STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP2119-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY L. JACKSON,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, AFFIMRING A JUDGMENT OF CONVICTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

If a defendant's postconviction motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may deny the motion without conducting a *Machner*[1] hearing. In this case, Defendant-Appellant-Petitioner Larry Jackson makes three claims of deficient performance, but the allegations are conclusory and the record conclusively demonstrates that he is not entitled to relief.

Jackson asserts that his counsel failed to investigate or call two alibi witnesses, but the record shows that neither witness had personal knowledge of where Jackson was when the crime occurred. He also alleges that his trial counsel failed to prepare Jackson's mother before testifying at trial, but he fails to explain how his trial counsel should have prepared her. And he alleges that his trial counsel performed deficiently when she told him that he needed to testify before any other defense witnesses testified. But the record shows that Jackson's trial counsel did not tell Jackson that he had to testify before any other defense witnesses; instead, Jackson chose not to testify based on his father's advice.

In addition, given the strength of the State's case, the record conclusively demonstrates that Jackson is not entitled to relief.

For these reasons, the circuit court properly denied Jackson's motion without a *Machner* hearing.

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

ISSUE PRESENTED

Did the circuit court properly deny Jackson's postconviction motion alleging ineffective assistance of counsel without conducting a *Machner* hearing?

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

STATEMENT OF THE CASE

Pre-trial background

In March 2015, R.K., his wife C.W., and their three children lived in the lower unit of a duplex located on 60th Street in Milwaukee. (R. 172:44–45.) Gerald Tucker ("Gerald") and his wife, Tiffany Tucker ("Tiffany"), lived with their children in the upper unit of the duplex. (R. 172:46.) Both units in the duplex shared a single front door that was accessed via a common hallway on the first floor. (R. 172:45.) Behind the duplex was a concrete parking pad where the residents could park their cars. (R. 172:39.)

On March 11, 2015, R.K. was on the parking pad when he noticed glass shards spread around his car. (R. 172:48–49.) The families living in the duplex had a history of fighting, so R.K. believed that Gerald spread the glass shards around his car. (R. 172:49.) R.K. then confronted Gerald about the glass. The argument began in the back parking pad but eventually moved to the front of the duplex. (R. 174:22.)

During the argument, Tiffany called Jackson for help. (R. 174:23, 42–43.) A short time later, Jackson arrived at the duplex and shot R.K., who died as a result. (R. 174:24–26.) Jackson did not immediately run away. Instead, he stayed at the duplex for a few minutes before leaving. (R. 174:27.)

Jackson was eventually arrested. On April 7, 2016, an amended information was filed, charging him with first-degree intentional homicide, use of a dangerous weapon, party to a crime, and possession of a firearm by a felon. (R. 5.)

On April 11, 2016, Jackson's trial counsel filed a notice of alibi. (R. 9.) The notice indicated that three people may testify that Jackson was at home when R.K. was shot. Those three people were Jackson's mother Carol, Jackson's sister Crystal, and his girlfriend Janikka Marsh. (R. 9.)

Trial

At trial, C.W. testified that R.K. found glass shards spread around their car parked on the parking pad. (R. 172:48–49.) So, R.K. went outside to confront Gerald about the glass. (R. 172:49.) Later that evening, C.W. heard "about four or five" gunshots coming from the front yard. (R. 172:55.) C.W. momentarily "froze"; however, realizing that R.K. was still outside, C.W. looked out the front windows to make sure he was okay. (R. 172:55.) C.W. saw a man outside, about three feet away from her window, running away from the duplex. (R. 172:56, 69.)

A few days later, C.W. saw who she believed was the same man that she saw run past her window when R.K. was shot. (R. 172:57, 70–71.) This time the man was with Tiffany in the common first floor hallway of the duplex. (R. 172:57.)

In October 2015, C.W. viewed a photo array consisting of six different individuals, including Jackson. (R. 66; 172:57–58; 173:10.) C.W. was "not able to a hundred percent" identify any of the photos as the man she saw run past her window. (R. 172:64.) However, she identified two photos that "looked like" that man. (R. 172:58.) One of those photos was Jackson. (R. 173:14.)

The State also called Andre Dorsey. Dorsey testified that he and R.K. were friends and that, on March 11, 2015,

R.K. called and asked him to come to the duplex. (R. 173:22.) R.K. told Dorsey that he believed Gerald had spread glass shards around his car tires and that he wanted to confront Gerald about it. (R. 173:22.) R.K. told Dorsey that he was concerned that Gerald would have his friends "jump" R.K. during the confrontation, so he wanted Dorsey to be present "as a precaution." (R. 173:22.)

