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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

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RESPONSE BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was trial counsel ineffective for not presenting evidence that someone other than Jovan Mull—and possibly one of the State's main witnesses—was the actual perpetrator?

The circuit court denied Mr. Mull's motion for a new trial and the court of appeals reversed.

2. Was trial counsel ineffective for not moving to strike testimony or moving for a mistrial after he elicited a hearsay statement from one of the State's witnesses that Mr. Mull had confessed to the crime, bragged about it, and referred to the victim as a "bitch?"

The circuit court denied Mr. Mull's motion for a new trial and the court of appeals reversed.

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

The circuit court denied Mr. Mull's motion for a new trial and the court of appeals reversed and remanded for a new trial on other grounds, without reaching the interest of justice claim.

STATEMENT OF THE CASE AND FACTS

I. Shooting and Law Enforcement Investigation.

On March 7, 2015, Vashawn Smyth[1] was out and about with two friends—Menjuan Bankhead and Casie James—when he received an invitation to attend a house party on North 35th Street in Milwaukee. (83:7).[2] Both Smyth and Bankhead were being supervised by the Department of Corrections; both men also had felonious criminal records.[3] (83:7; 83:33). While both Smyth and Bankhead would eventually distance themselves from another member of the group—Tyler Harris—Tyler[4] told police he went out that evening in the company of both men. (84:21). All three would be identified as possessing guns. (84:48; 84:52).

Shortly after the crowded house party got going, a gay man named Davion Crumble, known as "D-Boy," started a fight with another gay man, Desmand

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[1] Mr. Mull will use the State's spelling for consistency.

[2] The State inaccurately refers to Casie James as Vashawn's sister. (State's Br. at 9).

[3] Smyth was convicted of felony child abuse in 2014 and placed on probation for two years in Milwaukee County Case No. 14CF882. Smyth is presently facing new charges for being a felon in possession of a firearm in Milwaukee County Case No. 22CF2712. Bankhead's history includes a 2012 conviction for possession of a firearm as a felon in Milwaukee County Case No. 12CF4002.

[4] There are three individuals with the last name Harris. Mr. Mull will use first names for Tyler, Sanchez, and Demon Harris.

Butler. (83:5; 83:52). Although the fight was eventually broken up, Crumble continued to challenge others to fight him. (82:34; 83:59). Meanwhile, another partygoer, Demon Harris, witnessed a man in a red shirt proclaim, "they don't wanna fight me cause I have this heat on me." (82:38). He saw a second man, "wearing all red," who also claimed to have a gun. (82:38).

Things escalated further when Crumble, still fired up from the first fight, bumped into Smyth. (82:34; 83:59; 135:65). Thereafter, the party devolved into "one big brawl." (135:66). Smyth was backed up by his friends, including Bankhead. (135:66; 83:28).

Crumble was eventually pulled into a nearby bedroom. (83:8). Crumble used the barricaded bedroom door to jab a broomstick at his opponents while his friend, Kenta, threw a bottle at the fighters on the other side. (83:60).

At this point, Demon Harris saw the "straight guy" who had been "arguing" with Crumble, accompanied by two other men, trying to enter the bedroom. (82:38). Alphonso Carter, another attendee, noticed that two of those men were armed. (135:124; 83:21).

One of the men was Bankhead. (84:52). He was holding a gun and shouted, "Shoot through that motherfucker." (84:52). Keshawna Wright, another partygoer, then witnessed Smyth shoot through the door. (82:56.) According to Smyth's ex-girlfriend, "Gummy," Smyth had shot into the room hoping to hit

one of the gay men inside. (82:54; 83:9). The shooter fatally wounded a bystander, Ericka Walker, who had also taken cover inside the bedroom. (83:60).

After the shooting, Smyth was "stressed out and laying low." (83:34). He received a call from his probation agent, informing him that police were looking for him. (83:7). By this point in time, police had obtained sufficient evidence, including Keshawna Wright's identification, to consider him a "named suspect" in the shooting. (82:56-57).

Smyth knew that people were posting online about his possible involvement. (83:7). Smyth also had three outstanding, unrelated, warrants. (82:57). Smyth therefore smoked two blunts, declared his "love" for his "niggas" on Facebook, and turned himself in at his probation agent's office. (83:7).

Smyth then told police he saw Mr. Mull pointing a gun at the party after the shots were fired; however, he did not actually see the gunshots. (83:8). Smyth's sighting of Mr. Mull at the party was the first time he had seen him in a year and a half. (83:7). The last time the two men had encountered each other, they nearly came to blows. (83:7).

Police confronted Smyth with Facebook pictures in which he posed with guns, including one picture in which he is wearing a red hooded sweatshirt. (83:9). Police ultimately obtained multiple descriptions of a potential shooter which included a red hooded sweatshirt. (82:25; 82:34; 82:29; 82:50; 83:2.) Smyth admitted he was the person in the photographs;

however, he denied possessing a gun at the party. (83:9).

Despite Smyth's denials, police continued to interrogate him. (83:14). Smyth ultimately admitted he had withheld information from police. (83:19). Smyth acknowledged Tyler Harris was also present at the party with a gun. (83:15). Smyth told police he spoke to Tyler immediately after the shooting and Tyler told him, "I emptied my clip." (83:15). Smyth stated Tyler was wearing a red Wisconsin Badgers hoodie in which he had concealed his handgun. (83:19).[5] After the shooting, Tyler admitted to emptying his clip and told Smyth to "get out of here." (83:19). "[Smyth] stated he believes [Tyler] said this because he was shooting his gun at the party." (83:20).

Bankhead and Tyler were ultimately arrested and interrogated. (84:41; 84:51). Tyler told police "that the shots went off within a few feet of him." (84:21). Tyler did not see Mr. Mull at the party but stated Smyth's friend, Casie James, told him Mr. Mull was responsible. (84:22).

Bankhead admitted to fighting and told police he was wearing a sweatshirt consistent with the shooter's garb, but denied being the shooter. (83:32; 83:48). He contradicted Smyth's account—that the two friends had left the home together—and instead told police that he met up with Smyth *after* the shots were fired. (83:33).

[5] At least one other witness identified Tyler Harris in a photo lineup as having a gun at the party. (84:48).

Bankhead confirmed that a photo of Mr. Mull was being circulated in the community along with rumors that he was the shooter. (83:35). Bankhead urged police to talk to Sanchez Harris, who would have additional information inculpating Mr. Mull. (83:35). Sanchez then decided to cooperate with police after being asked by Bankhead's girlfriend to help get Bankhead and Smyth out of jail. (83:43). Sanchez was close friends with both men. (84:59-84:60).

