FILED
03-03-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP1362-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JOVAN T. MULL,

Defendant-Appellant.

PETITION FOR REVIEW AND APPENDIX

JOSHUA L. KAUL
Attorney General of Wisconsin

CHRISTINE A. REMINGTON
Assistant Attorney General
State Bar #1046171

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8943
(608) 294-2907 (Fax)
remingtonca@doj.state.wi.us

TABLE OF CONTENTS

Page

ISSUE PRESENTED FOR REVIEW 5

CRITERIA SUPPORTING THE PETITION FOR REVIEW 5

STATEMENT OF THE CASE AND STATEMENT OF FACTS 5

SUMMARY OF ARGUMENT 15

ARGUMENT 15

The court of appeals ignored binding case law by impermissibly weighing the evidence rather than defer to the attorney's strategic choices. 15

A. The standards of review for an ineffective assistance claim are well established and require deference to the attorney's strategic choices. 16

1. General standard of review. 16

2. The defendant bears the burden of proving deficient performance and prejudice. 16

3. The lawyer's reasonable strategies are virtually unassailable on appeal. 17

B. The court of appeals failed to defer to Attorney Guerin's strategies at trial. 18

1. The court of appeals failed to defer to Attorney Guerin's reasonable doubt strategy. 18

a. The *Denny* third-party perpetrator evidence is demanding, and Attorney Guerin did not have the evidence he needed to support it. 19

b. Attorney Guerin reasonably chose a reasonable defense strategy. 20

c. Mull also failed to show prejudice. 22

2. The court of appeals also failed to defer to Attorney Guerin's strategic decision about how to handle Pugh's testimony. 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Lema v. United States,
987 F.2d 48 (1st Cir. 1993) 17

State v. Benson,
2012 WI App 101, 344 Wis. 2d 126, 822 N.W.2d 484 22

State v. Breitzman,
2017 WI 100, 378 Wis. 2d 431, 904 N.W.2d 93 ..... 22, 23

State v. Denny,
120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984) 19, 20

State v. Doss,
2008 WI 93, 312 Wis. 2d 570, 754 N.W.2d 150 24

State v. Erickson,
227 Wis. 2d 758, 596 N.W.2d 749 (1999) 22

State v. Kimbrough,
2001 WI App 138, 246 Wis. 2d 648,
630 N.W.2d 752 ..... 5, 15, 17, 18

State v. Machner,
92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) 12

State v. Maloney,
2004 WI App 141, 275 Wis. 2d 557, 685 N.W.2d 620 17

State v. Manuel,
2005 WI 75, 281 Wis. 2d 554, 697 N.W.2d 811 16

State v. Mull,
No. 2020AP1362-CR, 2022 WL 287813
(Wis. Ct. App. Feb. 1, 2022) 14, 15, 17

State v. Thiel,
2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305 17

State v. Williquette,
180 Wis. 2d 589, 510 N.W.2d 708 (Ct. App. 1993) 16

State v. Wilson,
2015 WI 48, 362 Wis. 2d 193, 864 N.W.2d 52 ..... 19, 20

Strickland v. Washington,
466 U.S. 668 (1984) .....5, *passim*

United States v. Best,
426 F.3d 937 (7th Cir. 2005) 17

Statutes

Wis. Stat. § (Rule) 809.62(1r)(d)..... 5, 15

Other Authorities

7 Daniel D. Blinka,
Wisconsin Practice Series: Wisconsin Evidence
§ 404.719 (4th ed. 2017) 19

ISSUE PRESENTED FOR REVIEW

Under binding case law, in reviewing an ineffective assistance claim, the court must defer to a trial attorney's strategic decisions. Here, the circuit court found Mull's attorney used reasonable strategies in choosing a defense and handling cross-examination of a witness, and it deferred to the attorney's strategy. But the court of appeals substituted its own decisions for those of Mull's trial attorney. Did the court of appeals impermissibly fail to defer to Mull's attorney's strategic decisions?

CRITERIA SUPPORTING THE PETITION FOR REVIEW

The State submits that this Court should grant the petition for review. The court of appeals' decision conflicts with controlling opinions of the supreme court. *See* Wis. Stat. § (Rule) 809.62(1r)(d). The court cited to *State v. Kimbrough*, 2001 WI App 138, ¶¶ 32–34, 246 Wis. 2d 648, 630 N.W.2d 752, when it concluded that the attorney's strategic decision was objectively unreasonable. This is a misinterpretation of *Kimbrough*. It conflicts with the requirement in *Strickland v. Washington*, 466 U.S. 668, 689 (1984), to defer to trial counsel's authority to make strategic decisions.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This homicide arose out of a fight and shooting at a party at the home of the victim Ericka Walker. (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 him with first-degree reckless homicide. (R. 103:3.)