When Dorsey arrived at the duplex, R.K. and Gerald were arguing on the back parking pad. (R. 173:24.) The argument eventually moved to the front of the duplex, where they argued while standing next to the concrete walkway connecting the duplex's front steps with the sidewalk. (R. 173:26, 28–29.) Dorsey watched them argue while standing off to the side of the yard by a fence. (R. 173:30.)

As the argument continued, a fourth individual approached Gerald and the two began to whisper. (R. 173:32–33.) The individual struck Dorsey as odd for two reasons. First, he was wearing clothing that was "out of place for . . . [the] temperature that it was outside," including a "long coat" and a "turquoise scarf," although the scarf was not covering his face. (R. 173:32, 50–52.) Second, the individual was too "skinny" to assist Gerald in a fight. (R. 173:34–35.) After Gerald and the individual were done whispering, Gerald told R.K., "I'm not going fight you over glass." (R. 173:35.) Gerald and the individual then went up the steps leading to the front door of the duplex and went inside. (R. 16; 173:35.)

As soon as Gerald and the individual entered the duplex, R.K., who was still standing by the concrete pathway, briefly looked at Dorsey, who was still standing off to the side by the fence. (R. 173:35, 55.) Dorsey then went to light a cigar and, as he did, he heard gunshots being fired from "inside" the duplex. (R. 173:35.) When Dorsey looked up, he saw R.K. fall to the ground. (R. 173:36.) Dorsey then looked at the duplex's front door and saw a hand holding a gun turning in his

direction. (R. 173:36.) The gun then fired twice at Dorsey. (R. 173:36.)

In response, Dorsey retreated to the side of the duplex. (R. 173:37.) He then saw R.K. get up and run across 60th Street where he collapsed. (R. 173:37.) A short time later, Dorsey flagged down a police car. (R. 173:37.) The officer exited his car, called for an ambulance, and ordered Dorsey to lay down. (R. 173:37.) However, Dorsey ignored that order and, instead, ran back to the duplex to check on C.W. and the kids. (R. 173:37–38.) He attempted to drive the kids away from the scene but was stopped by police a short distance from the duplex. (R. 173:38.)

Dorsey admitted that he had previously been convicted of three crimes. (R. 173:41.) He also admitted that, after he was pulled over while trying to remove R.K.'s kids from the scene, police recovered a .45 caliber handgun from inside his car. (R. 173:41–42, 44.) Dorsey testified that he had not been charged with any crimes related to that gun. (R. 173:42.)

In October 2015, police showed Dorsey a photo array. (R. 173:39, 54.) Dorsey identified Jackson as the individual he saw whispering with Gerald. (R. 173:39–41.)

The State also called Gerald, who testified that, one night after getting groceries, he was confronted by R.K. and Dorsey on the back parking pad. (R. 174:18–19.) According to Gerald, he did not engage R.K. or Dorsey because R.K. had a gun. (R. 174:21–22.) Instead, Gerald went upstairs and put away his groceries. (R. 174:22.)

Later that evening, Gerald decided to have a cigarette in the front yard. (R. 174:22.) Although R.K. and Dorsey were still outside, Gerald knew that R.K. no longer had a gun because he saw him give it to C.W. (R. 174:51.) While Gerald was smoking, R.K. and Dorsey approached him. (R. 174:22.) At that point, Gerald heard Tiffany call Jackson, whom

Gerald had known for "[t]en plus years." (R. 174:23, 42.) Gerald testified that, a short time later, Jackson arrived at the duplex. (R. 174:24.) Gerald explained that he did not know what Jackson intended to do, but "knew it was very likely" that he had a gun. (R. 174:25.) Thus, Gerald attempted to prevent Jackson from shooting anyone by "grabb[ing]" Jackson and "walk[ing] him" up the steps[2] and into the duplex through the front door. (R. 174:24–25.)

Once they were inside the duplex, Jackson showed Gerald a gun. (R. 174:26.) When Gerald asked Jackson to hand over the gun, Jackson stated "fuck that." (R. 174:26.) Jackson then opened the front door and shot R.K. (R. 174:26.) Jackson did not immediately run away and, instead, closed the front door. (R. 174:27.) "Sometime after that," Jackson opened the front door and ran away. (R. 174:27.)