Sanchez claimed he rode to the party with Mr. Mull, and that Mr. Mull told him he had a gun. (83:42). He said the shooter was wearing a Wisconsin Badgers sweatshirt and pants like those worn by Smyth the night of the shooting. (83:43; 83:32). He told police Mr. Mull "had to be" the shooter and identified Mr. Mull in a photo lineup. (83:43; 84:1).

At least two other eyewitnesses identified Mr. Mull as the shooter. (84:5; 84:8). However at least three other witnesses—Keshawna Wright, Charles Cantrell, and Elicia Burrows—failed to identify Mr. Mull as the shooter. (83:48; 84:25; 84:27).

II. The Trial

The State ultimately charged Mr. Mull with the reckless homicide of Ericka Walker. (1). Mr. Mull was then represented by Attorney Eamon Guerin, who made his first appearance six months prior to the jury trial. (129:3). While Mr. Mull's first counsel expressed a need to investigate, (127:3), Attorney Guerin expressed no such concerns. Instead, Attorney Guerin entered a speedy trial demand. (131:13). He filed a

witness list with nine distinct witnesses and informed the court he was anticipating "maybe four" defense witnesses at trial. (13; 132:3).

During opening statements, the prosecutor assured the jury that while Smyth was initially identified as a suspect, he was "not the shooter." (134:27). Instead, Smyth was a valuable eyewitness who would help establish that Mr. Mull "did it." (134:28).

Attorney Guerin's opening statement referenced Smyth "covering up" on behalf of Tyler Harris. (134:31). Counsel told the jury there were many "different versions" of what happened that night. (134:31). The main issue was the shooter's "identity." (134:32).

Cheyenne Pugh was one of the State's first witnesses. (135:2). Pugh received two tips about the shooter's identity and confirmed she was originally told Smyth was the shooter. (135:40). Attorney Guerin made repeated, unsuccessful, objections to her testimony about Smyth. (135:37; 135:40; 135:44).

However, Attorney Guerin made no objection when Pugh described statements made by non-testifying witnesses about Mr. Mull. (135:45). According to Pugh, the victim's girlfriend, Shaquita, told her, "everybody going around saying it's a young dude that's light skinned with dreads named

Woadie."[6] (135:36). She described showing Shaquita a photo of Smyth and Shaquita telling her this was not the perpetrator. (135:36). Moreover, multiple people were claiming the shooter was a light-skinned man with dreadlocks. (135:45). According to Pugh, "they" said "Woadie" was the shooter. (135:45).

Pugh also testified "Kia Wade" told her Mr. Mull "was in the hood bragging about it." (135:46). Instead of objecting, Attorney Guerin asked additional open-ended questions during cross, leading Pugh to tell the jury she had been told Mr. Mull was "in the hood bragging about it saying that he hit a lick over there on 35th and he killed the stud bitch." (135:54).

Smyth testified, and admitted to being involved in the fight. (135:66). Smyth told the jury that while there were two men at the party with guns—Tyler Harris and Jovan Mull—it was Mr. Mull who was pointing the weapon around the time of the shooting. (135:67-69).

Smyth responded in the affirmative when asked conclusory questions about being arrested as a suspect. (135:71; 135:74). Attorney Guerin attempted to elicit Tyler's admission to shooting his gun through Smyth; however, counsel abandoned the topic after the court sustained the State's objection. (135:79).

The State also called Sanchez Harris, who initially testified that he did not talk to anyone on the

[6] Woadie has been identified as Mr. Mull's alleged nickname.

ride over to the party. (135:90). When prompted, however, Sanchez testified that Mr. Mull told him he was carrying a gun. (135:91).

Although he initially testified that he was "involved" in the fight, Sanchez changed his story and asserted he "wasn't fighting nobody." (135:93-94). At some point, the fight stopped and he "heard shooting." (135:94). He saw someone with "dreads and a red hoody" holding a gun. (135:94). Sanchez described the item of clothing as a Wisconsin Badgers hoodie. (135:98). Sanchez could not recall if the hood of the sweatshirt was up and had difficulty recalling the direction that the man was pointing the gun. (135:95-96).

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

Sanchez described participating in a photo array in which police showed him only two pictures. (135:99). He identified Mr. Mull as "[t]he person who probably did it." (135:102). Sanchez had already seen a photo of Mr. Mull before speaking to police. (135:105; 135:114).

Attorney Guerin's cross-examination challenged Sanchez's ability to see the shooting based on the spatial layout in the apartment; in response, Sanchez appeared to recant his eyewitness testimony. (135:113). While Sanchez reverted to claiming he *had* seen the shooting, he was eventually shown a photo of

Mr. Mull and admitted, "I ain't really see the face like that." (135:117).[7]

Alphonso Carter testified that he witnessed Ericka Walker escort Crumble[8] into the bedroom. (135:124). He saw three men outside the bedroom door. (135:124). Two of the men were armed. (135:124). One man "drew his gun, and his friend told him to shoot in the room." (135:125).

Carter viewed three photo arrays. In the first, targeting Smyth, he did not identify a suspect, although he picked out two of the fillers as people who were either present at the party or involved in the fight. (136:31). He was then shown a second photo array targeting Mr. Mull. (135:134). He failed to make any identification.[9] (135:135). After requesting to see side profile pictures, Carter identified Mr. Mull as the shooter in a third array, asserting that "everybody else didn't look anything like that person at all." (135:127). However, there were also some differences on display in the photographs shown to Carter—gold teeth, facial hair and a neck tattoo. (137:26).

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[7] The State avers "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."(State's Br. at 10-11). While Sanchez confirmed this remark was made, he never identified the speaker as Tyler Harris. (135:115).

[8] Crumble was referred to by his nickname, D-Boy.

[9] The detective who administered the array claimed that Carter identified Mr. Mull in this array. (137:19).

Desmand Butler testified that he witnessed the shooting. (137:46). However, he recanted his identification of Mr. Mull and did not think Mr. Mull was the shooter after seeing him in court. (137:62). Finally, the State called Vachune Hubbard, Mr. Mull's codefendant in another matter. (137:100). Hubbard testified that Mr. Mull had admitted the shooting to him and Hubbard acknowledged that he received consideration from the State for this testimony. (137:94).

The State also presented the testimony of a ballistics expert, who testified that all of the casings recovered from the home "were fired from the same 9-millimeter caliber firearm." (136:77).

