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

REPLY BRIEF OF PLAINTIFF -RESPONDENT-PETITIONER

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The court of appeals' decision is legally flawed because it conflicts with controlling opinions. *See* Wis. Stat. § (Rule) 809.62(1r)(d). The court's opinion directly conflicts with numerous cases dictating that reviewing courts grant great deference to trial attorney's strategic decisions.

In large part, Mull's brief focuses on statements made by witnesses to the police or others pretrial. Mull pieces together those statements into a narrative to argue that he is not guilty and that Attorney Guerin was ineffective. But this Court cannot engage in factfinding. This Court searches the record to support the circuit court's findings of fact. *Hofflander v. St. Catherine's Hosp., Inc.*, 2003 WI 77, ¶ 70, 262 Wis. 2d 539, 664 N.W.2d 545. While Mull attempts to distract from the credibility determinations made by the jury at the trial and by the circuit court at the postconviction motion hearing, this Court should remain focused on the record. It should reverse the court of appeals' decision that improperly engaged in reexamination of the facts presented to the circuit court.

I. The court of appeals ignored binding case law by impermissibly making credibility determinations rather than defer to the attorney's strategic choices.

Under controlling precedent, the court of appeals owed deference to the attorney's strategic decisions. The court ignored that precedent. *State v. Mull*, No. 2020AP1362-CR, 2022 WL 287813, ¶ 36 (Wis. Ct. App. Feb. 1, 2022) (unpublished); (R-App. 19–20.)

A. The court of appeals failed to defer to Guerin's reasonable trial strategy.

The court failed to follow precedent in refusing to defer to Guerin's reasonable doubt strategy, concluding he should have pursued a *Denny* third-party perpetrator defense instead. But 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 weaker than a reasonable doubt defense. This decision was well within the range of competent assistance, and the court of appeals should have deferred to it.

Mull misstates the State's argument and claims that the State believes that any legal strategy defeats an ineffective assistance claim. (Mull's Br. 24.) It does not. Of course, Guerin's strategy needed to be reasonable to require deference. *See State v. Breitzman*, 2017 WI 100, ¶ 65, 378 Wis. 2d 431, 904 N.W.2d 93. Here, Guerin's strategy was reasonable. The court of appeals' decision is erroneous because it failed to defer to the reasonable strategy.

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

Denny does not favor admissibility. The court of appeals concluded that Guerin's strategy was unreasonable on the theory that he should have pursued a *Denny* third-party perpetrator defense. But that defense requires evidence Guerin did not have.

The court of appeals 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 that given what it viewed as a paucity of evidence in the State's favor, the circuit court would have allowed Mull to present such a defense. But *Denny* has requirements for the defense's evidence that do not hinge on what the trial court views as the strength of the State's case.

Mull implies that his investigation was incomplete. (Mull's Br. 24.) But Mull does not provide any argument that Guerin's investigation was incomplete. Mull seems to assume from Guerin's willingness to go forward promptly with trial that he did not do the work he needed. But Mull presents no evidence that the witnesses were findable or that more time would have yielded the result he now desires. Mull ignores Guerin's testimony discussing 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.)

Mull asserts that the State forfeited any argument that the evidence would not have been admissible. (Mull's Br. 26–27.) The State did not forfeit the argument. Instead, it argued that if Guerin should have pursued the *Denny* defense, then Mull would have to prove that the evidence would satisfy the *Denny* requirements and would have been authorized under the facts. The court of appeals' decision should have examined the *Denny* requirements, to determine admissibility. It erred when it failed to do so.

Mull argues that the *Denny* evidence was all admissible. (Mull's Br. 28–30.) But his argument seems to

assume that every witness that gave a statement to police would have been located *and* each would have testified in conformity with the statements that they gave. The record rebuts those assumptions. Many witnesses were not found. Many changed their stories multiple times. These witnesses were not deemed credible by the police, the State, or Guerin.

The reviewing court must be highly deferential to counsel's strategic decisions. The court of appeals improperly substituted its judgment for that of Guerin. Rather than deferring to counsel's strategic decisions, it independently decided how it would have tried the case, assuming an availability of witnesses that Mull did not show. This Court should reverse and reinstate Mull's judgment of conviction.

