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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2020AP1362-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOVAN T. MULL,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICITON AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JONATHON D. WATTS AND THE HONORABLE JOSEPH R. WALL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did Jovan T. Mull meet his burden to prove that his trial counsel was ineffective for failing to: (1) present a third-party perpetrator defense or (2) object to hearsay testimony?

The circuit court answered no.

This Court should affirm.

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

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither publication nor oral argument. The issue presented may be resolved by applying established law to the facts.

INTRODUCTION

In March 2015, Mull attended a party at Ericka Walker's[1] house in Milwaukee. After a fight broke out, one of the fight participants hid behind Walker's closed bedroom door. A jury convicted Mull of firing several shots through that closed door, killing Walker.

Mull filed a postconviction motion pursuant to Wis. Stat. § (Rule) 809.30, alleging that trial counsel was ineffective for a series of prejudicial errors and omissions. Mull also claimed he was entitled to a new trial in the interest of justice. Initially, the circuit court denied Mull relief without

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[1] The State uses the victim's name in its brief because she is a homicide victim. *See* Wis. Stat. § (Rule) 809.86(3).

a hearing, but this Court reversed that decision and remanded for an evidentiary hearing.

After the hearing, the circuit court concluded that Mull failed to meet his burden to prove ineffective assistance of counsel. (R. 118.) Mull cannot prove trial counsel's deficiency, and he cannot prove prejudice. As for Mull's claim seeking a new trial in the interest of justice, he has failed to demonstrate entitlement to that extraordinary relief. This Court should affirm.

STATEMENT OF THE CASE

On March 7, 2015, a fight and shooting occurred at a party at Walker's home in Milwaukee. (R. 1:2.) During the fight, Walker attempted to intervene by pulling some of the participants of the fight into a bedroom. (R. 103:2.) "Someone outside of the bedroom [then] fired multiple gunshots through the closed bedroom door." (R. 103:2–3.) Walker was hit by some of the bullets and she died of her injuries. (R. 103:3.) After a several week investigation, the State identified Mull as the shooter and charged Mull with first-degree reckless homicide. (R. 103:3.)

Trial

At trial in April 2016, Attorney Eamon Guerin told the jury in his opening statement that it would have to resolve "an issue of identity" from "many different versions" of what happened at the party. (R. 134:32.) Attorney Guerin advised the jury to pay attention to "how the story changes" from the initial arrest of a suspect based on "credible evidence and statements" to the later charges against Mull. (R. 134:33.)

Walker's ex-girlfriend Cheyenne Pugh testified that she was not at the party, but that she received conflicting information from friends after the shooting identifying both

Vashawn Smyth and Mull[2] as the shooter. (R. 135:34–36, 41.) Pugh did not know who killed Walker (R. 135:34–35.)

When the State read one of the messages implicating Smyth to Pugh, Attorney Guerin objected on hearsay grounds. (R. 135:40.) The State explained that the statement was not being offered for the truth of the matter asserted, but rather to explain how the investigation unfolded. (R. 135:40.) The court overruled the objection and explained to the jury that "the statement in the chat is not being offered for the truth of what it says, but merely that there's a statement that this witness received." (R. 135:40.)

On cross-examination, Pugh confirmed that she did not personally know who had sent her the information implicating Smyth. (R. 135:49, 51.) Pugh testified that "they" did not want to be directly associated with the investigation. (R. 135:53.) When Attorney Guerin asked who, if anyone, "they" was and whether anyone was receiving the messages in addition to Pugh, Pugh explained that she meant people who were "coming up to [her] about the situation" and offering condolences for Walker's death. (R. 135:54.)

Pugh then gave the additional example of one woman who told Pugh about Mull "being in the hood bragging about it saying that he hit a lick over there on 35th and he killed the stud bitch." (R. 135:54.) Pugh defined "stud" as "a female who dresses like a guy." (R. 135:54.) Attorney Guerin also asked Pugh why she initially gave a false name to police, and Pugh explained that she did not immediately give her actual name because she "had warrants out for [her] arrest." (R. 135:56.) When Attorney Guerin remarked that Pugh's "story changed" from Smyth to Mull, she emphasized that she never said

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[2] Pugh identified Smyth as "Bush" and Mull as "Woadie." (R. 135:36–37; 46.) In the record, Smyth's name is often spelled "Smith." The State spells his name Smyth throughout its brief because he spelled it that way in his testimony. (R. 135:58.)

Smyth was the shooter, only that one person told her Smyth was the shooter while others said it was Mull. (R. 135:56.)

Smyth testified that he went to the party with his sister and Mejuan Bankhead. (R. 135:61.) He recalled that two fights broke out, and that he got involved in the fight in the living room. (R. 135:63–66.) Smyth testified that he did not have a gun, but he saw two other people with guns that night: Mull[3] and Tyler Harris. (R. 135:67–68.) Smyth testified that Mull was wearing a blue hooded sweatshirt. (R. 135:74.) According to Smyth, Tyler Harris was in the living room and Mull was in the kitchen pointing his gun toward the living room when Smyth left. (R. 135:68, 73.) Smyth heard shots but did not see the shooter. (R. 135:69.) Smyth admitted that he was arrested right after the shooting because the police suspected that he was the shooter. (R. 135:71.)

On cross-examination, Attorney Guerin revisited the issue of Smyth's arrest as the shooter and asked him again whether he had a gun at the party. (R. 135:74, 76.) Attorney Guerin remarked that Smyth had told police that he usually carried a gun. (R. 135:76.) Attorney Guerin further inquired about Smyth seeing Tyler Harris with a gun, where Tyler Harris was in the house, and whether Smyth witnessed the shooting. (R. 135:77–78, 80.)

