FILED
07-18-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1362-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JOVAN T. MULL,

Defendant-Appellant.

ON REVIEW FROM A COURT OF APPEALS DECISION REVERSING A POSTCONVICTION ORDER AND REMANDING FOR A NEW TRIAL IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JONATHAN D. WATTS AND THE HONORABLE JOSEPH R. WALL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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INTRODUCTION

In March 2015, Jovan T. Mull attended a party at Ericka Walker's[1] house in Milwaukee. A fight broke out at the party and 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 alleging that trial counsel was ineffective for a series of alleged 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 a hearing, but this Court reversed and remanded for an evidentiary hearing.

After the evidentiary hearing, the circuit court concluded that Mull failed to meet his burden to prove ineffective assistance of counsel. It based its conclusion on Mull's trial attorney's testimony about the strategic decisions that he made throughout the trial about what defense to pursue and when to object.

The circuit court properly deferred to those strategic decisions after finding the trial attorney's testimony to be credible and it denied Mull's ineffective assistance claims. As for Mull's claim seeking a new trial in the interest of justice, he has failed to demonstrate entitlement to that extraordinary relief.

The court of appeals reversed and remanded for a new trial when it misapplied settled case law and refused to defer to the trial attorney's strategic decisions. Instead, it substituted its own judgment and concluded that Mull's attorney's strategy was unreasonable. This Court should reverse the court of appeals' decision. It should also conclude

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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).

that Mull's attorney did not provide ineffective assistance at trial. And it should refuse to reverse in the interest of justice.

ISSUES PRESENTED

1. When deciding an ineffective assistance claim, the reviewing 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 properly deferred to the attorney's strategy. The court of appeals substituted its own strategic determinations for those of Mull's trial attorney. Did the court of appeals impermissibly fail to defer to Mull's attorney's strategic decisions?

The circuit court did not answer this question.

The court of appeals did not answer this question.

This Court should answer yes and reverse.

2. Should this Court decline Mull's invitation to exercise its extraordinary remedy of remanding for a new trial in the interest of justice?

The circuit court answered yes.

The court of appeals did not answer this question.

This Court should answer yes.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This homicide arose out of a fight and shooting at a party at the home of Ericka Walker. (R. 1:2.) During the fight, Walker attempted to intervene and pull 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 from 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[2] 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"

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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 Smyth spelled it that way during his testimony. (R. 135:58.)

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 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[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.)

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

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 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 told them in the car that he had "emptied his clip" at the party. (R. 135:115.)

Another attendee at 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 at witness, that witness 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*[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

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

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 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.) 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.) 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.)

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) (unpublished); (R-App. 18). 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; (R-App. 19). It concluded that Mull was prejudiced by this unreasonable decision. *Id.* ¶ 40; (R-App. 21).

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; (R-App. 23–24).

Therefore, it remanded to the circuit court for a new trial. The State petitioned this Court to review the decision of the court of appeals. This Court granted the State's petition.

SUMMARY OF ARGUMENT

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 *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 decisions were objectively unreasonable. This is a misinterpretation of *Kimbrough*. The court's opinion directly conflicts with numerous cases dictating that reviewing courts grant great deference to trial attorney's strategic decisions.

ARGUMENT

I. 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; (R-App. 19–20.)

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 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.

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.*

As this Court has made abundantly clear, an attorney's strategic decisions are virtually unassailable. In *State v. Breitzman*, 2017 WI 100, ¶ 38, 378 Wis. 2d 431, 904 N.W.2d 93, this Court reiterated that an attorney's "decisions in choosing a trial strategy are to be given great deference." This Court has repeatedly concluded the same. *See e.g., State v. Balliette*, 2011 WI 79, ¶ 26, 336 Wis. 2d 358, 805 N.W.2d 334; *State v. Maloney*, 2005 WI 74, ¶ 43, 281 Wis. 2d 595, 698 N.W.2d 583.

