STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2020AP001362-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOVAN T. MULL,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in Milwaukee County Circuit Court, the Honorable J.D. Watts and the Honorable Joseph R. Wall presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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1. Is Mr. Mull entitled to a new trial in the interest of justice?

2. Was trial counsel ineffective for not presenting a third-party perpetrator defense at trial?

   The circuit court concluded that counsel's performance was neither deficient nor prejudicial.

3. Was trial counsel ineffective for not moving to remedy the injection of hearsay testimony about an alleged "confession" by Mr. Mull?

   The trial court concluded that counsel's performance was neither deficient nor prejudicial.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because the case is highly fact-intensive and involves the application of settled precedents, publication is not requested. Oral argument may be helpful, however, given the complexity of the factual background.

STATEMENT OF THE CASE

An information filed in Milwaukee County Circuit Court charged Jovan Mull (Jovan) with first-degree reckless homicide, contrary to Wis. Stat. § 940.02(1). (3:1). Jovan was convicted after a jury trial and sentenced to a term of imprisonment. (57:1;

64:1). (App. 101). Jovan filed a postconviction motion requesting an evidentiary hearing on his claims of ineffective assistance of counsel. (82). The motion also requested that the circuit court exercise its discretionary authority and grant a new trial in the interest of justice. (82). The court denied the motion in a written order without a hearing. (97). (App. 103).

Jovan appealed. (100:1). This Court remanded for an evidentiary hearing on several of Jovan's ineffectiveness claims. *State v. Mull*, Appeal No. 2018AP1349-CR, unpublished slip op., (Wis. Ct. App. July 23, 2019) (per curiam).[1] (App. 112). Following further proceedings, the circuit court once again denied the motion for a new trial. (118). (App. 165).

This appeal follows. (121).

STATEMENT OF RELEVANT FACTS

The Party

On March 7, 2015, Shaquita Williams was attending a house party on 17th and Galena in Milwaukee. (84:11). When police shut the party down later that evening, Shaquita "told everyone to come to her house on N. 35th Street." (84:11). That residence was occupied by Shaquita and her girlfriend, the eventual victim in this case, Ericka Walker. (84:11; 82:40).

This gathering was a reoccurring "teen party" for younger LGBT-identified individuals. (82:35).

[1] The opinion is included in the index as #103.

These parties were advertised on social media and, in this case, attendees were notified via text that the location had been changed to Ericka's home. (82:35). According to Davion Crumble, one of Ericka's friends, her home would have been familiar to the partygoers, as Ericka had hosted at least two similar "after sets" there. (83:58). While these parties were usually restricted to LGBT attendees, there were occasionally "mixed" parties which "straight" individuals were welcome to attend. (82:40). The relocated party appears to have been "mixed." (82:40).

On this night, however, Ericka had no idea that her home was to be the site of a wild house party. According to Tramell Allen, a houseguest, Ericka was in her bedroom, with the door closed, by 11 P.M. (82:40). Tramell was one of three houseguests: in addition to Tramell, Davion Crumble (a/k/a "D-Boy"), and a high schooler named "Kenta" were also staying at the residence. (82:39-40).

While none of these individuals were expecting that excited partygoers would show up on the doorstep, that appears to be what happened: Tramell told police that around midnight he observed "a whole bunch of cars pull up" and at that point knew there was going to be a party. (82:40). Shortly thereafter, partygoers started lining up outside. (83:7). The house filled up quickly, with one attendee asserting that there may have been up to 100 people inside. (82:60).

The First Fight

Unfortunately, it did not take long for things to get out of hand. Shortly after the party started,

Tramell's boyfriend, Desmand Butler (a/k/a "Boy O-Lay"), began arguing with Tramell's friend, Davion. (82:40). The argument escalated and "turned physical." (82:43). Additional participants joined in before the fight was broken up. (83:59).

Keshawna Wright, a partygoer who was new to the scene, watched the first fight. (82:34-35).[2] She later recalled that Davion remained agitated after the fight was broken up and that he was challenging other partygoers to fight him. (82:34). Davion corroborated this, later telling police that he "was still mad and wanted to continue to fight." (83:59).

Meanwhile, another partygoer, Demon Harris, witnessed a man in a red shirt proclaim, shortly after the fight was broken up, "they don't wanna fight me cause I have this heat on me." (82:38). He saw a second man, "wearing all red," who also claimed to have a gun. (82:38).

In addition to the lingering tensions from the recently broken-up fight, the party appears to have been suffused with an atmosphere suggesting further impending violence. In part, this stemmed from the nature of the party itself: According to Tramell, the "mixed" parties could be dangerous, as "there would always seem to be fights between the straight and gay partygoers." (82:40).

[2] In the police report, Davion appears as "Trayvion." It is unclear to whom this error should be imputed; Keshawna told police she did not know the people at the house very well. In any case, context makes clear that she is referring to Davion Crumble.

The Second Fight

That assessment turned out to be wholly accurate with respect to this party, which was attended by a group of straight partygoers including Vashawn Smith and his friend Menjuan Bankhead. (83:24). Both men had troubled pasts and were under probationary supervision.[3]

According to Menjuan, Tyler Harris was also "[hanging] around with [Vashawn] at the party." (83:34). Although Menjuan denied having anything to do with Tyler on the night of the party, Tyler told police he went out that evening in the company of both Vashawn and Menjuan. (84:21). Both Tyler and Menjuan would later be identified as possessing guns. (84:48; 84:52). And, while Vashawn would deny that he had a gun during the party, he also told police that he "usually" carried one with him. (83:12).

This group was stationed near the kitchen during the first fight and watched the scuffle between the gay men. (135:64). After the fight ended, Vashawn later remembered "One of them come our way." (135:65). As Vashawn later told police, he "doesn't talk to faggots." (82:2). In Desmand's account, one of the straight partygoers yelled out to

[3] Vashawn testified at trial that he had one prior conviction, which based on CCAP records, appears to have been felony child abuse for intentionally causing harm to a child. (135:59). Vashawn was eventually arrested at his probation agent's office. (83:7). Menjuan Bankhead told the police he was also "on paper" at the time of the shooting. (83:33). According to CCAP, Menjuan has multiple prior felony convictions including a 2012 conviction for being a felon in possession of a firearm.

the gay men involved in the fight and called them "bitch ass fags." (83:5).

Davion "bumped into" the man Keshawna would later identify as Ericka's killer. (82:34). Vashawn confirmed he was the person who had been bumped into. (135:65). A second fight broke out, with Davion on one side and Vashawn and 3-4 of his friends on the other. (82:34).

Elicia Burrows, another partygoer, confirmed that the fight started between two gay men but that another subject who was not gay got involved when the fight moved from the kitchen into the living room. (82:31). Dejuan Harris, Demon Harris' brother, likewise confirmed that the second fight was "between [Davion] and the straight boys." (82:43).[4] During the fight, Desmand witnessed a black man with a Wisconsin Badgers sweatshirt brandishing a handgun while threatening to "shoot the place up." (83:5).

At this point, the party devolved into one "big brawl." (135:66). Vashawn was backed up by his friends, including Menjuan. (113:66; 83:28). Meanwhile, Davion quickly found himself outnumbered—with Vashawn and ten other males on one side versus Davion and his friend Kenta on the other. (83:59).