Sanchez Harris also testified, recounting that he rode with Mull to Walker's party. (R. 135:83, 89–91.) Mull told Sanchez Harris that he had a gun. (R. 135:91.) At the party, Sanchez Harris saw the shooting from the kitchen, and testified that Mull was "[t]he person who probably did it." (R. 135:96, 102–04.) Sanchez Harris stated that Smyth and Bankhead had left by the time he heard shots. (R. 135:94.) Sanchez Harris rode home with Mull after the shooting, and

[3] Smyth identified "Woadie" as Mull. (R. 135:70.)

Mull threatened him. (R. 135:97–98, 103–04.) Sanchez Harris testified that Mull was wearing a red sweatshirt. (R. 135:98.)

Attorney Guerin probed for inconsistencies on cross-examination, eliciting testimony that Sanchez Harris had remembered at trial who was driving the van, but had no such memory when he was interviewed by police. (R. 135:106.) Attorney Guerin also asked whether Sanchez Harris routinely rode with armed strangers at night. (R. 135:108, 114–15.) Moreover, Attorney Guerin questioned whether Sanchez Harris could have seen the shooting itself in light of his testimony about where he was standing when the incident occurred. (R. 135:113–14.) And because Sanchez Harris had already seen a photo of Mull before participating in the photo array, Attorney Guerin wondered whether the array was simply "pin the tail on the donkey." (R. 135:105, 114, 118.) Finally, Attorney Guerin confirmed with Sanchez Harris that when Sanchez Harris rode back with Mull after the party, someone else had a gun and said that he had "emptied his clip." (R. 135:115.)

A person who attended the party Alphonso Carter testified that after the fight, he saw two men with guns in the living room. (R. 135:121, 124.) One man told the other to shoot, and that man then fired at Walker's bedroom door. (R. 135:124.) Carter identified Mull as the shooter. (R. 135:127–29.) On cross-examination, Attorney Guerin elicited testimony that Carter did not initially identify anyone from a photo array, but had the police return with profile shots. (R. 135:134–35.) Moreover, Carter recalled the shooter wearing a white t-shirt and blue jeans. (R. 135:136–37.) This testimony was contrary to Sanchez Harris's testimony that Mull wore a red sweatshirt (R. 135:98) and Smyth's testimony that Mull wore a blue hooded sweatshirt (R. 135:74).

A friend of Walker's, Desmand Butler testified that he was involved in the fight at the party, and that the person who was taken to the bedroom began throwing things from

behind the bedroom door. (R. 137:38, 41–44.) Butler then saw one person standing about five feet in front of him shoot at the closed bedroom door. (R. 137:44–45.) The shooter wore a red sweatshirt. (R. 137:55.) He acknowledged identifying Mull as "the only person that [Butler] thought look[ed] like who it was" from a photo array. (R. 137:49.)

On cross-examination, Attorney Guerin reviewed the photographs from the photo array with Butler after confirming his description of the shooter. (R. 137:55, 57–60.) After initial cross-examination concluded and the jury was excused, Butler told the court that he now doubted his identification. (R. 137:61.) The jury returned to the courtroom, and Butler testified that he "was the closest witness to" the shooter but no longer thought that Mull was "really him." (R. 137:62–63.) Butler explained that he picked Mull from the photo array because he was the younger of the two men with dreadlocks. (R. 137:63.) Butler stated that in person, the height and body language were different. (R. 137:63.)

Detective Matthew Bell testified that Butler had been sure Mull was the shooter when he picked his photo out of the photo array. (R. 138:9–10.) Detective Patrick Pajot testified that Butler viewed a live line-up with Bankhead as the target and a photo array with Smyth as the target but did not identify anyone as the shooter. (R. 137:66–69.) Rather, Butler only identified Bankhead and Smyth as having been at the party. (R. 137:67–69.)

Another acquaintance of Walker's Vachune Hubbard testified that although Mull initially denied involvement in the shooting, he eventually confessed to Hubbard that he had shot through the bedroom door at the party. (R. 137:91, 99.) On cross-examination, Attorney Guerin questioned why Hubbard would goad Mull into confessing to the shooting if he did not want to be implicated in criminal activity. (R. 137:103.)

Detective Michael Washington explained how the police were able to identify Mull as Woadie by using the Facebook information from Pugh. (R. 136:19–20.) He confirmed that Pugh had first heard of Mull at a vigil. (R. 136:19.) Detective Washington acknowledged that Smyth was considered a possible suspect at one point during the investigation. (R. 136:18–19.) On cross-examination, Attorney Guerin questioned Detective Washington about the Facebook post containing Mull's name and who could have posted it. (R. 136:24–25, 27.) Detective Erik Gulbrandson also acknowledged that Smyth had been a suspect. (R. 136:30–31.) But when the detective showed a photo array targeting Smyth to Carter, Carter did not identify Smyth as the shooter. (R. 136:32.)

Mull did not testify nor present any witness testimony. Mull stated on the record that although he thought that they "could find some of the witnesses" on the defense list, he agreed with Attorney Guerin's decision not to call them. (R. 138:4–5.) The State remarked that many of the witnesses on the defense list were also on the State's list, and that the State could not "find a bunch of the kids that were at that party." (R. 138:5.)

In closing, Attorney Guerin reiterated that this case presented "an issue of identification." (R. 139:13.) Attorney Guerin remarked that the jury did not "hear from everybody at that party," and should consider witness credibility as well as the amount of "time that has elapsed between the witness's observation and the identification" of Mull. (R. 139:13–14.) Moreover, he advised the jury to consider "intervening events which may have affected or influenced the identification." (R. 139:14.) Specifically, Attorney Guerin noted that there were "photos floating around" of Mull while the police were conducting photo arrays, and that the State's witnesses gave conflicting descriptions of what Mull was allegedly wearing. (R. 139:19, 24.)