Attorney Guerin presented no defense case. He informed the court that "based upon what the state presented in their case and the witnesses, some the witnesses that we list, we listed that we are not choosing to call them." (138:4). Mr. Mull stated he agreed with his attorney's decision, although he also asserted "probably we could find some of the witnesses we had on my defense witness list." (138:5). Attorney Guerin made no record with respect to the availability of defense witnesses.

In closing argument, the prosecutor argued that the only question was whether Mr. Mull was the shooter or whether "the wrong person" was on trial. (139:7). He asserted that the case "really comes down" to the testimony of: "Vashawn Smith, Sanchez Harris, Alphonso Carter, Mr. Butler, Demond Butler and

Vachune (sic) Harris." (139:7). Attorney Guerin's argument focused on discrepancies in the eyewitness identifications and the possibility of suggestive eyewitness procedures. (139:14).

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

III. Postconviction Proceedings and Appeal

Mr. Mull filed a motion for a new trial. (82). Relevant to this appeal, he argued counsel was ineffective for: (1) not presenting a third-party perpetrator defense and (2) not moving to strike or asking for a mistrial in response to Pugh's testimony that Mr. Mull was bragging about killing the "stud bitch." (82:12-17). The motion was denied in a written order without a hearing. (97).

Mr. Mull appealed. (100). The court of appeals reversed and remanded for an evidentiary hearing. *State v. Mull*, ("*Mull I*"), Appeal No. 2018AP1349-CR, unpublished slip op., (Wis. Ct. App. July 23, 2019). (App. 3).

Attorney Guerin then testified that he was familiar with the legal requirements for a third-party perpetrator defense, which he understood to be "motive, opportunity evidence." (142:10). He did not present Smyth as a third-party perpetrator because "it was difficult to locate witnesses who would support that defense." (142:13). He did not recall which witnesses could not be located, however. (142:13). Counsel gave a similar explanation for not presenting

a third-party perpetrator defense targeting either Tyler or Bankhead. (142:23; 142:27). Similarly, he did not present the other witnesses outlined in the postconviction motion because he apparently could not locate them, either. (142:29-30). With respect to the statement of Pugh, counsel testified that he did not move to strike or move for a mistrial because he was more focused on attacking Pugh's credibility. (142:35-36).

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

The motion was again denied. (145). Mr. Mull appealed and the court of appeals reversed, granting a new trial on both grounds. *State v. Mull*, ("*Mull II*"), Appeal No. 2020AP1362, ¶ 1, unpublished slip op., (Wis. Ct. App. February 1, 2022). (App. 25).

The court of appeals agreed that counsel was ineffective for not presenting a third-party perpetrator defense that Smyth, Bankhead, or Tyler committed the murder and "counsel should have presented the testimony of several additional witnesses to support this defense." *Id.*, ¶ 21. (App. 34). The court of appeals concluded "there were a number of witnesses who were interviewed during the police investigation who provided information that could have been used to

present a defense that Smyth, Bankhead, or Tyler Harris was the shooter that night." *Id*., ¶ 33. (App. 39).

Although counsel testified he did not pursue a third-party perpetrator defense because he could not find witnesses, the court of appeals concluded this was unreasonable because: (1) testimony of witnesses called at trial would have supported the defense; (2) counsel did not make any efforts to obtain these witnesses by use of a subpoena or a material witness warrant; and (3) counsel could have used hearsay exceptions to present the testimony of truly unavailable witnesses. *Id*., ¶ 35. (App. 40). While counsel testified that he pursued a reasonable doubt defense instead, the court of appeals noted that counsel's efforts were not substantial and the omitted evidence would have directly furthered the alleged defense strategy. *Id*., ¶¶ 37-38. (App. 41-42).

The court of appeals concluded that omission of this evidence undermined confidence in the verdict. *Id*., ¶ 42. (App. 43-44). The jury was never given an opportunity to assess the credibility of witnesses which, if believed, would have supported an acquittal. *Id*. (App. 43-44).

The court of appeals likewise found that counsel acted unreasonably in eliciting damaging testimony about Mr. Mull during his cross-examination of Pugh and for not remedying the error by moving to strike, asking for a cautionary instruction, and/or asking for a mistrial. *Id*., ¶ 45. (App. 44). While counsel explained that he did not want to highlight the statement and

wished to discredit the testimony in other ways, the court was not persuaded that seeking to remedy the error would have been inconsistent with those aims. *Id*. (App. 44). Further, Attorney Guerin's cross-examination of Pugh revealed an "incautious" strategy reliant on open-ended questions that invited the problematic testimony. *Id*., ¶ 46. (App. 45).

This deficiency prejudiced Mr. Mull because it allowed the jury to consider an alleged hearsay confession which reflected pride in killing Ericka Walker, a tragic victim Mr. Mull allegedly denigrated as a "bitch." *Id*., ¶ 48. (App. 45-46).

This Court then granted the State's petition for review.

ARGUMENT

I. Trial counsel's errors necessitate a new trial.

A. The deficient performance inquiry requires an independent and objective assessment of reasonableness.

1. Courts defer only to reasonable strategic decisions.

Both the state and federal constitutions guarantee criminal defendants a right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *State v. Felton*, 110 Wis. 2d 485, 499, 329 N.W.2d 161 (1983). It is this access to an

effective lawyer which functions to ensure the overall fairness of the criminal justice system. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

A defendant claiming this constitutional right has been violated must first prove that counsel performed "deficiently." *Strickland*, 466 U.S. at 688. This requires the reviewing court to independently examine whether counsel's conduct fell below "an objective standard of reasonableness." *Id.*

Thus, even though reviewing courts begin with a presumption of reasonableness, *id.* at 689, evaluation of the defendant's claim does not begin and end with that presumption. Instead, the reviewing court must apply its independent judgment and determine whether counsel's conduct was sufficient "to make the adversarial testing process work in the particular case." *Id*. at 690.

The State is therefore correct that the law mandates deference to counsel's strategic decisions. (State's Br. at 20). However, as the State also concedes, that deference is only warranted when the challenged conduct is, in fact, reasonable. (State's Br. at 19). It is the requirement of reasonableness itself which results in the "deference" cited by the State in its brief. *Dunn v. Jess*, 981 F.3d 582, 591-592 (7th Cir. 2020).

It is therefore incorrect to insist, as the State does, that strategic decisions are "unassailable" or immune from challenge. (State's Br. at 20). While stringent, the *Strickland* standard is not meant to be

"insurmountable." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986).