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[4] Demon Harris also stated that Davion had been "jumped by straight guys." (82:41).

One of Davion's friends then took Davion into Ericka's bedroom. (82:43).[5] Inside the bedroom, partygoers barricaded the door with a dresser to prevent the other fighters from entering. (83:60). However, Davion managed to crack the door open, Kenta threw a bottle out and, at one point, Davion jabbed a broomstick out the door at the fighters on the other side. (83:60).

Demon Harris saw the straight man who had been "arguing" with Davion, accompanied by two other men, trying to enter the bedroom into which Davion had retreated. (82:38). Demon Harris' account was corroborated by Alphonso Carter, who noticed that two of those men were armed. (135:124; 83:21). He heard one of the men say, "Shoot in there." (135:124). Police eventually spoke with another eyewitness, Jalyn Lynch, who told police that this individual was Menjuan Bankhead, and asserted that they heard "Bankhead yelling shoot, shoot into the door, after seeing him with the gun." (84:52). Eventually, they heard Menjuan state, "Shoot through that motherfucker." (84:52).

The Shooting

Menjuan's directive was followed by a volley of shots. (84:52). Those shots passed through the flimsy door, missed the combatants from the earlier fight, and fatally wounded Ericka. (83:60).

[5] Dejuan Harris told police that he was the person who had pulled Davion into the bedroom; other partygoers identified different partygoers, including Ericka, as occupying that role during the fight.

The shooting was witnessed by multiple partygoers. According to Keshawna, a black man with a red and black hoodie pulled out a gun and fired 5-6 shots into the bedroom door. (82:25; 82:34). Channell Howard confirmed that the shooter had a sweatshirt with a red hood, although she described a slightly different hairstyle. (82:29).[6]

Likewise, Charles Cantrell agreed that the shooter had been wearing a red hoodie earlier in the night, although he remembered the shooter having taken that sweatshirt off before firing the fatal shots. (82:50). Menjuan would later tell police that his red Wisconsin Badgers sweatshirt was pulled off during the fight. (83:29).

Elicia confirmed it was one of the "straight" men who fired the fatal shots and that he was intending to hit one of the gay partygoers. (82:32). She believed him to be a younger man, with a black and blue sweatshirt. (82:31). Michael Allen also witnessed the shooting and told police the shooter had a hoodie with a red sleeve. (83:2).

Vashawn's friend, Casie James, initially told police that she was outside of the home with Vashawn and Menjuan when the shots were fired. (83:24). She then told police that she met up with Vashawn and Menjuan *after* the shots were fired and therefore placed them in the house at the time of the shooting. (83:23-25). Menjuan was bleeding and smeared blood on the car as they drove away from the scene. (83:25).

[6] She later asserted the hood was black, not red. (82:62).

The Investigation

Shortly after the shooting, police were put in touch with Cheyenne Pugh, who did not attend the party, but who received text messages from someone who did. (82:54). That person told Cheyenne that a man he knew as Bush—Vashawn Smith's nickname—shot into the room hoping to hit one of the "fags" inside. (82:54). Keshawna was then shown a photo array and identified Vashawn as the person she had seen shooting the gun. (82:56).

As a result, Vashawn became a "named suspect in this incident." (82:57). In addition to law enforcement suspicion that he had murdered Ericka, Vashawn also had an outstanding probation warrant and two municipal warrants. (82:57). He was eventually arrested at his probation agent's office. (82:58). At the time he was arrested, Vashawn knew rumors were flying on social media that he had killed Ericka. (83:9).

In Vashawn's first custodial interview, he admitted to being involved in the fight, which started when one of the "gay guys" bumped into him. (83:8). He told police that his friend, Menjuan, had been involved, too. (83:8). According to Vashawn, he recalled seeing a man he knew as "D" on top of Menjuan. (83:8). "D" was removed from Menjuan's back and escorted to the bedroom. (83:8). Shortly thereafter, Vashawn told police he heard shots being

fired and, when he looked up, witnessed Jovan (who he knew as Woadie) pointing a gun.[7] (83:8).

Notably, Vashawn and Jovan were not friends; while he knew Jovan, he had not seen him for roughly one to one-and-a-half years prior to the party. (83:7). The last time they interacted, the two men had a disagreement and almost got into a fight. (83:7).

Police also confronted Vashawn with photographs obtained from Facebook, in which he can be seen flaunting multiple handguns. (83:9). He admitted that the guns were real and that he was the man in the pictures. (83:9).

Despite his story inculpating an alternative suspect, police kept the pressure on Vashawn, interrogating him a second time the next day. (83:12). Although police probed at Vashawn's story, he "continued to deny any involvement in this shooting incident." (83:12).

The following day, police conducted a third custodial interview, telling Vashawn "he had not been honest and that it was time to be honest about what had occurred." (83:14). In response, Vashawn offered new information inculpating a different suspect—his friend, Tyler Harris. (83:15). Vashawn told police that he witnessed Tyler with a gun prior to the shooting. (83:15). He told police he spoke to Tyler

[7] Vashawn subsequently identified Jovan in a photo array as the person he saw with the gun. (84:14).

shortly after the shooting and that Tyler told him, "I emptied my clip." (83:15).

In a fourth custodial interview, Vashawn told police that Tyler was wearing a red Wisconsin Badgers hoodie and that he had concealed his handgun inside that garment. (83:19). In Vashawn's account, he left the residence in the company of Menjuan Bankhead, briefly losing track of Tyler around the time of the shooting. (83:19). Afterwards, Tyler admitted to emptying his clip and told Vashawn to "get out of here." (83:19). Vashawn understood Tyler to mean that he had just shot his gun at the party. (83:19). He further admitted that he had intentionally concealed this information because he wanted to protect Tyler, who he considered a "family member." (83:19). He stated that Tyler had also made statements on Facebook about needing to "stay low." (83:20). "[Vashawn] stated he believes T.H. said this because he was shooting his gun at the party." (83:20).

As a result of this new information, police arrested Tyler. (84:41). At least one other witness identified Tyler in a photo lineup as having a gun at the party. (84:48). Tyler admitted he was at the party with Vashawn and Menjuan on the night of the shooting. (84:21-22).

Law enforcement also arrested Menjuan, suspecting him of being a party to the crime of this homicide. (84:51). Jalyn Lynch's statement, memorialized in the probable cause affidavit, places Menjuan in front of the bedroom door with a firearm. (84:52). Menjuan admitted to wearing a red Wisconsin Badgers sweatshirt during the party.

(83:32).[8] Menjuan denied any involvement, telling police that he was outside the house when the shots were fired. (83:29). He could not account for Vashawn's location during the shooting, telling police Vashawn met up with him outside after the shots had been fired. (83:33).

Menjuan also told police that Vashawn had been "stressed out and laying low" after the shooting. (83:34). He confirmed that Tyler had been hanging around with Vashawn, but disclaimed that he had anything to do with Tyler on the night of the party. (83:34). He told police to talk to his friend, Sanchez Harris, who had information supporting the claim that Jovan was the shooter. (83:35).