The jury convicted Mull of first-degree reckless homicide. (R. 57.)

Postconviction

After sentencing, Mull moved the court for postconviction relief pursuant to Wis. Stat. § (Rule) 809.30. (R. 82:1.) He requested an evidentiary hearing and argued that he was entitled to a new trial on three alternative grounds. First, because his Attorney Guerin provided ineffective assistance for failing to, (1) adequately cross-examine Smyth, (2) present a third-party perpetrator defense implicating Smyth, Tyler Harris, or Bankhead, (3) call witnesses or elicit testimony in support of a reasonable doubt defense, (4) object to Pugh's inadmissible hearsay testimony, (5) object to Detective Washington's inadmissible hearsay testimony, and for (6) eliciting additional hearsay testimony from Pugh on cross-examination without remedying the error. (R. 82:9–18.) Second, the State failed to disclose material impeachment evidence relating to Smyth. (R. 82:18–19.) And third, he was entitled to a new trial in the interest of justice. (R. 82:19–20.)

Relevant here, Mull provided investigative reports regarding witnesses he believed would have assisted in the third-party perpetrator defense. Keshawana Wright identified Vashawn Smith as the shooter from a photo array. (R. 82:55–56.) The following week, Wright participated in a line-up with Bankhead as the target, but she did not recognize anyone. (R. 83:47.) Approximately two weeks after the shooting, Wright participated in a second photo array with Mull as the target, but Wright stated that no one looked familiar. (R. 84:18–19.) The officer who administered the second array noted in his report that Wright "wasn't attempting to identify any suspects." (R. 84:19.)

The State contested each of Mull's claims. (R. 92:2–19.) Moreover, the State documented its unsuccessful attempts to locate and subpoena several witnesses for trial. (R. 92:45–61.) Mull replied, renewing his request for relief and for a hearing. (R. 96:1–12.)

The circuit court denied Mull relief without an evidentiary hearing. (R. 97:9.) Mull appealed. (R. 100.) This Court reversed the circuit court's order and remanded for an evidentiary hearing. (R. 103:1.) This Court detailed the evidence presented at trial. (R. 103:7–10.) It also articulated the evidence Mull claimed was not but should have been presented. (R. 103:10–11.)

This Court concluded that Mull alleged sufficient facts to entitle him to a *Machner*[4] hearing on his claim that attorney Guerin should have presented a third-party perpetrator offense. (R. 103:12.) The Court noted that one eyewitness identified Smyth as the shooter, that Tyler Harris shot his gun during the party, and that Bankhead held a gun outside of the bedroom door before the shooting. (R. 103:12.)

This Court also held that Mull was entitled to a *Machner* hearing on his claim that Attorney Guerin was ineffective for failing to move to strike Pugh's cross-examination testimony regarding Mull bragging about shooting Walker. (R. 103:17–19.) Finally, this Court concluded that Mull failed to adequately allege that Attorney Guerin's performance in cross-examining Smyth caused prejudice. (R. 103:21.)

On remand, the circuit court held a *Machner* hearing. (R. 142.) Attorney Guerin testified that as an experienced criminal defense attorney he knew about third-party perpetrator evidence. (R. 142:9–10.) He discussed the

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

difficulty he had finding witnesses to interview. (R. 142:12.) Attorney Guerin explained that without witnesses to testify that Smyth was the shooter, he could not pursue a third-party perpetrator defense. (R. 142:13.)

Instead, Attorney Guerin explained that at trial he pursued a defense that the State could not meet its burden to prove guilt beyond a reasonable doubt. (R. 142:18.) He chose this defense over the third-party perpetrator defense because of the difficulty he and his investigator had locating relevant witnesses. (R. 142:18.) He testified that a third-party defense would have been difficult because of the missing evidence. (R. 142:19.)

Regarding Attorney Guerin's cross-examination of Pugh, he knew that hearsay had been allowed during Pugh's direct examination. (R. 142:31.) Attorney Guerin explained that Pugh made the statement identifying Mull as the shooter, but that the statement came in the context of other troubling testimony. (R. 142:33.) He explained that rather than call attention to Pugh's answer, he used his questioning to attack Pugh's credibility. (R. 142:35–36.) Attorney Guerin believed that if he objected to Pugh's comment, then it risked bringing too much attention to it. (R. 142:40.)

Attorney Guerin explained that he chose to present a reasonable doubt defense because different people had identified different shooters, there were different descriptions of outfits, and there was confusion describing the fight because two fights had occurred in close proximity. (R. 142:41.) Given that testimony, because of multiple people with multiple guns, multiple people giving bad descriptions, and because of witnesses drinking and smoking marijuana, Attorney Guerin believed that he could attack witnesses' credibility. (R. 142:41.)

Only Keshawna Wright identified Smyth as the shooter. (R. 142:48.) And Attorney Guerin could not locate

her. (R. 142:44.) No witnesses identified Bankhead or Tyler Harris as the shooter. (R. 142:49.) Smyth heard Tyler Harris say that he "emptied his clip," but there was no other evidence that Tyler Harris was the shooter. (R. 142:49.)