Trial

In his opening statement at trial in April 2016, Attorney Eamon Guerin told the jury 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[1] as the shooter. (R. 135:34–36, 41.) Pugh did not know who killed Walker. (R. 135:34–35.)

When the State read a Facebook message 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,

---

[1] 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.)

"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 said that one woman told Pugh about Mull's "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 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, Pugh emphasized that she never said 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 fights broke out in two locations, 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[2] 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

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

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 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, Tyler Harris had a gun and said that he had "emptied his clip." (R. 135:115.)

Another 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 lineup 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 information from a Facebook post obtained from Pugh that identified Mull as the shooter. (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 a 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 or present any witness testimony. Mull stated that although he thought that they "could find some of the witnesses" on the defense list, he had 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" on Facebook 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, he asserted that 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, he alleged that the State failed to disclose material impeachment evidence relating to Smyth. (R. 82:18–19.) And third, he asserted that he was entitled to a new trial in the interest of justice. (R. 82:19–20.)

Mull provided investigative reports regarding witnesses he believed would have assisted in the third-party perpetrator defense. Keshawana Wright initially identified Vashawn Smyth 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), including documenting its unsuccessful attempts to locate and subpoena several witnesses for trial. (R. 92:45–61.)

The circuit court denied Mull relief without an evidentiary hearing. (R. 97:9.) Mull appealed. (R. 100.)

The court of appeals reversed the circuit court's order and remanded for an evidentiary hearing. (R. 103:1.) The court concluded that Mull alleged sufficient facts to entitle him to a *Machner*[3] 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.)

The 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, the court concluded that Mull failed to

---

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

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 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 appealed. (R. 121.) The court of appeals rejected the circuit court's conclusion. It was not persuaded by Mull's attorney's testimony that he rejected presenting a third-party perpetrator defense because he could not locate witnesses. *State v. Mull*, No. 2020AP1362-CR, 2022 WL 287813, ¶ 34, (Wis. Ct. App. Feb. 1, 2022) (not recommended for publication); (Pet-App. 116). It concluded that he was deficient for failing to pursue alternative means to present the third-party perpetrator defense. *Id.* It concluded that the attorney's strategic decision to pursue a reasonable doubt defense was objectively unreasonable. *Id.* ¶ 36; (Pet-App.

117). It concluded that Mull was prejudiced by this unreasonable decision. *Id.* ¶ 40; (Pet-App. 119).

Next, the court concluded that the attorney was deficient, and Mull was prejudiced for the failure to move for a mistrial after testimony that Mull was bragging about killing the victim. *Mull*, 2022 WL 287813, ¶¶ 43–48; (Pet-App. 121–22).

Therefore, it remanded to the circuit court for a new trial. The State now petitions this Court to review the decision of the court of appeals.

SUMMARY OF ARGUMENT

Review is warranted because the court of appeals' opinion is flawed. The court of appeals' decision is legally flawed because it conflicts with controlling opinions. *See* Wis. Stat. § (Rule) 809.62(1r)(d). The court cited to *Kimbrough*, 246 Wis. 2d 648, ¶¶ 32–34, when it concluded that the attorney's strategic decisions were objectively unreasonable. This is a misinterpretation of the holding in *Kimbrough*. Accordingly, the State requests that this Court review the decision of the court of appeals.

ARGUMENT

The court of appeals ignored binding case law by impermissibly weighing the evidence rather than defer to the attorney's strategic choices.

Under controlling precedent, the court of appeals owed deference to the attorney's strategic decision. The court ignored that precedent. *Mull*, 2022 WL 287813, ¶ 36; (Pet-App. 117–18.) This directly conflicts with *Gordon* and *Breitzman*.

A. The standards of review for an ineffective assistance claim are well established and require deference to the attorney's strategic choices.

1. General 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. The court of appeals 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.*

2. 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* 466 U.S. at 687. 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.

3. The lawyer's reasonable strategies are virtually unassailable on appeal.

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, the court of appeals claimed to rely upon *Kimbrough*, 246 Wis. 2d 648, ¶¶ 32–34, for its conclusion that the trial attorney's strategic decision was objectively unreasonable. *Mull*, 2022 WL 287813, ¶ 36. But in *Kimbrough*, the court did not overrule the trial attorney's

strategic decision. Instead, it concluded that defense counsel was objectively reasonable when he selected the trial defense strategy. *Kimbrough*, 246 Wis. 2d 648, ¶ 32. The court of appeals' reliance on *Kimbrough* misconstrues the decision and conflicts with *Strickland* and other Wisconsin cases requiring the court of appeals to defer to trial counsel's strategic decisions.

B. The court of appeals failed to defer to Attorney Guerin's strategies at trial.

The court of appeals failed to follow controlling precedent because it failed to defer to Attorney Guerin's reasonable strategies at trial.