At Menjuan's urging, police spoke to Sanchez Harris, who told them he rode to the party with "Woadie," later identified as Jovan, along with his brothers Demon and Dejuan. (83:42). According to Sanchez, Jovan told him he had a gun. (83:42).

Sanchez told police that he witnessed someone in a Wisconsin Badgers sweatshirt and "Rock Revival pants" fire into the door. (83:43). Vashawn Smith was wearing this style of pants during the party. (83:32). When asked, however, Sanchez told police Jovan "had to be" the shooter. (83:43). He confirmed that he only came to the police at the request of Menjuan's pregnant girlfriend. (83:43). He identified Jovan as the shooter in a photo lineup. (84:1).

[8] Keshawna Wright identified this as the sweatshirt worn by the shooter. (83:48).

Jovan was also identified as the shooter by Desmand Butler and Alphonso Carter. (84:5; 84:8). According to police reports, Jovan's photo was being "circulated" in the community around the same time that these identification procedures were conducted. (83:35). However, at least three other witnesses—Keshawna Wright, Charles Cantrell and Elicia Burrows—failed to identify Jovan as the shooter. (83:48; 84:25; 84:27). Likewise, Jalyn Lynch told police they did not see Jovan at the party after having been shown a photograph of him. (83:50). In addition to witness statements, law enforcement also utilized a snitch—Jovan's codefendant in another felony case. (83:53). That individual told police, after having been arrested for numerous serious felonies, that Jovan had admitted to the shooting. (83:54).

The Trial

The State ultimately charged Jovan Mull, and only Jovan Mull, with the shooting death of Ericka Walker. (1). No charges were ever issued against Menjuan Bankhead or Tyler Harris in connection with the shooting or their illicit possession of firearms while at the party. And, while Vashawn was charged with being a felon in possession of a firearm as a result of the evidence discovered during this investigation, the prosecutor in this case appeared on behalf of the State and moved to dismiss that case prior to Vashawn's cooperation at Jovan's eventual trial. (84:58).

In opening, the prosecutor told the jury that the shooting and the fight were connected. (134:26). The prosecutor also told the jury that Vashawn had initially been arrested as a suspect. (134:27). In the

prosecutor's telling, Vashawn was only ever identified as being at the party and was "not the shooter." (134:27).

Likewise, defense counsel referenced Vashawn's arrest but made no mention that he had been identified as the shooter by an eyewitness. (134:31). He also made a brief, vague reference to Tyler Harris having a gun at the party and Vashawn "covering" for him. (134:31).

Cheyenne Pugh was one of the State's first citizen witnesses. (135:2). Cheyenne told the jury she received two apparent tips about the shooter's identity. She confirmed that she was originally told that Vashawn was the shooter. (135:40). She also testified that she later received information inculpating Jovan. (135:35).

Cheyenne testified that Ericka's girlfriend, Shaquita, had told her, "everybody going around saying it's a young dude that's light skinned with dreads named Woadie." (135:36). She described showing Shaquita a photo of Vashawn and Shaquita telling her that this was not Ericka's killer. (135:36). She testified that multiple people were claiming the shooter was a light-skinned man with dreadlocks. (135:45). According to Cheyenne, "they" said "Woadie" (Jovan's nickname) was the shooter. (135:45). Cheyenne also testified that she had received Jovan's picture from yet another out-of-court speaker and that a woman named Kia Wade had told her that Jovan "was in the hood bragging about it." (135:46).

There was no objection to this testimony, and on cross-examination trial counsel continued to question Cheyenne about information she received about the shooter's identity. (135:54). Cheyenne then engaged in an uninterrupted narrative, in which she ultimately stated:

> And also another lady was telling me about him [Jovan] going -- being in the hood bragging about it saying that he hit a lick over there on 35th and he killed the stud bitch.

(135:54). Detective Michael Washington testified that police used the information provided by Cheyenne to connect Jovan with the "Woadie" nickname. (136:20).

Vashawn testified that he went to the house party with his friends, Casie and Menjuan. (135:61).[9] He described watching the fight between Davion and Desmand. (135:65).[10] One of the men involved in the first fight then bumped into Vashawn. (135:65). He admitted to being involved in the ensuing fight. (135:66). He told the jury that the fight broke up and he did not know where the fighters on the other side went. (135:67). He said that he saw two men with guns: Jovan (identified as Woadie) and Tyler Harris. (135:67). He specifically testified that he saw Jovan pointing a gun after the fight and then heard shots being fired. (135:69). According to Vashawn, Jovan was wearing a blue hooded sweatshirt. (135:74).

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[9] In the trial transcript, Menjuan is spelled as "Mejuan."

[10] Vashawn did not use their names in his testimony, however, based on the other evidence in the record counsel has substituted their proper names to avoid confusion.

Vashawn denied actually seeing the shots being fired. (135:69). He initially testified that he saw Jovan pointing the gun after the fight had concluded and that he left the house party once he saw the gun. (135:68-69). However, later in his testimony he asserted that he could not have seen the shooting because he was "fighting." (135:73).

Vashawn confirmed that he had been a suspect in the shooting. (135:71). He denied being the shooter and told the jury that he had identified Jovan as the person who was there with the gun when questioned by police. (135:72).

Vashawn was hostile to cross-examination, telling trial counsel that he was "getting agitated with this shit." (135:75). He was asked only a single question about being a suspect. (135:74). Trial counsel attempted to elicit Tyler Harris' statements to Vashawn in which he confessed to the crime, but the court sustained the prosecutor's objection before the question could be answered. (135:78).

Sanchez Harris testified that he rode over to the party with his brothers and a man named Kenneth. (135:88). Along the way they picked up additional passengers, although Sanchez could not recall precisely how many. (135:89). He initially testified that he did not talk to any of these people. (135:90). When confronted with his prior statement to police, he then changed his story and told the jury that one of the men went by Woadie and told him either "I got it on me" or "I got a gun." (135:91).

Sanchez described the fight breaking out at the party and told the jury that his friends, Vashawn and

Menjuan, were both involved.[11] (135:93). Although he initially testified that he was "involved" in the fight, he almost immediately changed his story and asserted he "wasn't fighting nobody." (135:93-94). He testified that at some point, the fight stopped and he "heard shooting." (135:94). He testified that Vashawn and Menjuan were already gone when the shooting started. (135:94). Prior to the shooting, he saw someone with "dreads and a red hoody" holding a gun. (135:94). When prompted by the prosecutor, Sanchez specifically described the item of clothing as a Wisconsin Badgers hoodie. (135:98). Sanchez could not recall if the hood of the sweatshirt was up and had difficulty recalling the direction that the man was pointing the gun. (135:95-96).

Sanchez also testified that he rode with "Woadie" after the party. (135:98). Although he initially testified he could not remember what was said on the ride back, he ultimately recalled Woadie threatening him. (135:98).

Sanchez described participating in a photo array 10 days after the shooting, in which he claimed police showed him only two pictures. (135:99). He identified Jovan as "the person who probably did it." (135:102). Sanchez admitted that he had already seen

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[11] He identified them by their nicknames, Bush and Toot.