The circuit court orally denied Mull's postconviction motion. (R. 145:29.) The court found Attorney Guerin's testimony credible because he testified that he did not remember when he did not remember. (R. 145:22.) The court believed that Attorney Guerin made the strategic decision to pursue a reasonable doubt defense because he could not locate the proper witnesses to present a third-party perpetrator defense. (R. 145:23.) Further, the court concluded that Attorney Guerin had a trial strategy to undermine Pugh's credibility generally, but to not bring too much attention to her testimony that Mull shot Walker. (R. 145:29.) The court concluded that the alleged errors in Attorney Guerin's performance were not deficient and did not cause Mull to suffer prejudice. (R. 145:29.)

Mull appeals. (R. 121.)

ARGUMENT

I. Attorney Guerin did not provide ineffective assistance.

A. Standard of Review

Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. *State v. Manuel*, 2005 WI 75, ¶ 26, 281 Wis. 2d 554, 697 N.W.2d 811. This Court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that this Court reviews without deference to the circuit court's conclusions. *Id.*

B. The defendant bears the burden of proving deficient performance and prejudice.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. "[S]trategic choices made [by an attorney] after thorough investigation of law and facts. . . are virtually unchallengeable." *Id.* This Court defers to strategic decisions by counsel and strongly presumes that trial counsel's conduct was not deficient. *Id.* at 689. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Williquette*, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (Ct. App. 1993) (citation omitted).

To demonstrate prejudice, the 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. In determining prejudice, this Court determines whether the aggregated errors by counsel caused prejudice based upon the totality of the circumstances at trial. *State v. Thiel*, 2003 WI 111, ¶ 62, 264 Wis. 2d 571, 665 N.W.2d 305.

C. Mull failed to prove that Attorney Guerin provided ineffective assistance.

Because Mull failed to prove either of the two *Strickland* prongs, the circuit court properly concluded that Attorney Guerin was not ineffective. Mull failed to show that Attorney Guerin's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. This Court should affirm.

1. Attorney Guerin made the strategic decision to pursue a reasonable doubt defense because he concluded it was the strongest defense.

Mull faults trial counsel for failing to pursue a third-party perpetrator defense. (Mull's Br. 35–44.) But the record conclusively demonstrates otherwise. Attorney Guerin could not locate the relevant witnesses to prepare a pretrial motion to present a third-party perpetrator defense. Without the missing evidence, he believed the third-party perpetrator defense was weak. He therefore made the strategic decision to pursue a reasonable doubt defense, which he concluded was a stronger defense. This decision was well within the range of competent assistance. Mull cannot show prejudice based on Attorney Guerin's choice of defense strategy. Mull fails to prove either prong of the ineffective assistance test.

a. Courts do not favor admission of third-party perpetrator evidence.

Proper admission of third-party perpetrator evidence requires a showing that (1) the third party had a motive to commit the crime; (2) the third party had an opportunity to commit the crime; and (3) the third party had a direct connection to the crime. *State v. Denny*, 120 Wis. 2d 614, 624, 357 N.W.2d 12 (Ct. App. 1984); *State v. Wilson*, 2015 WI 48, ¶¶ 56–72, 362 Wis. 2d 193, 864 N.W.2d 52.

Denny does not favor admissibility. Indeed, the State's burden of proving the defendant's guilt beyond a reasonable doubt would be all the more daunting if it also had to establish the innocence of other potential suspects. That is why "*Denny*'s objective is to blunt speculation that someone other than the defendant committed the crime." 7 Daniel D. Blinka, *Wisconsin Practice Series*: *Wisconsin Evidence*, § 404.719 at 253 (4th ed. 2017). The evidence must prove the third party had a motive—a plausible reason—to commit the charged crimes. *Wilson*, 362 Wis. 2d 193, ¶¶ 57, 62–63. But proof of motive is not enough: "[T]he *Denny* test is a three-prong test; it never becomes a one-or two-prong test." *Id.* ¶ 64.

The evidence must also prove the third party had the opportunity to commit the charged crimes. *Wilson*, 362 Wis. 2d 193, ¶ 58. Mere third-party presence at the crime scene will not normally suffice. *See id.* ¶¶ 60, 65, 68, 75. A court may ask whether the defendant has proved that a third party had the practical skills, capacity, or ability to carry out the crimes. *Id.* ¶ 67. A court's determination of opportunity depends on the defendant's theory of third-party involvement. *Id.* ¶ 68.

Finally, the evidence must directly connect third-party perpetrators with the actual commission of the charged crimes. *Wilson*, 362 Wis. 2d 193, ¶ 71. The evidence must have an "inherent tendency" to make that connection. *Id.* The evidence should "firm up the defendant's theory of the crime and take it beyond mere speculation." *Id.* ¶ 59. In other words, although the evidence need not show the "guilt of a third party beyond a reasonable doubt," it must do more than raise a "possible ground of suspicion." *Denny*, 120 Wis. 2d at 623.

b. Attorney Guerin chose the strongest defense to present at trial.

Mull claims that Attorney Guerin's failure to pursue a third-party perpetrator defense was deficient. Mull posits Smyth, Tyler Harris, and Bankhead as viable alternate suspects and alleges how each of these three individuals would satisfy the three-prong *Denny* test. (Mull's Br. 35–43.) But the only evidence that any of the three men were responsible for the crime was Wright's statement and she was unavailable. The defense would have failed. Additionally, even if a third-party perpetrator defense *may* have been available, Attorney Guerin pursued a different defense. Attorney Guerin's strategic decision was not deficient. Mull cannot meet his burden.

Based on the available evidence, a third-party perpetrator defense was unavailable. There was no available direct evidence that Smyth, Tyler Harris, or Bankhead committed the crime.