2. Guerin reasonably chose a reasonable defense strategy.

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

Mull claims that Guerin's postconviction testimony about his trial strategy was not believable for a number of reasons, often focusing on Guerin's lack of memory about some of the events surrounding the trial. (Mull's Br. 31–34.) But the circuit court disagreed. It 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.)

This Court must defer to the circuit court's findings of fact. Reviewing courts are "precluded from making findings of fact where the facts are in dispute." *Tourtillott v. Ormson Corp.*, 190 Wis. 2d 291, 294, 526 N.W.2d 515 (Ct. App. 1994). This Court and the court of appeals must accept a reasonable inference drawn by a circuit court from established facts if more than one reasonable inference may be drawn. *Pfeifer v. World Serv. Life Ins. Co.*, 121 Wis. 2d 567, 571, 360 N.W.2d 65 (Ct. App. 1984). This Court refuses to engage in credibility determinations. And it defers to the circuit court's findings of fact regarding credibility.

3. 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 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 v. Washington*, 466 U.S. 668, 694 (1984).

Mull argues that the State conceded that its case was weak and that any alternative defense would have a reasonable probability of a different outcome. (Mull's Br. 40.) The State did not do so. There was sufficient evidence for the jury to conclude that Mull was guilty of killing Walker. As with all cases involving multiple, impaired eyewitnesses, the jury heard many conflicting stories. But the presence of conflicting stories does not mean that the State's case was weak. Mull's incorrect assumption fails to meet his burden to prove prejudice

The jury heard evidence about 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 was not identified as the shooter. (R. 137:66–67, 69–70.)

The defendant, not the State, has the obligation to demonstrate prejudice. 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. Mull completely failed to do so in the circuit court, in the court of appeals, and in this Court.

B. The court of appeals also failed to defer to 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 Guerin's strategic choice about how to handle Pugh's testimony. 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.

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.) Guerin believed that if he objected to Pugh's comment, it risked bringing too much attention to it. (R. 142:40.) Even if he made the objection outside of the presence of the jury, the

jury had heard it and would have had to think about the stricken testimony. 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.

Mull claims that Guerin's testimony regarding the victim's nickname is "incredibl[e]" and "nonsensical." (Mull's Br. 42.) Mull appears to have no record evidence to support his view that Guerin's belief was "incredibl[e]." (Mull's Br. 42.) And whether it was her nickname is irrelevant. Mull's argument appears to be that Guerin should have objected to Pugh's description of the victim as showing that it must have been false, because the victim was not known as that. But Mull could have described the victim however he wanted to Pugh. It did not need to be her regular nickname—it could have been a name he just made up. Again, Mull attempts to relitigate the facts in the improper forum.

Mull relies on the court of appeals' decision to argue that Guerin's strategy was not reasonable. (Mull's Br. 42.) But the court of appeals improperly failed to defer to the circuit court's findings of fact. The court of appeals' error was the primary reason for the State's petition for review. The court of appeals' decision is legally flawed because it conflicts with controlling opinions. *See State v. Kimbrough*, 2001 WI App 138, ¶¶ 32–34, 246 Wis. 2d 648, 630 N.W.2d 752. Mull's reliance on the court of appeals' erroneous conclusion must be rejected for the same reasons that the court of appeals' decision should be reversed.

Likewise, Guerin did not perform deficiently when he did not move for a mistrial after Pugh's statement. Moreover, Mull failed to prove that any failure by Guerin to object or move for a mistrial caused him prejudice.

In deciding a mistrial motion, the circuit court must determine 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. Mull failed to articulate a sufficiently prejudicial error. The court would not have granted a mistrial motion

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 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 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 Guerin's. This Court should reverse.

II. This Court should not 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. 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's attempts to show a "substantial probability of a different result on retrial" must be rejected. *See Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). Mull attempts to relitigate the trial in the pages of his brief. But his reliance on police statements and contradictory statements from witnesses that could not be located at the time of trial and cannot be located now is misplaced. This Court is bound by the facts in the record and the circuit court's credibility determinations.

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

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

Dated this 13th day of September 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 2,438 words.

Dated this 13th day of September 2022.

Electronically signed by:

Christine A. Remington
CHRISTINE A. REMINGTON

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 13th day of September 2022.

Electronically signed by:

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