The State is also wrong to suggest that the mere proffering of an explanation or excuse will defeat an ineffectiveness claim. "Simply calling a lawyer's decision 'trial strategy' is not sufficient to defeat a claim of ineffective assistance." *State v. Coleman*, 2015 WI App 38, ¶ 20, 362 Wis. 2d 447, 865 N.W.2d 190. Instead, the decision must be scrutinized for its objective reasonableness. *Id.*

2. Courts do not defer to objectively unreasonable conduct, decisions based on an incomplete investigation, excuses belied by record evidence, or mere oversight.

Thus, one area in which deference is not required is straightforward—the normal deference owed to strategic decisions is not required when, objectively evaluated, the particular decision is unreasonable. *See Morrison*, 477 U.S. at 385.

The deference owed to "strategic" decisions will also wax and wane with the degree of underlying investigation and research trial counsel conducts. Thus, while strategic decisions "made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[,]" *Strickland*, 668 U.S. at 690, in contrast, decisions based on an incomplete investigation or a misunderstanding of the law can become unreasonable as a result. *Morrison*, 477 U.S. at 385 (failure to file a suppression motion

following lack of pretrial investigation into State's evidence); *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (decision not to seek out mitigation evidence based on mistaken understanding of discovery law); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (failure to follow local practice in procuring mitigation evidence in capital case); *Rompilla v. Beard*, 545 U.S. 374, 385-386 (2005) (failure to review discoverable records relating to aggravating factors at capital sentencing hearing).[10]

Likewise, reviewing courts should be skeptical of excuses given by trial counsel that conflict with other record evidence. For example, in *Wiggins*, the United States Supreme Court cautioned lower courts against accepting mere "*post hoc* rationalization" as evidence of *bona fide* strategic deliberation. *Wiggins*, 539 U.S. at 527. In that case, Wiggins alleged that his lawyer unreasonably failed to develop and present

[10] The State cites *United States v. Best*, 426 F.3d 937, 945 (7th Cir. 2015), for the proposition that decisions about which witnesses to call can never form the basis for an ineffective assistance of counsel claim. (State's Br. at 19). This overstates the persuasive force of *Best*, which holds that a "conscious" decision as to which witness to call based on a reasonable underlying investigation will not constitute deficient performance.

Even so, this Court has plainly held that "[f]ailure to call a potential witness may constitute deficient performance." *State v. Jenkins*, 2014 WI 59, ¶41, 355 Wis. 2d 180, 848 N.W.2d 786. An attorney's failure to call a witness whose testimony would have been central to the theory of defense can also constitute deficient performance. *State v. White*, 2004 WI App 78, ¶¶ 20-21, 271 Wis. 2d 742, 680 N.W.2d 362.

favorable mitigation evidence relating to a traumatic childhood. *Id.* at 516-517. Defense counsel explained, however, that he made a strategic choice to instead focus on disputing the factual basis for the conviction. *Id.* This explanation was accepted by the lower courts before being rejected by the United States Supreme Court, which found counsel's rationale incompatible with the record evidence and therefore not deserving of deference. *Id.* at 526.

Finally, it is also clear that some kinds of decisions are *per se* unreasonable, such as decisions evincing legal ignorance. *Morrison*, 477 U.S. at 385. The same can be said for "implausible" justifications offered at a postconviction motion hearing. *Id.* at 386. Moreover, mere inattention and oversight cannot be the basis for a reasoned exercise of strategic judgment. *Wiggins*, 539 U.S. at 534.

B. Counsel's failure to present evidence in support of a third-party perpetrator defense was objectively unreasonable.

1. The State has forfeited any argument that the evidence against Smyth, Bankhead, and/or Tyler would not have been admissible evidence of third-party guilt. This evidence satisfies the criteria for admissibility.

In his postconviction motion, Mr. Mull argued that evidence of third-party guilt existed with respect to each of the three alternative perpetrators—Smyth,

Bankhead, and Tyler. (82:12). In the court of appeals, the State argued that a third-party defense was legally unavailable. (State's Ct. App. Br. at 15). However, the State did not actually respond to the bulk of Mr. Mull's arguments. (Ct. App. Reply Br. at 10). The court of appeals then reversed and remanded for a new trial, concluding that the "evidence Mull identifies meets the standard for a third-party perpetrator defense." *Mull II*, Appeal No. 2020AP1362-CR, ¶ 24. (App. 35).

In its petition for review, the State alleged that review was necessary because the court of appeals did not correctly apply the standard for admitting evidence of third-party guilt. (Petition for Review at 19). However, the State did not specifically explain how it arrived at this conclusion. The State now renews its argument that *Denny*[11] was wrongly applied and faults the court of appeals for "glossing over" that case's legal requirements. (State's Br. at 24).

Yet, the State fails to develop a comprehensive argument and does not detail what components of *Denny*'s three-prong test Mr. Mull would have difficulty meeting. Because the State has failed to adequately develop or present the argument, it is forfeited. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992); s*ee also Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶ 24 n.15, 390 Wis. 2d 266, 938 N.W.2d 493 (*Pettit* rule applies in this Court).

[11] *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

"In order to present evidence and make argument suggesting that a third party may have committed the charged crime, a defendant must show that the third party had (1) opportunity; (2) motive; and (3) a direct connection to the crime that is not remote in time, place or circumstances." *State v. Vollbrecht*, 2012 WI App 90, ¶ 25, 344 Wis. 2d 69, 820 N.W.2d 443. Evaluating the record evidence, it is clear that counsel could have presented a third-party perpetrator defense and satisfied the legal standard with respect to each of the alternative perpetrators.

With respect to Smyth, the court of appeals previously summarized that record evidence:

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

Mull I, Appeal No. 2018AP1349-CR, ¶ 22. (App. 12-13).

Thus, Smyth: (1) had an opportunity to commit the crime, as he was present when the fatal shots were fired; (2) had a motive to shoot at the people in the room, with whom he was engaged in an ongoing brawl; and (3) had a direct connection to that crime because he was observed committing it.

With respect to Bankhead, the court of appeals previously summarized that record evidence as follows:

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

Mull I, Appeal No. 2018AP1349-CR, ¶ 24. (App. 13).

Thus, Bankhead: (1) had an opportunity to commit the crime, as he was present (with a gun) when the fatal shots were fired; (2) had a motive to shoot at the people in the room, with whom he was engaged in an ongoing brawl; and (3) had a direct connection to that crime because he was observed brandishing a firearm, standing where the shots would have been fired (in front of the door) and was shouting about shooting into the door.