Wright was the only witness who could have presented direct evidence that Smyth committed the crime. She initially selected Smyth's photo in an array and identified him as the shooter. (R. 82:55–56.) But neither the State (R. 92:45–61), nor Attorney Guerin (R. 142:44) could locate Wright to testify at trial. Without this direct evidence, Attorney Guerin could not meet the requirements of the third-party perpetrator defense. *See Wilson*, 362 Wis. 2d 193, ¶ 71.

Similarly, there is discovery evidence that Bankhead was armed at the party and involved in the fight. (R. 83:49–50.) Lynch even told police that Bankhead told someone to shoot through the bedroom door. (R. 83:50.) But in so stating, Lynch eliminated Bankhead as the shooter. (R. 83:50.) Lynch's testimony would not have provided support for a third-party perpetrator defense.

After ruling out the third-party perpetrator defense, Attorney Guerin selected a reasonable doubt strategy. (R. 142:41–42.) This trial strategy led to the jury hearing evidence that undermined the State's case. The jury knew about Smyth, Tyler Harris, and Bankhead. It knew about the discrepancy between descriptions of the shooters closing. Attorney Guerin's strategy still led to the jury hearing evidence that someone else shot and killed Walker.

Where reasonable, trial strategy "is virtually unassailable in an ineffective assistance of counsel analysis." *State v. Maloney*, 2004 WI App 141, ¶ 23, 275 Wis. 2d 557, 685 N.W.2d 620. "[A] lawyer's decision to call or not to call a witness is a strategic decision generally not subject to review. The Constitution does not oblige counsel to present each and every witness that is suggested to him." *United States v. Best*, 426 F.3d 937, 945 (7th Cir. 2005) (citation omitted).

When the prosecution's case is "relatively weak," a reasonable defense attorney can decide "that the best prospect for acquittal lay in discrediting the government's witnesses, rather than presenting additional testimony." *Lema v. United States*, 987 F.2d 48, 54 (1st Cir. 1993). Defense witnesses present many risks. A defense witness, for example, "may impress the jury unfavorably and taint the jury's perceptions of the accused" and "may prompt jurors to draw inferences unfavorable to the accused." *Id.*

Here, Attorney Guerin reasonably executed his chosen defense. For example, he cast doubt on Smyth's credibility by confirming that he had been arrested for the shooting and questioning whether Smyth was not also armed at the party when he had told police he often carried a gun. (R. 135:74, 76.)

The jury knew that Smyth was present at the party, participated in the fight, and was identified as the shooter by one witness. (R. 82:13.) But the jury knew that the police suspected Smyth, as did at least the one community member

who messaged Pugh, and that Smyth had told police he carried a gun in the past, and he had been fighting at the party that night. (R. 135:35–36, 66, 71, 76.)

Attorney Guerin also confirmed that Tyler Harris was armed that night. (R. 135:77–78.) With respect to Tyler Harris, the jury knew he was seen at the party with a gun. (R. 135:67–68.) There is no evidence that Tyler Harris shot his gun at the bedroom door.

The jury heard that Bankhead was the target of a line-up at one point during the investigation. (R. 137:66–67, 69–70.) The jury could infer that Bankhead had been a suspect, yet he was not identified as the shooter.

The jury also heard evidence undermining the identification of Mull as the shooter. When cross-examining Sanchez Harris, Attorney Guerin elicited testimony that Sanchez had seen a picture of Mull prior to participating in the photo array, casting doubt on the reliability of Sanchez's identification. (R. 135:114, 118.) Attorney Guerin also questioned Sanchez's testimony about riding with Mull to and from the party, asking whether Sanchez would voluntarily ride with armed people he did not know. (R. 135:115.)

As for Carter, Attorney Guerin clarified on cross-examination that he did not initially identify Mull from a photo array but required profile photographs. (R. 135:134–35.) Moreover, Attorney Guerin elicited conflicting testimony on cross-examination about what Mull was wearing that night. (R. 135:98, 136–37.)

More powerful for the defense was Butler's testimony on cross-examination. Attorney reviewed the photos Butler had been presented in a photo array targeting Mull in light of Butler's description of the shooter. (R. 137:57–59.) After the jury was excused, Butler told the court that he now doubted his identification. (R. 137:61.) The jury returned to the courtroom, and Butler testified that he no longer thought that

Mull was really "him" and did not "want to convict nobody that's innocent." (R. 137:62–63.) Simply put, Butler recanted. (R. 137:63.)

Attorney Guerin opted to present a reasonable doubt defense. (R. 142:18.) In doing so, he presented the jury with essentially the same evidence Mull now argues should have been used. Mull cannot overcome the strong presumption of reasonableness of that strategy by showing it to be "irrational or based on caprice" rather than judgment. *State v. Breitzman*, 2017 WI 100, ¶ 65, 378 Wis. 2d 431, 904 N.W.2d 93. Mull fails to prove that Attorney Guerin's strategic decision to pursue the reasonable doubt strategy was deficient.

Likewise, as to prejudice, Mull comes up short. He states in conclusory fashion, that "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 [Mull] was the shooter, or at the very least, that the evidence was insufficient" to convict Mull. (Mull's Br. 44.)

But Mull again fails to prove how, in light of the totality of the evidence adduced at trial, a different result would have been reasonably probable had a third-party perpetrator defense been formally presented. *Strickland*, 466 U.S. at 694 ("The 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."). As explained above, the jury knew that Smyth and Bankhead had been suspects, and that Tyler Harris was also at the party with a gun. The jury also knew that Mull was identified as the shooter by two witnesses, while a third testified to hearing Mull confess to the crime.

In any event, Mull cannot prove prejudice. Once more, he has failed to articulate how, in light of the evidence adduced at trial, it was reasonably probable that the trial outcome would have been different had trial counsel called certain witnesses. *See Strickland*, 466 U.S. at 694.