Based on a review of social media postings, Sanchez and Vashawn were good friends. In one posting, he called both Vashawn and Menjuan "real niggas." (84:60). In another, posted the day of jury deliberations, he posted "Free my nigga Bush." (84:59).

a photo of Jovan that was being circulated in the community before speaking to police. (135:105; 135:114). Later in the trial, trial counsel questioned the accuracy of that array by pointing out that the individuals did not have similar hairstyles and at least one individual had a highly distinguishing characteristic, a neck tattoo. (136:47-50).

Trial counsel's cross-examination also revealed that Sanchez could not recall where they picked up the individual identified as Jovan on the way to the party. (135:107). He claimed that Jovan and his associates just happened to be standing on the side of the road with their thumbs out, looking to hitch a ride. (135:107). He was also challenged on his ability to see the shooting based on the spatial layout in the apartment and appeared to recant his testimony about witnessing the shooting. (135:113). While Sanchez then reverted to claiming that he had seen the shooting, he was eventually shown a photo of Jovan and admitted, "I ain't really see the face like that." (135:117).

Alphonso Carter testified that he witnessed Ericka escort Davion (who he identified as D-Boy) into the bedroom during the fight. (135:124). He saw three men in the living room adjoining the bedroom. (135:124). Two of the men were armed. (135:124). He specifically recalled seeing that one man "drew his gun, and his friend told him to shoot in the room." (135:125).

Alphonso Carter participated in three photo array procedures. In the first, targeting Vashawn, he did not identify him as the shooter, although he

picked out two of the fillers as people who were either present at the party or involved in the fight. (136:31).

He was then shown a second photo array targeting Jovan. (135:134). He failed to make any identification.[12] (135:134). After requesting to see side profile pictures, Alphonso identified Jovan as the shooter, asserting that "everybody else didn't look anything like that person at all." (135:127).[13] As trial counsel brought out in his cross-examination of the detective who administered the array, there were also some differences on display in the photographs shown to Alphonso—gold teeth, facial hair and a neck tattoo. (137:26). Alphonso testified the shooter had been wearing a white shirt and blue jeans. (135:136).

Desmand Butler testified that he witnessed the shooting. (137:46). However, he recanted his prior identification of Jovan and told the jury that he did not think Jovan was the shooter after seeing him in court. (137:62). Finally, the State called Vachune Hubbard, Jovan's codefendant in another matter. (137:100). Vachune testified about an alleged confession by Jovan and acknowledged that he received consideration from the State in exchange for that testimony. (137:94).

The State also presented the testimony of a ballistics expert who testified that all of the casings

[12] The detective who administered the array claimed that Alphonso did make an identification of Jovan in that first array. (137:19).

[13] Notably, this third array was not double-blind, as the officer administering the array knew which folder contained Jovan's picture before showing it to Alphonso. (137:19).

recovered from the home "were fired from the same 9-millimeter caliber firearm." (136:77).

Defense counsel called no witnesses and presented no evidence.

In his closing argument, the prosecutor argued that the only question was whether Jovan was the shooter or whether "the wrong person" was on trial. (139:7). He asserted that the case "really comes down" to the testimony of five key witnesses: Vashawn, Sanchez, Alphonso, "Demond Butler" (an apparent combination of Demon Harris and Desmand Butler; however, Demon Harris did not testify at this trial), and "Vachune Harris," apparently referring to Vachune Hubbard. (139:7). Defense counsel's argument focused on discrepancies in the eyewitness identifications and the possibility of suggestive eyewitness procedures. (139:14).

The jury convicted Jovan of first-degree reckless homicide. (64).

Postconviction Proceedings

Jovan filed a Rule 809.30 postconviction motion which was denied in a written order. (82; 97). (App. 103).

Jovan appealed and this Court remanded for an evidentiary hearing as to: (1) whether counsel was ineffective for not presenting a third-party

perpetrator defense[14] and (2) whether counsel was ineffective for not seeking to remedy the admission of a hearsay confession during his cross-examination of Cheyenne Pugh. *Mull*, Appeal No. 2018AP1349-CR, ¶ 5. Because this Court remanded on some issues, it did not reach the request for a new trial in the interest of justice. *Id*., ¶ 1 n. 3. (App. 113).

Trial counsel testified at the postconviction hearing that he was familiar with the legal requirements for presenting a third-party perpetrator defense, which he understood to be "motive, opportunity evidence." (142:10). He testified that he did not present a defense targeting Vashawn Smith as a third-party perpetrator because "it was difficult to locate witnesses who would support that defense." (142:13). He did not recall which witnesses he was referencing, however. (142:13). Counsel gave a similar explanation for not presenting a third-party perpetrator defense targeting either Tyler Harris or Menjuan Bankhead. (142:23; 142:27). Similarly, he did not present the other witnesses outlined in the postconviction motion because he apparently could not locate them, either. (142:29-30).

With respect to the hearsay statement of Cheyenne Pugh, counsel testified that he did not move to strike or move for a mistrial because he was more focused on attacking Cheyenne's credibility. (142:35-36).

[14] Embedded in this first claim, as this Court construed it, was whether trial counsel should have also called other favorable witnesses to support Jovan's claim of innocence. *Id*., ¶ 5 n.5.

Trial counsel indicated that he may have used an investigator to help him prepare for trial; however, he lacked a specific recollection of who that investigator was. (142:15).[15] Undersigned counsel located the investigator but she had no recollection of the case, nor were any notes or reports available. (143:3).

The circuit court denied the motion for a new trial in an oral ruling. (145). (App. 133).

This appeal follows. (121).

ARGUMENT

I. A new trial is warranted in the interest of justice.

A. Legal principles and standard of review.

This Court has the discretionary power to order a new trial in the interest of justice. *State v. Henley*, 2010 WI 97, ¶ 63, 328 Wis. 2d 544, 787 N.W.2d 350; Wis. Stat. §752.35. The controlling statute reads:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct

[15] Trial counsel testified that he worked with Lisa Steinbacher. (142:15). However, undersigned counsel's investigation revealed that he actually utilized an investigator by the name of Amanda Bates. (143:3).

> the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Wis. Stat. § 752.35. This relief is limited to "exceptional cases." *State v. McKellips*, 2016 WI 51, ¶ 52, 369 Wis. 2d 437, 881 N.W.2d 258.

B. The real controversy was not fully tried.

In this case, the jury was required to determine whether the State had proven Jovan Mull guilty beyond a reasonable doubt. As the foregoing statement of facts adequately demonstrates, the jury was never given a full and fair opportunity to answer that question, let alone adequately address whether the "wrong person" was on trial. (139:7).

As a careful review of the entire record reveals, important information was left out of the trial and, when that information is considered, a compelling alternative hypothesis emerges: Vashawn Smith, or one of the friends who fought alongside of him at the "brawl," fired the fatal shots that killed Ericka, *not* Jovan Mull. At the very least, the omitted evidence substantially undermines the believability and persuasiveness of the State's case, thereby creating substantial reasonable doubt which should have entitled Jovan to an acquittal.

The glaring omissions from the factual picture are manifold, but can be generally separated into four categories: (1) evidence connecting Vashawn and his

friends to the shooting; (2) evidence directly implicating Vashawn or one of his friends as the shooter; (3) evidence tending to call into question Vashawn's credibility and believability as a witness; (4) other evidence tending to exonerate Jovan.