Finally, as to Tyler, the court of appeals summarized the record evidence as follows:

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

Mull I, Appeal No. 2018AP1349-CR, ¶ 23. (App. 13).

Thus, Tyler: (1) had an opportunity to commit the crime, as he was present (with a gun) when the fatal shots were fired; (2) had a motive to shoot at the people in the room, with whom his friends were engaged in an ongoing brawl; and (3) had a direct connection to that crime because he admitted to shooting his gun at the party.

2. Counsel's justifications at the postconviction hearing are unpersuasive, as are the State's arguments.

As the State notes, Attorney Guerin's stated reason for not presenting the third-party perpetrator evidence was that he could not find witnesses who

would support the defense at trial. (State's Br. 23). This *post hoc* justification is flawed.

First, counsel's explanation at the postconviction hearing is not consistent with his actions before and during trial. While Mr. Mull's first attorney expressed a need for more time to adequately investigate the case, Attorney Guerin never put any such concerns on the record despite being given an opportunity to do so. For example, at the final pretrial, the State indicated it had some concerns about finding witnesses. (132:3). Trial counsel raised no such concerns and instead told the court he was anticipating calling up to four defense witnesses. (132:3). At the conclusion of the trial, he stated he was not calling witnesses based on the State's presentation; he made no record about witness unavailability. (138:4).

Second, it is not clear that counsel made the "conscious" strategic choice attributed to him by the State. Instead, Attorney Guerin explicitly promised the jury it would hear "different versions" of what happened and made a direct reference to Tyler Harris. (134:131-132). Attorney Guerin also told the jury that it would be required to determine the shooter's identity. (134:132). He then made a clumsy and unsuccessful effort to introduce Tyler's statement about shooting his gun at the party. (135:79).

However, counsel also repeatedly objected to helpful testimony concerning Smyth's status as a suspect. (135:37; 135:40; 135:44). Trial counsel's

inconsistent and confusing approach is evidence of caprice and irrationality, not reasoned strategic judgment.

Third, contrary to the State's claim, Attorney Guerin was not particularly knowledgeable about the requirements for a third-party perpetrator defense. When asked to explain his understanding of the legal elements, counsel could only name two of the three *Denny* requirements—"motive, opportunity evidence." (142:10).

Fourth, counsel did not conduct a sufficient investigation. Counsel claimed that he used an investigator, although he got the name of that investigator wrong. (142:15; 143:3). No notes of the alleged investigation exist, either. (143:3). And, counsel could not recall any aspect of the investigation he claimed to have conducted. (142:13). The record is clear that counsel subpoenaed no witnesses, did not seek a continuance in order to locate witnesses, and did not ask the court for an order to procure their appearance.

Fifth, counsel's rationalization ignores that trial testimony elicited by the State would have also filled in many components of the third-party perpetrator defense. For example, Smyth testified and admitted to being present at the time of the shooting (opportunity) and being involved in the brawl (motive). Testimony from Sanchez and Smyth would have also established Bankhead's motive and opportunity, as that testimony places him at the party and involved in the fight.

Finally, Smyth's testimony about Tyler being at the party with a gun would have also established *his* opportunity to commit the crime.

Sixth, counsel omitted other legal avenues toward admitting third-party perpetrator evidence.[12] As set forth in the briefs below, Keshawna Wright's statements implicating Smyth would have been admissible under Wis. Stat. §§ 908.045(4) or 908.045(2) if she was, in fact, unavailable to testify at trial. Jalyn Lynch's statements implicating Bankhead would be admissible under the same rationale. And, with respect to Tyler, his statement to Smyth—in which he admitted to committing the crime—would have been admissible under Wis. Stat. § 908.045(4) if he was unavailable either because he could not be located or because he exercised his Fifth Amendment right not to testify.[13] Thus, counsel's decision not to present a third-party perpetrator defense was unreasonable, as his testimony establishes that he never contemplated using any alternative means of

[12] The State did not address this aspect of Mr. Mull's argument in its brief in the court of appeals and, as a result, the court of appeals concluded the point was conceded. *Mull II*, Appeal No. 2020AP1362-CR, ¶ 36. (App. 40). The State did not petition for review on this basis and has not renewed any arguments that alternative means of presenting the evidence were not available; accordingly, it has forfeited any such argument.

[13] Counsel was told by the State that Tyler could not be located. (142:25). Trial counsel's failure to even consider asking the court to make a finding of unavailability so as to admit his inculpatory statements at that point is *per se* unreasonable.

presenting this evidence other than calling witnesses on Mr. Mull's behalf. Such oversight cannot produce an objectively reasonable strategic judgment. *Wiggins*, 539 U.S. at 534.

Accordingly, the evidence shows that trial counsel acted unreasonably in not presenting a third-party perpetrator defense. He did not conduct a sufficient investigation and never considered whether there were other means of presenting the testimony after concluding he was prevented from pursuing such a defense due to witness "unavailability." This is deficient performance.[14]

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[14] The court of appeals held that counsel's failure to call other witnesses supporting Mr. Mull's claim of innocence—including other eyewitnesses who did not identify Mr. Mull as the shooter—was subsumed within its treatment of the third-party perpetrator issue. *Mull I*, Appeal No. 20181349-CR, ¶ 5. (App. 6). In his postconviction motion, Mr. Mull argued that counsel should have called Elicia Burrows, who did not identify Mr. Mull in a photo lineup, Charles Cantrell, another witness who did not pick Mr. Mull out of the lineup, and Demon Harris, who would offer corroborative testimony about the men by the door. (82:15).

In its opinion remanding for a new trial, the court of appeals discussed the usefulness of these witnesses in establishing the third-party perpetrator defense. The State did not petition on this basis and has not raised any argument to this effect in its brief and has therefore forfeited the issue.

C. The State's remaining arguments lack merit.

Having established counsel's performance was objectively unreasonable, Mr. Mull will briefly respond to the State's remaining arguments, all of which are unpersuasive.

1. The court of appeals correctly applied precedent.

In its petition for review and its brief to this Court, the State claims that the decision of the court of appeals rests on a misapplication of *State v. Kimbrough*, 2001 WI App 138, 246 Wis. 2d 648, 630 N.W.2d 752. It was due to this alleged "misapplication" that the State urged this Court to accept review. (State's Pet. at 5).[15]

The State claims *Kimbrough* creates a new standard for assessing ineffectiveness claims applicable "when the attorney's explanation is not credible." (State's Br. at 21). This is wrong.