As noted, the jury heard from Smyth himself that he had been a suspect and was even arrested in this case. (R. 135:71.) Moreover, Pugh testified that at least one member of the community had named Smyth as the shooter. (R. 135:35–36, 41.) Further, the State presented testimony that witnesses had seen armed individuals other than Mull at the party, including Tyler Harris. (R. 135:67–68, 121, 124.) And the jury heard testimony that Bankhead was the target of a line up at one point during the investigation, but he was not identified as the shooter. (R. 137:66–67, 69–70.)

Speculation, moreover, is insufficient to establish ineffective assistance. *See State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999); *State v. Benson*, 2012 WI App 101, ¶ 19, 344 Wis. 2d 126, 822 N.W.2d 484. As the Wisconsin Supreme Court has acknowledged, it is always the case that "there are many aspects of a trial which make its outcome uncertain." *Breitzman*, 378 Wis. 2d 431, ¶ 70. And "[v]irtually every act or omission of counsel would" have "some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. That is why the actual prejudice test is not whether a different result was merely possible, but whether it was reasonably probable but for trial counsel's deficient performance. *Id.* at 694. Mull's allegations do not satisfy that heavy burden.

Mull focuses on what he wanted Attorney Guerin to do differently. (Mull's Br. 35–43.) But the fact that a different strategy existed alone does not establish that Attorney Guerin's performance was deficient. The Wisconsin Supreme Court "has long disapproved of this 'hindsight-is-better-than-foresight' approach" to ineffective assistance claims. *State v.*

Fencl, 109 Wis. 2d 224, 228–29, 325 N.W.2d 703 (1982) (citation omitted); *Weatherall v. State*, 73 Wis. 2d 22, 26, 242 N.W.2d 220 (1976).

Attorney Guerin was able to call into question witness credibility and the reliability of witness identification of his client as the shooter. He was able to get evidence to the jury that other armed men could have been the shooter. That Mull was nonetheless convicted does not compel the conclusion that trial counsel's performance must have been deficient. *See State v. Balliette,* 2011 WI 79, ¶ 25, 336 Wis. 2d 358, 805 N.W.2d 334. (ineffective assistance determination is not based on hindsight, and performance is not deficient solely because the defense proved unsuccessful).

Mull further alleges that Attorney Guerin was deficient for failing to call certain witnesses in support of his reasonable doubt defense. (Mull's Br. 37–43.) Specifically, Mull faults counsel for failing to call (1) Wright, who identified Smyth as the shooter, (2) Lynch, who said he saw Bankhead with a gun, and (4) Tyler Harris, who also had a gun at the party. (Mull's Br. 37–43.) But again, Mull's claim is second guessing based on failure to succeed at trial. Attorney Guerin was not deficient for respecting Mull's strategic decision not to call witnesses.

Mull's argument ignores his on-the-record approval of Attorney Guerin's strategic decision not to call witnesses. (R. 138:4–5.) Attorney Guerin explained that he had discussed the matter with Mull, and based on what the State had presented, they had decided not to call additional witnesses. (R. 138:4.) Mull remarked that he thought some of the witnesses on the defense witness list could probably be found, but he nonetheless agreed with the decision. (R. 138:4–5.)

Mull cannot now fault as deficient performance Attorney Guerin's respect of that strategic decision based

upon their judgment of the circumstances at that time. *See State v. Domke*, 2011 WI 95, ¶ 49, 337 Wis. 2d 268, 805 N.W.2d 364 (attorney's performance may be deficient if it is based on caprice or an irrational trial tactic rather than judgment). To do so would be to inappropriately view counsel's challenged conduct through "the distorting effects of hindsight." *Breitzman*, 378 Wis. 2d 431, ¶ 65 (citation omitted). An attorney has a duty to consult with the defendant on important decisions. *Strickland*, 466 U.S. at 688. Mull cannot prove Attorney Guerin was not deficient in this respect.

Moreover, the witnesses Mull maintains should have been called were also on the State's witness list. (R. 7:1–2.) At trial, the State represented that it could not "find a bunch of the kids that were at that party." (R. 138:5.) Mull does not contest that statement. In postconviction proceedings, the State documented its unsuccessful attempts to subpoena Wright and Burrows. (R. 92:7–8, 45–49, 51–52, 54–58, 60–61.) Attorney Guerin was not deficient because he did not duplicate the State's futile efforts to subpoena these unavailable witnesses. There is no indication that a subpoena from Attorney Guerin would have yielded a different result.

True, the State did not claim to have also subpoenaed Lynch. (R. 92:8.) But there is no indication whatsoever that he was available for trial and would have testified in line with his police statements. Nor is it certain that any of his or Wright's statements would have been admissible through alternative means as Mull speculates they could have been. (Mull's Br. 34–43.)

Mull fails to prove either prong of the ineffective assistance test. Attorney Guerin did not perform deficiently by making the strategic decision to pursue a reasonable doubt defense. His decision did not cause Mull to suffer prejudice. The jury heard evidence that Smyth, Tyler Harris, or Bankhead could have been the shooter. The circuit court

properly concluded that Attorney Guerin did not provide ineffective assistance. This Court should affirm.

2. Attorney Guerin made the strategic decision not to draw attention to Pugh's damaging testimony.

Mull's second claim of ineffectiveness is that trial counsel elicited prejudicial hearsay testimony from Pugh on cross-examination and did not move for a mistrial or to strike Pugh's response. (Mull's Br. 45–46.) Mull cannot meet his burden to prove deficient performance or prejudice.