Evidence connecting Vashawn and his friends to the shooting

Here, the State's theory was that the shooting and the fight were directly connected. (134:26). Based solely on the testimony at trial—establishing that Vashawn was the instigator of that fight—a rational inference is that either Vashawn or one of Vashawn's friends was responsible for the shooting. However, the evidence against Vashawn and his group of friends goes beyond mere inference and can be supported by ample evidence in this record—evidence that was wholly excluded from the factual picture presented at trial.

To begin with, there is a direct connection between Vashawn and his friends and the man shot at in the bedroom, Davion Crumble. As the police reports make clear, Davion was the person who "bumped into" Vashawn, triggering the second fight. (82:34). Not only did he start the fight with Vashawn before retreating into the bedroom, the police reports also make clear that he badly battered Vashawn's friend, Menjuan. According to Vashawn, a man he identified as "D" was literally "on [Menjuan's] back" before another partygoer intervened and ushered that person into the bedroom. (83:8). Menjuan was bleeding from the face, having struck his head on a cabinet during the violent brawl. (83:8). A statement of Menjuan—also never disclosed to the jury—adds

more details, that one of the fighters in Davion's group also tried to "taser" Menjuan before retreating into the bedroom. (83:28). Clearly, if anyone had a motive to fire into the bedroom, it would be Vashawn and his friends.

Importantly, it was after these events that Alphonso Carter witnessed the group of three men, one of whom told "his friend" to shoot into the room. (135:24). While Alphonso ultimately identified the person following that directive as Jovan—in a transparently problematic identification procedure—the jury was never given other contextual information which would have kept their focus on Vashawn and his friends and placed this evidence in its proper context.

For example, Demon Harris also witnessed the group of men, but told police that one of them was the straight partygoer who had been "arguing" with Davion. (82:38). As it was Vashawn's confrontation with Davion that kicked off the fight, it is hard to read this as anything other than a possible reference to Vashawn. Keshawna Wright, another witness who the jury never heard from, agreed: She identified the person who fired the gun as the same man who "bumped into" Davion (82:34).

This is not all that was kept from the jury. As memorialized in a sworn probable cause affidavit, Jalyn Lynch also saw this group of men and identified the man telling people to shoot into the door as Menjuan Bankhead—the friend who attended the party with Vashawn, fought by his side, and had been battered by Davion, the person who started the

fight by bumping into Vashawn before hiding inside the bedroom. (84:51).

This information gives a radically different understanding of the events leading up to the shooting, strongly inculpating Vashawn Smith and his friends. In sum, the jury never heard from Davion, the obvious target, and did not hear testimony from at least three other witnesses who would connect Vashawn and Menjuan with the shots being fired. And, while none of these witnesses can identify Tyler as being in that group, it is worth noting that the State already presented evidence that he was in possession of a gun at the party, (135:67), and, based on the police reports, he was out that evening in the company of Vashawn and Menjuan. (84:21-22). Tyler therefore makes a compelling candidate for the third man in this group: Menjuan, the man who told his "friend" to shoot into the door, Vashawn, the friend who was seen doing just that, and Tyler, who Vashawn later blamed for the shooting.

Evidence directly implicating Vashawn, Menjuan or Tyler as the shooter

This evidence, however, was not all that was omitted from the circumscribed narrative presented to the jury. Thus, while the jury heard one or two brief references to Vashawn as a suspect, the jury was assured by the prosecutor in his opening statement that Vashawn was "not the shooter." (134:27).

That personal assurance is called into question by a broad body of evidence now in the record,

including the actions of the police themselves, who focused intensive investigative resources on proving Vashawn's guilt. To that end, the jury was simply not told that an eyewitness—Keshawna Wright—identified Vashawn as the shooter and that police confidently relied on that identification as a basis to arrest him for the crime. (84:56).[16] They were also never told that Vashawn's friend, Casie James, could place him in the house when the shooting occurred, (83:23-25), or in the words of his other friend, Menjuan, that he was acting stressed and laying low after the shooting. (83:34).

If this evidence had been presented to the jury, it would clearly have provided a basis for the jury to acquit Jovan, either because it directly establishes that Vashawn was the shooter or, at the very least, that Jovan may have been wrongly identified. Regarding the former, as Cheyenne Pugh's friend apparently concluded, one reasonable interpretation of the evidence is that Vashawn was trying to hit the "fags" who had fought with him and his friends, battered Menjuan, and fled into the bedroom. (82:54).

[16] In their postconviction submission, the State called Keshawna Wright's identification into question, based on the way that her identification of the shooter's physical characteristics is recorded in the police reports. (111:5). It remains a fact, however, that Keshawna identified Vashawn in a properly administered photo array and that the State relied on that evidence in choosing to arrest Vashawn. It seems problematic to discard her information now, especially when she was never given an opportunity to be cross-examined on this point.

Regarding the latter, Vashawn and Jovan look remarkably similar. If Vashawn is a viable suspect—and he clearly is—then it remains eminently possible that those eyewitnesses claiming to have seen Jovan fire the gun (despite their disagreements on key facts) could very well have mistaken Jovan for Vashawn.

However, while Vashawn is clearly a strong alternative suspect, he is far from the only one. Two witnesses—including Vashawn—stated that Tyler Harris had a gun at the party and, according to Vashawn, Tyler admitted to committing the crime. At the same time, Menjuan is also a strong suspect, precisely because a witness who was never called at trial, Jalyn Lynch, can place him in front of the door with a gun, shouting about shooting through the door shortly before shots were in fact fired. However, the jury heard none of this evidence, and thus was never given an opportunity to consider whether either Menjuan or Tyler may have fired the fatal shots.

Evidence diminishing Vashawn's credibility and believability

Further, instead of being asked to assess Vashawn for what he truly is—a viable alternative suspect in this homicide—the jury was asked to evaluate Vashawn as just another prosecution witness, someone the State needed the jury to believe in order to convict Jovan, as they argued in closing. (139:7). However, the picture the jury was given about Vashawn's motives, the evolution of his story, and the response of those investigating the murder was glaringly incomplete.

To begin, the jury was simply not told that, in addition to being a suspect in a homicide, Vashawn was facing potential revocation of his probation, had municipal warrants, and was simultaneously under police investigation for multiple allegations of illegal possession of a firearm when he made the affirmative choice to cooperate with law enforcement and blame someone else for this crime. And, while the jury was told, obliquely, that there were at least some rumors that he committed the crime, they were not told that Vashawn himself was aware of these swirling rumors and that, according to his friend Menjuan, he was "stressed out and laying low" after the shooting occurred. (83:34).