1. The court of appeals failed to defer to Attorney Guerin's reasonable doubt strategy.

First, the court failed to follow precedent in refusing to defer to Attorney Guerin's reasonable doubt strategy, concluding he should have pursued a *Denny* third-party perpetrator defense. Attorney Guerin could not locate the relevant witnesses to prepare a pretrial motion to present a third-party perpetrator defense. Lacking 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, and the court of appeals should have deferred to it.

a. The *Denny* third-party perpetrator evidence is demanding, and Attorney Guerin did not have the evidence he needed to support it.

The court of appeals concluded that Attorney Guerin's strategy was unreasonable on the theory that he should have pursued a *Denny* third-party perpetrator defense. But that defense includes three elements and required evidence Guerin did not have.

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.* (citation omitted). 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 reasonably chose a reasonable defense strategy.

After ruling out the third-party perpetrator defense, Attorney Guerin selected a reasonable doubt strategy. (R. 142:41–42.) This strategy led to the jury's 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 shooter's clothing. Attorney Guerin's strategy led to the jury's hearing evidence that someone else shot and killed Walker.

And Attorney Guerin reasonably executed his chosen defense.

Regarding Smyth, 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.) 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 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), and the jury learned that Harris was seen at the party with a gun. (R. 135:67–68.)

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

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

As for Carter, Attorney Guerin elicited on cross-examination that Carter 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.)

Attorney Guerin's cross-examination of Butler was particularly powerful. Attorney Guerin reviewed with Butler the photos the witness had been presented in a photo array targeting Mull. (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.

c. Mull also failed to show prejudice.

Likewise, as to prejudice, Mull came up short. He failed to articulate how, in light of the evidence adduced at trial through Attorney Guerin's chosen defense strategy, it was reasonably probable that the trial outcome would have been different if the third-party perpetrator defense had been presented. *See Strickland*, 466 U.S. at 694.

The jury heard evidence about the other potential shooters. 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 lineup 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 this 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 failed to prove either prong of the ineffective assistance test. The circuit court properly concluded that Attorney Guerin did not provide ineffective assistance. The court of appeals improperly substituted its judgment for that of Attorney Guerin.

2. The court of appeals also failed to defer to Attorney Guerin's strategic decision about how to handle Pugh's testimony.

Similarly, the court of appeals failed to follow binding case law by not deferring to Attorney Guerin's strategic choice about how to handle Pugh's testimony. Attorney Guerin concluded that objecting to the answer would have drawn attention to the testimony and reasonably chose instead to ask questions that would undermine Pugh's credibility.

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.

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, 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 (citation omitted). 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 error was not sufficiently prejudicial to warrant a whole new trial. The circuit court correctly concluded that Attorney Guerin's strategy was reasonable (R. 145:29), and the court of appeals should have affirmed.

Moreover, Mull failed 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 explained the difference to the jury between hearsay evidence and evidence presented for a purpose other than for 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, Mull failed to show that 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.

In sum, the court of appeals improperly substituted its judgment for Attorney Guerin's. This Court should accept the State's petition and reverse.

CONCLUSION

Accordingly, the State requests that this Court grant its petition for review of the court of appeals' decision.

Dated this 3rd day of March 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

CHRISTINE A. REMINGTON
Assistant Attorney General
State Bar #1046171

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8943
(608) 294-2907 (Fax)
remingtonca@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 5,773 words.

Dated this 3rd day of March 2022.

CHRISTINE A. REMINGTON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

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

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

Dated this 3rd day of March 2022.

CHRISTINE A. REMINGTON
Assistant Attorney General

Index to the Appendix
State of Wisconsin v. Jovan T. Mull
Case No. 2020AP1362-CR

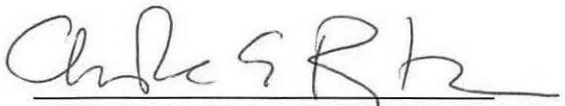
Description of document	Page(s)
State of Wisconsin v. Jovan T. Mull, No. 2020AP1362-CR, 2022 WL 287813, Court of Appeals Decision (unpublished), dated Feb. 1, 2022	101-123
State of Wisconsin v. Jovan T. Mull, No. 2015CF2419, Milwaukee County Circuit Court, Order denying motion for new trial, dated Aug. 10, 2020 (R. 118)	124

APPENDIX CERTIFICATION

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § (Rule) 809.62(2)(f) and that contains, at a minimum:(1) a table of contents; (2) the decision and opinion of the court of appeals; and (3) the findings or opinion of the circuit court necessary for an understanding of the petition.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 3rd day of March 2022.



CHRISTINE A. REMINGTON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(13) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(13) and 809.62(4)(b) (2019-20).

I further certify that:

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

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

Dated this 3rd day of March 2022.

CHRISTINE A. REMINGTON
Assistant Attorney General