Mull's complaint requires examination of all of Pugh's cross-examination testimony. Attorney Guerin began by questioning Pugh about the messages she had received on Facebook about the shooting. (R. 135:48–49.) Attorney Guerin confirmed Pugh's account name, and that she did not know who had sent her the message inculpating Smyth. (R. 135:48–49.) Then, Attorney Guerin asked a series of questions about the Smyth message. (R. 135:52–53.) When Attorney Guerin asked Pugh why a person who had sent her information about Mull then blocked Pugh, Pugh explained that "they" did not want to talk to the police about the shooting or otherwise be involved. (R. 135:53.)

Attorney Guerin asked Pugh who she referred to as "they" and whether other people were receiving messages besides her. (R. 135:54.) Pugh explained that she was not referring to the social media messages, but rather to people speaking to her in person about the event and expressing their condolences over Walker's death. (R. 135:54.) For example, Pugh continued, one person told her about Mull "bragging about [the shooting] saying that he hit a lick over there on 35th and he killed the stud bitch." (R. 135:54.) Attorney Guerin asked Pugh to define "stud," which Pugh explained was a "female who dresses like a guy." (R. 135:54.)

Attorney Guerin did not dwell further on the statement and asked Pugh about her meeting with police. (R. 135:54–55.)

Attorney Guerin's performance was not deficient when he failed to move to strike Pugh's answer about Mull bragging about the shooting. Attorney Guerin had sufficiently undermined Pugh's credibility. To object to her statement about Mull would have implied that Attorney Guerin believed that inculpatory statement to be true. He would have undermined his successful attempt to make Pugh's testimony seem incredible to the jury.

As Attorney Guerin explained, he did not want to draw attention to the statement. (R. 142:40.) He believed that if he moved past the statement, the jury would lump it in with her other testimony that undermined Mull's defense and ignore it. (R. 142:40.) This was a reasonable strategy. It was no deficient performance.

Likewise, Attorney Guerin did not perform deficiently when he did not move for a mistrial after Pugh's statement. When a circuit court considers whether to exercise its sound discretion and grant a mistrial, for example, it "must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." *State v. Doss*, 2008 WI 93, ¶ 69, 312 Wis. 2d 570, 754 N.W.2d 150. As Attorney Guerin explained, he did not move to strike the testimony or move for a mistrial because he did not want to draw attention to Pugh's prejudicial statement. (R. 142:40.) He felt there was more risk in objecting than in moving on. (R. 142:40.) A mistrial was not likely to be granted because "the claimed error was sufficiently prejudicial to warrant a new trial." *Doss*, 312 Wis. 2d 570, ¶ 69. The circuit court concluded that Attorney Guerin's strategy was reasonable. (R. 145:29.)

Mull fails to prove that any failure by Attorney Guerin to object or move for a mistrial caused him prejudice. In light

of the proceeding as a whole, Pugh's statement was insufficiently prejudicial to warrant starting over. Pugh did not testify that she knew whether the information was accurate or true, and the circuit court had previously distinguished for the jury hearsay evidence from evidence presented for a purpose other than the truth of the matter asserted. (R. 135:35, 40.)

In light of all the evidence adduced at trial, including testimony from Hubbard who recounted how Mull confessed to him directly, why a different outcome would have been reasonably probable but for Attorney Guerin's alleged errors in cross-examining Pugh. Mull failed to meet his burden to prove prejudice.

Mull claims that Pugh's statement that Mull confessed was uniquely strong evidence. (Mull's Br. 46.) But Pugh did not testify that her information was accurate. She did not testify that Mull confessed to her, but to some unnamed person. It was not strong evidence against Mull especially when examined in the context of the trial as a whole. The jury heard from Hubbard that Mull had directly confessed to shooting and killing Walker. (R. 137:99.)

In sum, Mull fails to meet his burden to prove either prong of the ineffective assistance of counsel test. Attorney Guerin was not deficient; Mull did not suffer prejudice. The circuit court properly denied his claim. This Court should affirm.

II. Reversal in the interest of justice is not appropriate here.

A. The decision whether to reverse in the interest of justice lies with this Court's discretionary power.

"Appellate courts may also reverse judgments 'where unobjected-to error results in either the real controversy not

having been fully tried or for any reason justice is miscarried.'" *State v. Zdzieblowski*, 2014 WI App 130, ¶ 24, 359 Wis. 2d 102, 857 N.W.2d 622 (quoting *Vollmer v. Luety*, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990)). *See also* Wis. Stat. § 752.35.

The power of discretionary reversal is a "formidable" statutory power. *State v. Wery*, 2007 WI App 169, ¶ 21, 304 Wis. 2d 355, 737 N.W.2d 66. The Wisconsin Supreme Court has charged this Court with exercising that formidable power only in exceptional cases—infrequently, judiciously, and with great caution and reluctance. *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60. Whether this Court should do so is within this Court's discretion. *Id.* ¶ 23.

As the Wisconsin Supreme Court has explained, a controversy may be held as not fully tried when: (1) "the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case," and (2) "when the jury had before it evidence not properly admitted which so clouded a crucial issue." *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

B. This Court should refuse to reverse in the interest of justice.

The rarely used exceptional discretionary power to grant a new trial in the interest of justice is not warranted. Mull argues that the real controversy was not fully tried because the jury did not receive all the relevant evidence. (Mull's Br. 23.) He asserts that the factual picture was missing: (1) "evidence connecting [Smyth] and his friends to the shooting;" (2) evidence directly implicating Smyth or a friend; (3) impeachment evidence about Smyth; and (4) other evidence exonerating Mull. (Mull's Br. 23–24.)

Mull claims that "the omitted evidence undermine[d] the believability and persuasiveness of the State's case."