In other words, jurors were not told that Vashawn had powerful motivations to lie and shift the blame for the shooting toward Jovan, in the hope of evading serious threats to his liberty. The jury was not told that Vashawn faced a serious allegation of possession of firearm by a felon which resulted from this investigation—provable both by his confession and Facebook photographs—and that this charge was miraculously dismissed on the eve of his testimony by the very same prosecutor who then relied on Vashawn's assistance to convict Jovan. The jury was also not told that Vashawn had picked up a new criminal allegation prior to testifying and that the very same prosecutorial agency presenting his testimony was also evaluating whether or not to

charge him with additional criminality at the time he testified against Jovan.[17]

Most importantly, the jury was not told that Vashawn admitted to concealing evidence from the investigators regarding his friend Tyler. In essence, the jury was asked to evaluate the believability of one story Vashawn gave to police but were never asked to consider his contradictory statements blaming someone else entirely, nor were they given an honest opportunity to assess his reliability or believability as a witness.

Other evidence tending to exonerate Jovan

First, it is worth pointing out that Jovan's alleged participation in this crime is curious, given that it arose out of a fight between Vashawn and his "friends" on one side and Davion and his group of LGBT friends on the other. Neither group appears to have claimed Jovan as a "friend." In fact, Vashawn and Jovan were anything but. Jovan and Vashawn had apparently almost come to blows approximately a year earlier and had not seen each other since, although the jury was never informed of this fact. Moreover, no witness identified Jovan as being friendly with Vashawn at the party, and it is therefore hard to understand why he would take

[17] As set forth in the postconviction motion, Vashawn committed the crime of hit and run several weeks before the trial. The State delayed filing the criminal complaint in that matter until the day after it obtained a verdict against Mr. Mull. (82:19).

Vashawn's side in a violent brawl involving multiple fighters.

Second, there were numerous witnesses who could provide eyewitness testimony favorable to Jovan—Keshawna Wright, Charles Cantrell and Elicia Burrows. (83:48; 84:25; 84:27). Likewise, Jalyn Lynch told police he did not see Jovan at the party after having been shown his photograph. (83:50). None of these witnesses testified at trial.

Third, there is the issue of clothing, with both Menjuan and Tyler Harris linked to clothing reportedly worn by the shooter in several eyewitness accounts.

Trial testimony in context

Considering the copious amount of unsubmitted evidence suggesting that the shooter was someone other than Jovan, the jury in this case cannot be said to have fully assessed the "real controversy," nor can an objective reader of the overall record be confident that jurors were given an opportunity to diligently fulfill their duty to "seek the truth." Wis. JI-Criminal 140. The omitted evidence radically changes the factual landscape, especially when the trial testimony is honestly assessed.

Here, the State claimed that its case hinged on the testimony of five witnesses. (139:7). However, their testimony is independently problematic and does not provide sufficient evidence of guilt capable of overcoming the substantial sources of reasonable doubt described above.

Sanchez Harris, for example, was an unreliable and uncooperative witness. He was inconsistent about whether he was involved in the fight, (135:94), and gave conflicting accounts of his ride to and from the party with the man he later identified as Jovan. As a friend of Vashawn, he had an obvious bias, appeared to recant important aspects of his testimony, and was less-than convincing on key points. For example, he told the jury Jovan "*probably* did it," (135:102) and admitted he did not really see the shooter's face. (135:17). The photo identification procedure Sanchez participated in was also problematic based on trial counsel's cross-examination.[18] (136:47-50).

While Alphonso Carter also identified Jovan in a photo array, that procedure, too, is inherently questionable. There is an unresolved dispute as to whether he identified Jovan after the second or third array, and his testimony makes clear that he made a relative value judgment, picking out Jovan because the fillers "didn't look anything like that person at all." (135:127). This is far from a convincing identification, especially when Alphonso's testimony about the shooter's clothing differs radically from the other witnesses. (135:136). Moreover, with respect to the identification of Jovan by both Sanchez and Alphonso, Jovan and Vashawn look remarkably similar.

[18] It is especially problematic if Sanchez was telling the truth about only being shown two photographs, as he testified at trial. (135:99).

The remaining witnesses are also problematic. Desmand Butler recanted his identification of Jovan. (137:62). Vashawn Smith was inconsistent in his testimony on key points—like whether the shots occurred during or after the fight—and also was incapable of concretely asserting that he had actually seen the shots being fired from the gun he claimed Jovan was pointing. He also had an evident bias, as demonstrated above. Finally, the snitch—Vachune Hubbard—clearly testified to help himself, creating obvious reasons to doubt his somewhat improbable story of confronting Jovan and demanding the truth about the rumors he had killed Ericka.

C. Justice has miscarried.

Finally, a careful review of the record reveals that a new trial is warranted because "justice has miscarried." Not only was important evidence relevant to the determination of guilt omitted, but Jovan did not have a meaningful defense, as the jury was never given an opportunity to evaluate whether someone else committed the crime. In addition, he was convicted in part based on rank hearsay testimony from Cheyenne Pugh, who was allowed to tell the jury multiple times that other people had told her Jovan was the killer, including two separate assertions that Jovan had confessed to third-parties.

Accordingly, this Court should grant a new trial in the interest of justice.

II. Trial counsel's ineffectiveness entitles Jovan to a new trial.

A. Legal standard and standard of review.

An accused's right to the effective assistance of counsel derives from the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, sec. 7 of the Wisconsin Constitution. *State v. Smith*, 207 Wis. 2d 259, 272, 558 N.W.2d 379 (1997). Wisconsin courts apply the two-prong test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id*. at 273. The defendant must establish: (1) trial counsel's performance was deficient; and (2) he was prejudiced by the deficiency. *Id*. To prove deficient performance, a defendant must establish that his counsel "made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Id*. (citations omitted). The prejudice prong requires a showing 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." *Id*. at 276 (citing *Strickland*, 466 U.S. at 694).

Unlike a sufficiency of the evidence analysis, ineffective assistance of counsel claims are not outcome-determinative. Rather, "[t]he focus of this inquiry is not on the outcome of the trial, but on the 'reliability of the proceedings.'" *State v. Thiel*, 2003 WI 111, ¶ 20, 267 Wis.2d 571, 665 N.W.2d 305 (*quoting State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985)). Reviewing courts should evaluate multiple allegations of deficient performance for their "cumulative effect." *Thiel*, ¶ 63.

B. Trial counsel was ineffective for failing to present a third-party perpetrator defense.

1. Vashawn Smith.

This Court remanded so that the circuit court could take testimony as to whether trial counsel had a reasonable strategic reason for not presenting a third-party perpetrator defense. *Mull*, Appeal No. 2018AP1349-CR, ¶ 28. (App. 124).

Here, reasonably competent counsel would have realized that there were adequate grounds to present a third-party perpetrator defense targeting Vashawn. As this Court previously found:

> The evidence implicating Smyth includes the following. The person who bumped into Smyth and started the fight was one of the people who retreated with E.W. to the bedroom and then continued to throw objects out the bedroom door. Smyth told police that he was "close by" the shooter when the shooting through the bedroom door occurred. Smyth's girlfriend told police that Smyth was in the house during the shooting and met up with her at her car after the shots were fired. An eyewitness named Keshawna Wright, who did not testify at trial, identified Smyth as the shooter in a police photo array, and stated that she was "absolutely certain" that Smyth was the shooter.

Id., ¶ 22.[19] (App. 121-122).

[19] This Court utilized an alternative spelling of Vashawn Smith's name.

