted). Washington has not explained with enough specificity what he thinks Attorney Taylor should have said about those sentencing factors. (Washington's Br. 43.)

Second, Washington argues that Attorney Taylor should have emphasized at sentencing that Washington has diabetes and high blood pressure. (Washington's Br. 43.) But, at the *Machner* hearing, Washington did not ask Attorney Taylor to explain why he had failed to discuss these health

issues at sentencing. (R. 103:28–49.) A *Machner* hearing "is important not only to give trial counsel a chance to explain his or her actions, but also to allow the trial court, which is in the best position to judge counsel's performance, to rule on the motion." *State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998). A defendant thus forfeits a claim that a given act or omission by counsel was ineffective if he did not raise the issue at a *Machner* hearing. *See, e.g.*, *State v. Thompson*, 222 Wis. 2d 179, 190 n.7, 585 N.W.2d 905 (Ct. App. 1998); *State v. Elm*, 201 Wis. 2d 452, 463, 549 N.W.2d 471 (Ct. App. 1996). Washington has forfeited this allegation of deficient performance.

Third, Washington faults Attorney Taylor for taking an "antagonistic stance" toward him at sentencing by saying that his behavior was "totally unacceptable" and that the shooting was "tragic." (Washington's Br. 43–44.) Washington, however, forfeited this issue by not asking Attorney Taylor about it at the *Machner* hearing. (R. 103:28–49.)

Fourth, Washington argues that Attorney Taylor performed deficiently by not making a specific sentence recommendation. (Washington's Br. 44.) He relatedly faults Attorney Taylor for not arguing that "any sentence of twenty years or more would almost certainly be a life sentence given Mr. Washington's age and poor health." (Washington's Br. 43.) But "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689–90. Attorney Taylor gave a reasonable explanation for why he did not make a specific recommendation or refer to a life sentence: he thought that "by not putting numbers on the recommendation . . . the [c]ourt would come to the lesser end of sentencing." (R. 103:44.)

And, regardless of that explanation, forgoing a specific recommendation was reasonable. As noted above, "regardless

of defense counsel's thought process, if counsel's conduct falls within what a reasonably competent defense attorney could have done, then it was not deficient performance." *Jackson*, 333 Wis. 2d 665, ¶ 9. A reasonably competent defense attorney could decline to make a specific sentence recommendation for two reasons: to avoid offending the court with a suggestion that is too low, and to avoid offering a number that is higher than what the court was considering.

Because Washington has not shown deficient performance, his ineffective assistance claim for resentencing fails.

C. Attorney Taylor's sentencing argument did not prejudice the defense.

To prove that an attorney's conduct during a sentencing hearing was prejudicial, a defendant must prove that but for counsel's deficient performance, "there is a reasonable probability the result of the sentencing hearing would have been different." *State v. Benson*, 2012 WI App 101, ¶ 19, 344 Wis. 2d 126, 822 N.W.2d 484 (citing *Strickland*, 466 U.S. at 694). "Speculation about what the result of the proceeding might have been is insufficient." *Id.* A defendant "must demonstrate that his counsel's alleged error actually had some adverse effect." *Id.*

If certain information was already known to a sentencing court (or jury in a capital case), counsel does not prejudice the defense by mentioning or failing to mention that information. For example, in *Smith v. Spisak*, the Supreme Court concluded that Spisak's capital sentence would have not been different even if defense counsel had made "a less descriptive closing argument with fewer disparaging comments about Spisak." 558 U.S. 139, 154 (2010). The Court reasoned that "the sentencing phase took place immediately following the conclusion of the guilt phase," so negative facts about Spisak and his killings were "fresh" in the jurors'

minds. *Id.* The Court also concluded that counsel did not prejudice the defense by failing to emphasize information that had been recently disclosed through experts' testimony. *Id.* at 155. Counsel "emphasized mental illness as a mitigating factor and referred the jury to the experts' testimony," but he did not repeat the experts' testimony connecting Spisak's mental illness with his crimes or the facts on which the experts had based their conclusions. *Id.* at 154–55. Failing to repeat that testimony at sentencing did not prejudice the defense because it was "fresh in the jurors' minds." *Id.* at 154.

Washington has failed to prove prejudice. The circuit court was already aware of all the mitigating factors that Washington argued Attorney Taylor should have mentioned at sentencing. (R. 92:3.) Under *Spisak*, Attorney Taylor did not prejudice the defense by failing to tell the court what it already knew. For example, the circuit court noted that Attorney Taylor had submitted a document that concerned Washington's medications and physical condition. (R. 102:25.) The court also noted Washington's lack of a serious criminal history and the alleged bullying of him. (R. 102:28.)

Further, the circuit court's remarks indicate that Washington's sentence would have been the same even if Attorney Taylor had argued that the accident was a shooting. In sentencing Washington, the court did not say whether it thought that the shooting was an accident. It instead faulted Washington multiple times for bringing a gun to a domestic dispute. (R. 102:26, 27.) The court stressed that Washington had violated a parental duty to protect his children and that the shootings had left "huge, huge voids in people's lives and this community." (R. 102:30.) The court said that the two victims had been "leaders of the community." (R. 102:29.) The court thus gave very little, if any, weight to whether the shooting was accidental.

Washington's prejudice arguments fail for one basic reason: when determining whether an attorney's performance

prejudiced the defense, a court considers only acts that constitute deficient performance. *State v. Hunt*, 2014 WI 102, ¶ 55 n.15, 360 Wis. 2d 576, 851 N.W.2d 434. Stated differently, a court may find an attorney's alleged errors prejudicial only if it first concludes that they were deficient performance. *State v. Sholar*, 2018 WI 53, ¶ 54, 381 Wis. 2d 560, 912 N.W.2d 89. Washington argues that he was prejudiced at sentencing because Attorney Taylor did not say, for example, that (1) a basketball caused the gun to accidentally fire, (2) William had a pattern of bullying Washington, (3) Washington was intoxicated when the shooting happened, (4) Washington had no prior convictions, and (5) Washington was remorseful. (Washington's Br. 47–49.) But Washington has not proven—or even clearly alleged—that Attorney Taylor's performance was deficient in those respects. (Washington's Br. 42–44.)

Further, many of the factors that Washington highlights likely would have hurt his effort at sentencing had Attorney Taylor mentioned them. Arguments about bullying, intoxication, and a basketball causing the shooting would have looked like Washington was trying to make excuses instead of accepting responsibility. And references to bullying and intoxication likely would have undercut an argument that the shooting was an accident caused by a basketball. After all, it is reasonable to assume that an intoxicated person is more prone to violence than a sober person. *State v. McGill*, 2000 WI 38, ¶ 31, 234 Wis. 2d 560, 609 N.W.2d 795. Had Attorney Taylor mentioned bullying and intoxication at sentencing, that argument would have suggested that the shooting was a drunken act of payback for all the bullying against Washington. Further, Washington had maintained that he was not intoxicated during the shooting and that his blood-alcohol level, even though it met the "legal standard" of intoxication, "had nothing to do with the shooting." (R. 103:18–19, 40.) Attorney Taylor would not have helped

Washington at sentencing by blaming the shooting on alcohol, bullying, or a basketball.

In short, Washington's resentencing claim fails because he has not shown that Attorney Taylor's performance was prejudicial.

CONCLUSION

This Court should affirm Washington's judgments of conviction and the order denying postconviction relief.

Dated this 11th day of March, 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 9,289 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 11th day of March, 2019.

_____
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