(Mull's Br. 23.) But the record rebuts it. There is an insufficient basis for this Court to exercise its discretion here.

Mull's argument boils down to an argument that the jury did not learn of all the facts and circumstances surrounding this homicide. Many of the facts Mull claims were omitted were background facts not directly relevant to the question of whether Mull shot and killed Walker. The jury did not need to decide how many fights happened at the party. Nor did it need to decide whether heterosexual and gay partygoers were getting along. It only needed to decide whether Mull shot and killed Walker. The other evidence did not keep the real controversy from being tried.

The State and Attorney Guerin emphasized to the jury that its task was to determine whether Mull was the shooter beyond a reasonable doubt. The jury had before it testimony that Mull was the shooter and that he had confessed to the shooting, but the jury also heard that people other than Mull were armed at the party and had been the subject of community and law enforcement suspicion. The jury even heard one of the State's witnesses recant his identification of Mull upon cross-examination, saying he did not want to help convict a potentially innocent person. (R. 137:61–63.) In other words, the jury had evidence of uncertain identification and competing narratives to consider, evidence "that bore on an important issue of the case." *Hicks*, 202 Wis. 2d at 160.

Additionally, Mull's argument is an attempt to repackage his ineffective assistance claims in an attempt to avoid proving prejudice. As established in section I of this brief, Attorney Guerin did not provide ineffective assistance. An interest-of-justice claim fails if it merely rehashes arguments that this Court has rejected. *State v. Arredondo*, 2004 WI App 7, ¶ 56, 269 Wis. 2d 369, 674 N.W.2d 647. Mull's argument for discretionary reversal rehashes his meritless claims of ineffective assistance. This Court should refuse to

use its extraordinary power to reverse in the interest of justice.

Mull argues that evidence connecting Smyth and his friends to the shooting was omitted. (Mull's Br. 24–26.) This claim has two parts: (1) more information about the fight should have been introduced, and (2) additional witnesses should have been called to testify. (Mull's Br. 24–26.) The fight preceding the shooting was not directly relevant to the question of whether Mull shot and killed Walker. Therefore, the omission of such evidence did not keep the real controversy from being tried. Mull cannot show that evidence connecting Smyth to the shooting was relevant to the true controversy.

Second, at trial, Mull personally agreed with Attorney Guerin's decision not to call witnesses to testify even though they could locate some of the witnesses. (R. 138:4–5.) Postconviction, Attorney Guerin testified that he could not locate witnesses because of aliases and other identification issues. (R. 142:12.) Mull cannot agree with the decision not to call these witnesses at trial, and only after conviction change his mind. He personally agreed that witnesses were not necessary. His claim fails.

Next, Mull argues that the real controversy was not tried because Keshawna Wright did not testify and identify Smyth as the shooter. (Mull's Br. 26–27.) But Attorney Guerin could not locate Wright to testify at trial. (R. 142:44.) Mull also argues that Bankhead and Tyler Harris were potential suspects in the shooting. (Mull's Br. 28.) But again, no witnesses identified Bankhead or Tyler Harris as the shooter. (R. 142:49.) Mull does not demonstrate that the real controversy was not tried.

Mull also asserts that the real controversy was not tried because the jury did not receive evidence about Smyth's motive to lie. (Mull's Br. 28–29.) But Mull's claims are

conclusory and without factual support. Mull fails to explain how such evidence could have been presented to the jury. He does not articulate whether Attorney Guerin should have called witnesses to testify or whether Attorney Guerin should have conducted cross-examination differently. These claims should be rejected outright.

Mull argues that the real controversy was not tried because the jury did not hear evidence that Mull did not have any motive to fight. (Mull's Br. 30.) But again, he fails to articulate any such evidence. He also claims that the jury should have heard from numerous witnesses. (Mull's Br. 31.) But Mull does not explain why he agreed at trial not to call any witnesses.

Mull claims that Bankhead and Tyler Harris were linked to clothing worn by the shooter in an apparent attempt to demonstrate that the real controversy was not tried. (Mull's Br. 31.) The jury heard evidence regarding the different clothing worn by the shooter. Smyth testified that Mull wore a blue sweatshirt. (R. 135:74.) Sanchez Harris testified that Mull wore a red sweatshirt. (R. 135:98.) Carter testified that the shooter wore a white t-shirt. (R. 135:136–37.) Butler testified that the shooter wore a red sweatshirt. (R. 137:55.) Mull fails to identify what information the jury should have heard but did not hear. And Mull fails to link this claim to any argument that the real controversy was not tried.

Mull argues that Sanchez Harris, Carter, and Butler all identified Mull as the shooter in "problematic" identification procedures. (Mull's Br. 32–33.) But Mull failed to challenge any of the identification procedures pretrial. And he had the opportunity to challenge each witness' identification on cross-examination. His claims do not demonstrate that the real controversy was not tried.

As for whether Mull's trial yielded a result so untrustworthy and unfair as to constitute a miscarriage of

justice, a ruling in Mull's favor would hinge on whether he has shown a "substantial probability of a different result on retrial." *See Luety*, 156 Wis. 2d at 19. There is nothing in this record that supports the conclusion that the real controversy, whether Mull was the shooter, was not fully tried, or that there was a miscarriage of justice. Rather, the record demonstrates the contrary. Accordingly, Mull is not entitled to this extraordinary relief.

CONCLUSION

This Court should affirm the circuit court's order denying postconviction relief and Mull's judgment of conviction.

Dated this 25th day of February 2021.

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 8201 words.

Dated this 25th day of February, 2021.

Electronically signed by,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

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

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 25th day of February, 2021.

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