At the postconviction hearing, trial counsel testified that he did not pursue a third-party perpetrator defense involving Vashawn, "because it was difficult to locate witnesses who would support that defense." (142:13). He could not recall any specific witnesses. (142:13). He could not recall what efforts he made to locate these witnesses, either. (142:15).

This is not a reasonable justification for three reasons. First, trial counsel could have established motive and opportunity with Vashawn's own statements. In fact, the State actually called Vashawn as a witness, at which time he established these two prongs by admitting to being involved in the fight and being present when the shots were fired. While counsel obviously could have shored things up further by calling Casie James, her testimony does not appear strictly necessary to establish motive and opportunity. Counsel did not have a concrete response when asked why he did not use Vashawn's own statements to establish elements of the third-party defense. (142:18).

Second, to the extent that the defense relied on the testimony of other witnesses, it is plainly apparent that counsel never sought available legal mechanisms to bring these witnesses to court, by utilizing a subpoena and/or a material witness warrant. The names and identifying information for vital witnesses appear in police reports and other discovery. There is no corresponding proof that trial counsel called, visited, or otherwise attempted to contact these individuals. Given the lack of proof that counsel made reasonable investigative efforts before

abandoning the defense, this Court should not accept the proffered strategic reason—witness unavailability—as objectively reasonable.

Third, counsel was not prohibited from mounting a defense even if he could not locate favorable witnesses. As set forth above, the first two prongs could be proved by other evidence already in the trial testimony. And, with respect to Keshawna Wright—the witness who clearly establishes a direct connection—there were alternative means of admitting her information if she was genuinely "unavailable."

Counsel could have asked to admit her identification of Vashawn via Wis. Stat. § 908.045(4), as her claim that one of the partygoers was in fact a coldblooded murderer would have threatened to expose her to "hatred, ridicule, and disgrace." While the trial court did not accept this legal rationale, (145:14); (App. 146), Jovan disagrees. Keshawna was nineteen and new to the "after set" scene. (82:34-35). At the party, she witnessed how rival groups engaged in physical combat culminating with gunfire. She knew that one of the men was willing to fire wildly into a door to harm a member of the opposing group. She nevertheless came forward to blame a member of the "straight" crowd for shooting into the door.

Accordingly, her circumstances satisfy both the "objective" and "subjective" poles of the social interest exception. *State v. Stevens*, 171 Wis. 2d 106, 114, 490 N.W.2d 753 (Ct. App. 1992). Objectively, speaking out against one of the party guests and naming them as a killer would tend to expose the speaker to hatred and ridicule, at the very least from those individuals in

the community who took Vashawn's side and might resent her for pointing the finger at their friend. It may have also exposed her to hatred from Vashawn and his friends, who had already demonstrated their willingness to use violence to settle petty disagreements. Subjectively, Keshawna must have been aware of this when she repeatedly cooperated with the police in order to provide them with information about Vashawn.

Moreover, her statement that Vashawn was the shooter, made shortly after the events occurred, would have also been admissible under Wis. Stat. § 908.045(2), which allows the admission of the witness's statement when three requirements are satisfied: "(1) the event or condition must be recently perceived in relation to the declarant's describing it; (2) the statement must be made while the declaration's [sic] recollection is clear; and (3) the statement must not be in response to the instigation of a person engaged in investigating, litigating, or settling a claim and must be made in good faith with no contemplation of pending or anticipated litigation in which the declarant would be an interested party." *State v. Kutz*, 2003 WI App 205, ¶ 51, 267 Wis. 2d 531, 574, 671 N.W.2d 660, 681.

Here, Keshawna's statements that Vashawn was the shooter were made in the days immediately following her witnessing the crime and there is no indication her recollection was unclear; rather, the description in the police reports is detailed and comprehensible. And, while the trial court focused on the third requirement—whether the statement was made "in response to the instigation of a person

engaged in investigating, litigating, or settling a claim," (145:15), this Court's articulation of the legal test in *Kutz* makes clear that the usage of the word "claim" is more technical and specific and refers to only to strictly-construed legal "claims." The statute does not foreclose the admissibility of statements made during a police investigation designed to solve a pressing public emergency—apprehending a murderer.

Accordingly, trial counsel's stated reason for not presenting a third-party defense with respect to Vashawn does not pass muster. The record does not establish that he in fact made good-faith efforts to procure Keshawna or any other witnesses for trial. More concerningly, the record also shows that his stated reason for not presenting this defense did not contemplate the admission of this information via other means. Accordingly, this Court should find that counsel's performance fell below an objective standard of reasonableness.

2. Menjuan Bankhead.

As this Court found:

> The evidence implicating Bankhead includes the following. Bankhead is a friend of Smyth. Smyth's girlfriend placed Bankhead inside the house when the shooting occurred. Shortly after the shooting, an eyewitness, Jalyn Lynch, who did not testify at trial, told police investigators that, just prior to the shooting, Bankhead was trying to get into the bedroom, had a gun, and shouted, "shoot into the door" and "shoot through that motherfucker." Bankhead told police

> investigators that he was wearing a red Wisconsin Badgers sweatshirt at the party.

Mull, Appeal No. 2018AP1349-CR, ¶ 24. (App. 122).

Once again, the testimony at trial establishes the first two prongs of the legal test—motive and opportunity. Here, the testimony of Sanchez Harris, a prosecution witness, established that Menjuan Bankhead was a participant in the fight leading up to the shooting. (135:93). As to opportunity, Vashawn's assertion that Menjuan was also at the party where the fatal shots were fired likely suffices, although once again counsel could have solidified the defense even further by calling Casie James, who would place him in the house when the shots were fired.

With respect to direct connection, Jalyn Lynch's testimony would have established this, placing Menjuan in front of the door, waving a gun, and talking about shooting through it. Counsel could have also established his direct connection by presenting evidence that Menjuan was wearing a sweatshirt consistent with the clothing worn by the shooter, as Desmand Butler testified that the shooter was wearing a Wisconsin Badgers sweatshirt. (137:55). And, Menjuan admitted to police that he was wearing clothing consistent with that description. (83:32).

Thus, counsel would have had to at the very least call Jalyn, and possibly Menjuan and Casie. Once again, however, counsel's explanation for failing to call these witnesses amounted to a generic assertion of witness unavailability. (142:27). As articulated above, no evidence was presented establishing that counsel's efforts were reasonable,

and there was no indication that he utilized legal mechanisms to procure witnesses for trial. And, similarly to Keshawna, counsel appears not to have contemplated whether unavailability exceptions would also be useful here with regard to Jalyn Lynch, whose statements would be admissible under the same legal rationale.

Accordingly, counsel's decision not to pursue a third-party perpetrator defense involving Menjuan was objectively unreasonable.

3. Tyler Harris.

This Court has summarized the evidence against Tyler as follows:

> The evidence implicating Tyler Harris includes the following. Smyth and Tyler Harris were very close friends. Tyler Harris told police that he was "within a few feet" of the shooter when shots were fired. An eyewitness named De'Chanel Coveh, who did not testify at trial, picked Tyler Harris out of a police photo array as a person who possessed a gun at the party. Smyth told police that as he and Tyler Harris left the party, Tyler Harris told Smyth that he had "emptied [his] clip." Smyth also told police that Tyler Harris had posted a message online after the party to the effect that Tyler Harris needed to "stay low."