Kimbrough is a fact-dependent decision that addresses an alleged failure to request a lesser-included instruction. *Id.*, ¶ 24. Counsel testified at a hearing and explained he did not have a strategic

[15] The "criteria for review" section of the petition cites only this alleged conflict as a basis for review. Because there is no actual conflict between these cases—and the court of appeals did not substantially rely on that decision for the outcome here—this Court could consider dismissing this appeal as improvidently granted.

reason. *Id*. The circuit court exercised its authority as the arbiter of credibility and rejected that testimony. *Id*., ¶ 30. Setting aside the factual dispute, the court of appeals labeled counsel's statements at the hearing as non-dispositive and concluded that his conduct was "objectively" reasonable. *Id*., ¶ 35. Thus, while the case deals with a unique scenario where a lower court rejects an attorney's concession of deficient performance, the court of appeals made clear that an affirmance was also required under the "objective reasonableness" standard.

Thus, contrary to the State's claim, *Kimbrough* does not create a new or different standard for evaluating ineffectiveness claims. Instead, it merely applies settled legal principles, which the court of appeals applied in its decision here. *Mull II*, 2020AP1362-CR, ¶ 36. (App. 40-41). As *Kimbrough* and *Mull* both restate the controlling law—strategic decisions of trial counsel must be objectively reasonable—it is difficult to understand how there is any perceived conflict. The State's reading of both *Mull* and *Kimbrough* is therefore flawed and, because there is no conflict between the two cases, there is no basis to reverse the court of appeals.

2. The court of appeals did not fail to defer to counsel's decisions; instead, it applied the correct standard of "objective reasonableness."

The State insists that the court of appeals failed to properly defer to Attorney Guerin's strategic

judgments. To that end, it accuses the court of appeals of "refusing" to follow precedent, "glossing over" legal requirements, and engaging in a method of "results-oriented reasoning." (State's Br. at 21-24). It asserts that the court of appeals reversed because "it independently decided how it would have tried the case." (State's Br. at 24).

As noted above, the State misreads the ineffective assistance inquiry, which does not mandate the blanket policy of deference sought by the State. Instead, deference is only warranted for *reasonable* judgments, which, in turn, require that counsel make a sufficient investigation and engage in a proper legal analysis.

Here, the court of appeals properly applied that case law, devoting extensive effort to examining counsel's proffered justifications in the context of the overall record. The court of appeals did not cursorily reject counsel's explanations; instead, it scrupulously engaged with the entire record while attempting to discern the objective reasonableness of counsel's actions. This Court should therefore affirm the court of appeals.

3. The State misstates the record and exaggerates counsel's success at trial. The weaknesses in its case do not excuse counsel's unprofessional errors.

The State cites case law from the 1st Circuit for the proposition that counsel's effectiveness needs to be

evaluated on a sliding scale, with the deficient performance inquiry adjusted depending on the strength of the prosecution's evidence. (State's Br. at 19-20) (citing *Lema v. United States*, 987 F.2d 48, 54 (1st Cir. 1993)). *Lema* is a fact-dependent, non-binding decision; it cannot change the constitutionally-mandated requirement of "objective reasonableness."

The State's argumentative approach is built on two strategies: exaggerating the success of trial counsel and misstating record evidence. Thus, for example, the State claims the jury heard "evidence that someone else shot and killed Walker." (State's Br. at 24). This is a distortion of the record evidence and also an inconsistency in the State's argument, which is built on the repeated claim that trial counsel reasonably chose *not* to present such evidence.

With respect to Smyth, the State is correct that there were generic references to his status as a "suspect." (State's Br. at 25). Yet, the State also assured the jury in its opening that he was "not the shooter," (134:27), and, because counsel did not present a third-party defense, the jury was never asked to consider him as such. The State also claims that the jury "knew" Smyth "was identified as the shooter by one witness." (State's Br. at 25). The record citation for that claim? Mr. Mull's postconviction motion explaining what evidence in the discovery supports a third-party perpetrator motion.

The State claims "Attorney Guerin explained that he chose to present a reasonable doubt defense

because different people had identified different shooters [.]" (State's Br. at 24). Attorney Guerin testified as such; however, this exposes the unreasonableness of his decision-making, as counsel could not use a "reasonable doubt" defense to smuggle in a *Denny* defense without giving notice to the prosecutor (and in fact, did no such thing).

It is therefore inaccurate to suggest counsel "presented the jury with essentially the same evidence Mull now argues should have been used." (State's Br. at 26). The State is correct there were scattered pieces of record evidence which would be favorable to a third-party perpetrator defense. Yet, there were also large pieces of evidence left out—for example, Keshawna Wright's identification of Smyth or Jalyn Lynch's statement about Bankhead. Moreover, it is simply insufficient to expect the jury to draw "inferences" about third-party guilt from isolated and brief references over the course of the trial when that same jury was never squarely asked to consider third-party guilt. Reasonably competent counsel would have assembled and presented the evidence that a third party was responsible in a coherent fashion, not merely sit back and rely on the jury speculating about a theory of defense that was never actually presented.

Thus, while counsel had some minimal successes (handed to him by weak State's evidence), those successes do not excuse his greater failures. The ineffectiveness inquiry is not defeated merely by showing what counsel did right; it is instead focused on specific and unreasonable acts or omissions.

D. Counsel's errors prejudiced Mr. Mull and the State has failed to adequately develop a contrary argument.

As to prejudice, the record is clear: there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Confidence in the outcome has been indisputably undermined. Mr. Mull stood trial for a homicide at which time the primary alternative suspect testified against him without the jury ever hearing compelling evidence that this person—or one of his friends—was the real killer. Had the jury believed just one piece of the omitted evidence—Keshawna Wright's identification, Jalyn Lynch's statement about Bankhead, or Tyler Harris' confession—that is a reasonable doubt.

As the State has already conceded, its case was "weak." (State's Br. at 19). Accordingly, had counsel provided any alternative showing that someone other than Mr. Mull killed Ericka Walker, there is a reasonable probability of a different outcome.

The State's contrary argument consists of a single paragraph of cursory analysis. (State's Br. at 27). It is simply untrue, as the State argues, that Mr. Mull failed to explain how the outcome would be different with the omitted evidence. (State's Br. at 27). Instead, as the court of appeals correctly concluded in applying *Strickland's* prejudice prong, in light of the multiple weaknesses in the State's case—including

inconsistent statements by witnesses—evidence that someone other than Mr. Mull committed the crime creates a reasonable probability of a different outcome. *Mull II*, Appeal No. 2020AP1362-CR, ¶ 40. (App. 42-43).