A reviewing court "should be 'highly deferential' to counsel's strategic decisions and make 'every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Breitzman*, 378 Wis. 2d 431, ¶ 65 (quoting *State v. Carter*, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695). The reviewing court should not "second-guess a reasonable trial strategy, [unless] it was based on an irrational trial tactic or based upon caprice rather than upon judgment." *Id.* (citation omitted).

Here, the court of appeals relied 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.

The court in *Kimbrough* did not conclude that the court of appeals could substitute its own judgment for that of the defendant's attorney. *Kimbrough* did not create a new and

different standard for reviewing an attorney's strategic decisions. Instead, in *Kimbrough*, the court addressed what standard applies when the attorney's explanation is not credible. *Kimbrough*, 246 Wis. 2d 648, ¶ 30. Only after making the credibility determination did the court of appeals discuss whether the trial attorney's *actions* were objectively reasonable. *Id.* ¶ 31.

The lynchpin to the *Kimbrough* holding is that the circuit court did not find the trial attorney's explanation of his strategy to be truthful. Because his testimony was not credible, it looked at his actions. It did not change or undermine any of the case law granting great deference to an attorney's strategic decisions generally.

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.

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 someone else was the shooter, he could not pursue a third-party perpetrator defense. (R. 142:13.)

The court of appeals rejected this testimony and substituted its own reasoning. *Mull*, 2022 WL 287813, ¶ 21. In doing so, it revaluated the evidence and substituted its judgment for that of Attorney Guerin. It concluded that Attorney Guerin's strategic reasons were objectively unreasonable and rejected it by allegedly applying *Kimbrough*. *Id.* ¶ 36. It did so without any analysis and without commenting on the circuit court's finding that Attorney Guerin's testimony was credible.

The court glossed over the *Denny* requirements and simply concluded that the reasonable doubt defense did not provide an alternative theory of who committed the shooting. *Mull*, 2022 WL 287813, ¶ 38. It concluded without deciding

that given the paucity of evidence on the issues, the circuit court would have allowed Mull to present such a defense. This sort of results-oriented reasoning should be rejected.

The reviewing court must be highly deferential to counsel's strategic decisions. The court of appeals improperly substituted its judgment for that of Attorney Guerin. Rather than deferring to counsel's strategic decisions, it independently decided how it would have tried the case. This Court should reverse and reinstate Mull's judgment of conviction.

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 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.

At the postconviction hearing, 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 because of the difficulty he and his investigator had locating relevant witnesses. (R. 142:18.)

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.)

Attorney Guerin reasonably executed his chosen defense.

Regarding Smyth, Attorney Guerin 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 he 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 trial tactic or based on caprice" rather than judgment. *Breitzman*, 378 Wis. 2d 431, ¶ 65.

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.

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.) 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.

Again, the court of appeals substituted its own judgment and applied the improper standard of review. Instead of citing to any case law, it rejected Attorney Guerin's explanation as "insufficient and his performance [as] deficient." *Mull*, 2022 WL 287813, ¶ 45. This is not the standard.

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

II. This Court should not grant Mull a new trial in the interest of justice.

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. This Court is charged 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 this 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 grant Mull a new trial in the interest of justice.

The rarely used exceptional discretionary power to grant a new trial in the interest of justice is not warranted here. There is an insufficient basis for this Court to exercise its discretionary reversal powers here.

Any attempt by Mull to seek a new trial in the interest of justice is an attempt to repackage his ineffective assistance claims. 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. As established in section I of this brief, Attorney Guerin did not provide ineffective assistance. This Court should refuse to use its extraordinary power to grant a new trial in the interest of justice.

Mull cannot show a "substantial probability of a different result on retrial." *See Vollmer*, 156 Wis. 2d at 19. There is nothing in this record that supports the conclusion that the real controversy, whether Mull recklessly murdered Walker, 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

Accordingly, the State requests that this Court reverse the court of appeals' decision and reinstate Mull's judgment of conviction.

Dated this 18th day of July 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,118 words.

Dated this 18th day of July 2022.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court and Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 18th day of July 2022.

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