Mull, Appeal No. 2018AP1349-CR, ¶ 23. (App. 122).

From an evidentiary perspective, admission of evidence regarding Tyler is relatively straightforward. First, Vashawn's trial testimony—that Tyler was at the party with a gun—clearly

establishes his opportunity to shoot his gun at the party. (135:67). While this could be strengthened even further by calling the second witness who saw him with a gun, that testimony is not necessary.

As to the other two requirements, motive and opportunity, counsel clearly needed to call Tyler as a witness. Tyler told police that he went out that night in the company of Vashawn and Menjuan. (82:21). Vashawn testified that the brawl involved his "friends" on one side. (135:66). Thus, if Tyler testified and his statements about attending the party as one of those "friends" were admitted, this would establish his motive to shoot into the door, at the person who had been on the other side of the brawl with his friends Vashawn and Menjuan.

As to direct connection, Vashawn told police that Tyler admitted to shooting his gun at the party and subsequently made suspicious postings online inferring his involvement in the shooting. Trial counsel tried to get this information out via his cross-examination of Vashawn but was stymied by an evidentiary objection. (135:78-79). Counsel could have avoided the evidentiary issue, however, by calling Tyler as a witness. If Tyler testified and denied responsibility, it would have been permissible to cross-examine Tyler about his alleged admissions to Vashawn and his online statements. If he continued to deny, then counsel would have been able to admit his statements through Vashawn. Wis. Stat. § 908.01(4)(a)1. And, if Tyler exercised his right to be free from self-incrimination, then these statements against his interest would have been admissible via Wis. Stat. § 908.045(4).

However, trial counsel testified that he did not call Tyler Harris as a witness because he could not locate him. (142:24). Once again, the record does not establish that he made any meaningful efforts to do so. Tyler's biographic information is contained within the discovery, which discloses that he made a voluntary statement to police. There is also no evidence that counsel ever obtained a subpoena for Tyler's appearance or that he asked for a material witness warrant. And, while counsel claims that he relied on proof from the State that Tyler was unavailable, (142:24), that testimony establishes the unreasonableness of his conduct. After all, if Tyler was genuinely unavailable, then counsel would have had a route to admit his confession to Vashawn—that he fired his gun inside the house during the party—via Wis. Stat. § 908.045(4). The fact that counsel stopped short when presented with the mere fact of Tyler's alleged unavailability—without ever considering that this would have actually allowed him to present direct evidence of Tyler's guilt—shows the extent to which counsel's performance fell below an objective standard of reasonableness. Accordingly, this Court should find that Jovan has prevailed on the deficient performance prong of the ineffectiveness rubric with respect to Tyler Harris.

4. Failure to present a third-party perpetrator defense prejudiced Jovan.

Failure to present an alternative suspect to the jury prejudiced Jovan. Although the State conceded that the jury needed to consider whether the "wrong man" was on trial, (139:7), jurors were never given

any other suspect to consider. Here, a review of the record discloses at least three other strong options, including Vashawn, who was identified as the shooter by an eyewitness. If this evidence were presented to the jury and they credited that testimony, reasonable doubt exists.

While the State argued below that there could be no prejudice because there are various issues present in each alternative theory—impugning the reliability of Keshawna's identification, the lack of a witness who saw Tyler fire his gun, and pointing out that Menjuan only talked about firing a gun to a third-party and was not actually seen firing it himself—there are problems with the narrative the State presented at trial, as well. Simply put, there is no "perfect" suspect. With every suspect—Jovan, Vashawn, Tyler, and Menjuan—evidence exists that both implicates and exonerates each one. However, it is the jury's obligation to weigh and assess that evidence and, had the full picture been presented at trial there is a reasonable probability that jurors would have viewed the case differently and concluded that someone other than Jovan was the shooter, or at the very least, that the evidence was insufficient to conclude that Jovan was the shooter beyond a reasonable doubt.

Accordingly, Jovan is entitled to a new trial.

D. Trial counsel was ineffective for not remedying Cheyenne Pugh's harmful injection of unreliable "confession" evidence into this trial.

On this point, this Court remanded on a narrow issue: "whether Mull received ineffective assistance of trial counsel when trial counsel failed to take any remedial action concerning testimony Pugh offered during cross-examination." *Mull*, Appeal No. 2018AP1349-CR, ¶ 31. (App. 125).

Cheyenne testified on cross-examination that she had been told, by a non-testifying declarant, that Jovan was "bragging about" killing the victim, whom he allegedly referred to with a derogatory name. *Id*., ¶ 39. (App. 128). Counsel did not move to strike this answer, which was clearly nonresponsive to his question (and the trial court has now made a finding as such, (145:26); (App. 158)), nor did counsel move for a mistrial.

At the motion hearing, counsel was asked why he did not move to strike or move for a mistrial. Counsel responded:

> It was more attempting to attack the whole foundation of where this statement came from, the credibility of the witness, that we didn't have these text messages or, you know, where did these come from that this victim -- this witness because of a relationship with the victim had motive to lie.

(142:35-36). Counsel's proffered strategic reason does not excuse his conduct in this case.

As a threshold matter, counsel's cross-examination does not clearly evince an attempt to coherently accomplish those goals. Counsel did little "attacking" and instead asked open-ended questions that seemed almost certain to open the door to further prejudicial remarks, as occurred here.

However, even if counsel had the general goal of attacking the reliability and believability of the witness's account, there was no basis to forego a meritorious motion regarding the admission of egregiously prejudicial hearsay testimony as to Jovan's alleged inculpatory statements.

In other words, the two objectives are not mutually exclusive. Counsel could have both objected to this inadmissible hearsay testimony, which portrayed Jovan as a cold and callous killer who harbored animus against the victim, and also argued to the jury that Cheyenne Pugh was not a credible witness. Reasonably competent counsel would have moved for a mistrial based on her hearsay statements in order to avoid infecting the jury's deliberations with such clearly inadmissible, yet highly salacious material; or, if that was unavailing, would have at the very least asked the Court to strike the inadmissible and non-responsive answer.

Counsel's failure to do so prejudiced Jovan. Admission of a statement by Jovan confessing to the charged offense was clearly prejudicial, as it invited the jury to resolve all "reasonable doubt" arguments made by counsel in favor of the State's case. A confession is uniquely strong evidence, especially a confession that paints the accused as a cold and remorseless killer. That is, the testimony not only

introduced an inadmissible and unreliable confession into this trial, but also portrayed Jovan in a chilling light. A jury asked to impartially consider who was responsible for this victim's tragic death would obviously have been impacted by evidence that Jovan was bragging about killing "the stud bitch." Accordingly, Jovan renews his request for a new trial on the basis of ineffective assistance of counsel.

CONCLUSION

Mr. Mull respectfully requests that, for the reasons outlined herein, this Court reverse the circuit court and grant the relief requested herein.

Dated this 23rd day of November, 2020.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,784 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, including the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

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Dated this 23rd day of November, 2020.

Signed:

Electronically signed by
Christopher P. August
CHRISTOPHER P. AUGUST
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Dated this 23rd day of November, 2020.

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