Accordingly, this Court should affirm the court of appeals and remand for a new trial.

II. It was objectively unreasonable to allow Mr. Mull to be convicted based on the prejudicial hearsay "confession" elicited from Cheyenne Pugh.

Attorney Guerin elicited a damaging statement from Pugh during cross-examination—that his client not only confessed to the crime, but had also bragged about killing the "stud bitch." (135:54). Mr. Mull argued that reasonably competent counsel should have responded to this utterance by moving to strike the answer and/or by requesting a mistrial. (82:17). The court of appeals agreed. *Mull II*, Appeal No. 2020AP1362-CR, ¶ 46. (App. 45).

With respect to a motion to strike the offending answer, the State now claims that counsel reasonably chose not to draw attention to the answer and to instead focus on undermining Pugh's credibility. (State's Br. at 28). The evidence belies that assertion. At the postconviction hearing, counsel conceded that this statement was not "helpful." (142:33). Counsel also agreed it was hearsay. (142:32). Yet, counsel seemed to shift the focus back to the State's direct examination, explaining that he apparently did not do

anything because there was *even more* problematic hearsay that preceded this damaging admission. (142:31).

Counsel also claimed, incredibly, that the victim went by the name "Stud Bitch." (142:33). There is no record-based support for this nonsensical assertion, which casts doubt on the overall reasonableness of counsel's conduct at trial and the believability of his postconviction excuses.

Moreover, it is not clear why a strategy of discrediting the witness would preclude a motion to strike otherwise inflammatory and prejudicial material. The two strategies are not mutually exclusive.

Finally, as the court of appeals recognized, counsel's cross-examination does not reflect the stated strategy. Instead, "trial counsel asked several open-ended questions that elicited unresponsive, narrative answers from Pugh and invited her to make prejudicial comments, such as the one challenged here." *Mull II*, 2020AP1362-CR, ¶ 46. (App. 45). Correctly applying *State v. Domke*, 2011 WI 95, ¶ 49, 337 Wis. 2d 268, 805 N.W.2d 364, the court of appeals therefore held that counsel's cross-examination of Pugh was "incautious and inconsistent with any rational trial strategy." *Id.* (App. 45).

Moreover, even if this Court is persuaded that counsel's decision not to "highlight" Pugh's answer was somehow reasonable, there was no risk in making a motion for a mistrial outside the presence of the jury.

The State appears to suggest there was no legal basis for such a motion. (State's Br. at 29). Respectfully, it is hard to conceive of testimony that would be more amenable to a mistrial. This was an inadmissible and unreliable hearsay "confession." It told the jury that the person on trial was somehow proud of killing the victim and that they considered her nothing more than a disposable "bitch."

As to prejudice, the State rests its argument on the claim that this statement was simply insufficient to undermine confidence in the ensuing result. (State's Br. at 29). Mr. Mull disagrees. A confession is a uniquely powerful piece of evidence, even more so when it is accompanied by extreme character evidence showing that the accused harbored animus against the victim or that he was somehow proud of killing her. This is not the type of testimony which can be easily set aside during jury deliberations and it is the type of inadmissible evidence which undermines the resulting verdict. *See State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985) (allowing jury to consider otherwise inadmissible evidence of prior criminality tainted jury verdict, regardless of sufficient evidence to convict).

Accordingly, this Court should affirm the court of appeals and remand for a new trial.

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

A. Legal principles and standard of review.

This Court has authority under Wis. Stat. § 751.06 to order a new trial in the interest of justice under two circumstances: "(1) the real controversy has not been fully tried or (2) it is probable that justice has for any reason miscarried." *State v. Henley*, 2010 WI 97, ¶¶ 81-82, 328 Wis. 2d 544, 787 N.W.2d 350; Wis. Stat. § 751.06. This relief is limited to "exceptional cases." *State v. McKellips*, 2016 WI 51, ¶ 52, 369 Wis. 2d 437, 881 N.W.2d 258.

B. The real controversy was not fully tried.

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

Important evidence was left out of the trial and, when that information is considered, a compelling alternative hypothesis emerges: Smyth, or one of the friends who fought alongside of him at the "brawl," fired the fatal shots, *not* Mr. Mull. At the very least, the omitted evidence substantially undermines the believability and persuasiveness of the State's case, thereby creating substantial reasonable doubt which should have resulted in an acquittal.

The glaring omissions from the factual picture are manifold, but can be generally separated into four categories: (1) evidence connecting Smyth and his friends to the shooting; (2) evidence directly implicating Smyth or one of his friends; (3) evidence tending to call into question Smyth's credibility and believability; (4) other evidence tending to exonerate Mr. Mull.

Evidence connecting Smyth and his friends to the shooting

Here, the State's theory was that the shooting and the fight were directly connected. (134:26). Yet, the jury did not hear important evidence showing that Smyth's confrontation with Crumble started the brawl and that Crumble retreated from Smyth and his friends after battering Bankhead but before being shot at by the same group of men he had just been "brawling" with.

As the police reports make clear, Crumble was the person who "bumped into" Smyth, triggering the second fight. (82:34). Not only did he start the fight with Smyth before retreating into the bedroom, the police reports also make clear that he badly battered Smyth's friend, Bankhead. According to Smyth, "D" was literally "on Bankhead's back" before another partygoer intervened and ushered that person into the bedroom. (83:8). Bankhead was bleeding from the face, having struck his head on a cabinet. (83:8). A statement of Bankhead—also never disclosed to the jury—adds more details, that one of the fighters in

Crumble's group actually tried to "tase" Bankhead before retreating into the bedroom. (83:28). Clearly, if anyone had a motive to fire into the bedroom, this evidence shows that it would be Smyth and his friends.

Importantly, it was after these events that Alphonso Carter witnessed the group of three men, one of whom told "his friend" to shoot into the room. (135:24). While Carter ultimately testified that the person who shot his gun was Mr. Mull (following a photo lineup in which he picked out Mr. Mull because the fillers did not look the shooter), the jury was never given other contextual information which would have kept their focus on Smyth and his friends and placed this evidence in its proper context.

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

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

Crumble, the person who started the fight by bumping into Smyth before hiding inside the bedroom. (84:51).

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

Evidence directly implicating Smyth, Bankhead or Tyler

While the jury heard one or two brief references to Smyth as a suspect, the jury was assured by the prosecutor that Smyth was "not the shooter." (134:27).

That personal assurance is called into question by a broad body of evidence now in the record, including the actions of the police themselves, who focused intensive investigative resources on proving Smyth's guilt. To that end, the jury was simply not told that an eyewitness—Keshawna Wright—identified

Smyth as the shooter and that police confidently relied on that identification as a basis to arrest him for this crime. (84:56). They were also never told that Smyth's friend, Casie James, could place him in the house when the shooting occurred, (83:23-25), or that in the words of his other friend, Bankhead, he was acting stressed and laying low after the shooting. (83:34).

If this evidence had been presented to the jury, it would have provided a basis for the jury to acquit Mr. Mull, either because it directly establishes Smyth was the shooter or, at the very least, that Mr. Mull was wrongly identified. Regarding the former, as one text message suggested, a reasonable interpretation of the evidence is that Smyth was trying to hit one of the gay men who had fought with him and his friends, battered Bankhead, and fled into the bedroom. (82:54).

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

However, while Smyth is clearly a strong alternative suspect, he is far from the only one. Two witnesses—including Smyth—stated that Tyler had a gun at the party and, according to Smyth, Tyler admitted to committing the crime. At the same time, Bankhead is also a strong suspect, precisely because a

witness who was never called at trial, Jalyn Lynch, can place him in front of the door with a gun, shouting about shooting through the door shortly before shots were in fact fired through the door. However, the jury heard none of this evidence, and thus was never given an opportunity to consider whether either Bankhead or Tyler may have fired the fatal shots.

Evidence diminishing Smyth's credibility and believability

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

To begin, the jury was not told that, in addition to being a suspect in a homicide, Smyth was facing potential revocation of his probation, had municipal warrants, and was under police investigation for multiple allegations of illegal possession of a firearm when he made the choice to cooperate with law enforcement and blame someone else for this crime. And, while the jury was told, obliquely, that there were at least some rumors that he committed the crime, they were not told that Smyth himself was aware of them and that, according to his friend Bankhead, he

was "stressed out and laying low" after the fact. (83:34).

Jurors were therefore not told that Smyth had powerful motivations to lie and shift the blame for the shooting toward Mr. Mull, in the hope of evading serious threats to his liberty. The jury was not told that Smyth faced a serious allegation of possession of a firearm by a felon which resulted from this investigation—provable both by his confession and Facebook photographs—and that this charge was dismissed prior to his testimony by the very same prosecutor who then relied on Smyth's assistance to convict Mr. Mull. The jury was also not told that Smyth had picked up a new criminal allegation prior to testifying and that the very same prosecutorial agency presenting his testimony was also evaluating whether or not to charge him with additional criminality at the time he testified.[16]

Most importantly, the jury was not told that Smyth admitted to concealing evidence from the investigators regarding his friend Tyler. In essence, the jury was asked to evaluate the believability of one story Smyth gave, but was never asked to consider his contradictory statements blaming someone else entirely.

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

Other evidence tending to exonerate Mr. Mull

First, it is worth pointing out that Mr. Mull's alleged participation in this crime is curious, given that it arose out of a fight between Smyth and his "friends" on one side and Crumble and his group of LGBT peers on the other. Neither group appears to have claimed Mr. Mull as a "friend." In fact, Smyth and Mr. Mull were anything but. Mr. Mull and Smyth had apparently almost come to blows over a year earlier and had not seen each other since. Moreover, no witness identified Mr. Mull as being friendly with Smyth at the party, and it is therefore hard to understand why he would take Smyth's side in a violent brawl involving multiple fighters.

Second, there were numerous witnesses who could provide eyewitness testimony favorable to Mr. Mull—Keshawna Wright, Charles Cantrell and Elicia Burrows, for example. (83:48; 84:25; 84:27). Likewise, Jalyn Lynch told police he did not see Mr. Mull at the party after having been shown his photograph. (83:50).

Third, there is the issue of clothing, with all three men linked to clothing reportedly worn by the shooter in several eyewitness accounts. As the court of appeals reasonably concluded, both Smyth and Bankhead can be placed in front of the door based on descriptions of clothing worn by the suspect. *Mull II*, Appeal No. 2020AP1362-CR, ¶ 27. (App. 36-37). Moreover, Tyler was also wearing clothing consistent with the shooter's red hoodie, and even concealed a gun in that garment. (83:19).

Trial testimony in context

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

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

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

participated in was also problematic based on trial counsel's cross-examination.[17] (136:47-50).

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

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

[17] It is especially problematic if Sanchez was only shown two photographs, as he testified at trial. (135:99).

story of confronting Mr. Mull and demanding the truth about the rumors he had killed Ericka Walker.

C. Justice has miscarried.

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

D. The State's arguments are conclusory, undeveloped, and incorrect.

The State offers only two arguments in its two-paragraph treatment of the issue. First, the State claims a new trial in the interest of justice cannot be ordered because Mr. Mull has merely "repackaged" his ineffectiveness claims. The State's citation is not on-point. In *State v. Arredondo,* 2004 WI App 7, ¶ 56, 269 Wis. 2d 369, 674 N.W.2d 647, the court of appeals summarily rejected the defendant's claim for a new trial in the interest of justice because it had already assessed those same arguments under the rubric of ineffective assistance of counsel and found them unpersuasive. *Id*.

However, the case does not mean a defendant is precluded from raising arguments under one legal theory and then incorporating some of those same concerns into his interest of justice argument. After all, the Court is required to assess whether other legal mechanisms would entitle the defendant to relief as part of its discretionary inquiry. *State v. Kucharski*, 2015 WI 64, ¶ 23, 363 Wis. 2d 658, 866 N.W.2d 697. Moreover, while some of the arguments overlap, the interest of justice claim is much broader in scope than the ineffectiveness claims presented for this Court's review.

Second, the State claims, without any explanation, that Mr. Mull has not shown a substantial probability of a different result on retrial. (State's Br. at 31). However, that prejudice requirement only applies to one, not both, of the interest of justice standards—a legal reality ignored by the State. In any case, it is quite clear that if any of this omitted evidence were presented, there is an obvious possibility of a different result. A jury which believes any of the omitted witnesses or evidence would have no choice but to vote not guilty.

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

CONCLUSION

For the reasons set forth herein, this Court should affirm the court of appeals and remand for a new trial.

Dated this 29th day of August, 2022.

Respectfully submitted,

Electronically signed by Christopher P. August
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 10,783 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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 29th day of August, 2022.

Signed:

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