Gerald acknowledged that, shortly after R.K. was shot, police attempted to interview him, but he refused to speak with police. (R. 174:31–32.) Gerald explained that, because he was on probation at the time, he knew that police would take him into custody. (R. 174:31.) He did not tell police that Jackson shot R.K. because he was afraid that Jackson would retaliate by killing his family. (R. 174:31, 54.) However, when Jackson informed Gerald that police recovered the gun that Jackson used to shoot R.K., he decided to admit that he witnessed Jackson shoot R.K. (R. 174:34.) Gerald explained that, once police recovered the gun, he figured they already "knew what was happening," so there was no longer a danger in identifying Jackson as the shooter. (R. 175:35.)

Detective Michael Washington testified that he was responsible for processing the scene. (R. 172:16–17.) He

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[2] There are two steps leading up to the duplex's front door. (R. 16.) As explained in section C below, those steps play a crucial role in explaining the trajectory of the bullet that killed R.K.

recovered a .40 caliber bullet lying in the grass next to the walkway connecting the duplex's front steps and the sidewalk. (R. 172:28.) A trail of blood connected the area where the bullet was recovered to where R.K. was found lying in the grass. (R. 172:37–38.) He also recovered a total of five .40 caliber cartridge cases from the front of the duplex. (R. 17; 173:120–21.) Four cases were found on the steps leading into the front door and one was found in the grass next to the steps. (R. 172:24–27, 30, 35.)

Joe Brown testified that, in March 2015, he owned a .40 caliber Smith and Wesson handgun. (R. 173:80.) On March 11, 2015, between 6:00 p.m. and 7:00 p.m., Jackson asked Brown if he could borrow the gun. (R. 173:81–82.) Brown agreed to lend it to Jackson because Jackson was his nephew's "best friend," and Brown had known him since Jackson was 12 or 13 years old. (R. 173:79.)

About 45 minutes later, Jackson returned with the gun. (R. 173:83.) Anthony Boone was also at Brown's house. (R. 173:85.) Upon his return, Jackson was wearing "blue rubber gloves." (R. 173:83.) While Jackson changed clothes in Brown's bathroom, Brown boiled the blue rubber gloves to "[g]et all the evidence off of [them]." (R. 173:83.) Brown then "[w]iped [the gun] down." (R. 173:105.) After Jackson left the house, Brown counted the bullets in the .40 caliber gun and found that five bullets[3] were missing. (R. 173:84.)

Brown testified that, two days later, he met with Jackson and asked him why five bullets were missing from his gun. (R. 173:85.) Jackson admitted that "he shot somebody." (R. 173:85.) Jackson stated that his friend "Gerald" called and asked him to come over because he was having problems with the "downstairs" neighbors. (R. 173:85–

[3] Brown was unsure exactly how many bullets were missing, but he believed it was five.

87.) Jackson explained that, when he got to Gerald's house, he saw Gerald and another individual arguing near the front steps of the duplex. (R. 173:88.) He also saw a third individual standing off to the side of the yard "leaning on the fence." (R. 173:87.) Jackson walked past the person leaning on the fence and approached Gerald. (R. 173:87–88.) He and Gerald then "stepped into the doorway" of the duplex. (R. 173:88.) At that time, Gerald "nodded his head, and that's when [Jackson] turned around and shot [R.K.]" (R. 173:89.) Jackson then "shot towards the person at the fence." (R. 173:90.)

Brown testified that Jackson also told him that Gerald was arrested in connection with R.K.'s shooting. (R. 173:91.) Jackson put money on Gerald's inmate account so Gerald could "buy stuff" and "make phone calls" while in jail. (R. 173:91.) Jackson added a total of $81 to Gerald's inmate account. (R. 173:148–49.) Brown also testified that, "a few days" after the shooting, he and Jackson returned to the duplex to help Tiffany move since Gerald was in jail. (R. 173:90–91; 174:71.)

Brown also acknowledged that his .40 caliber handgun was later recovered by police pursuant to a search warrant. (R. 173:92.) A forensic examination showed that Brown's gun was used to fire all five of the .40 caliber cartridge cases that were recovered from the front steps of the duplex. (R. 173:119–22.) It was also used to fire the bullet that was recovered near the concrete walkway connecting the duplex's front stairs to the sidewalk. (R. 173:123.)

Brown acknowledged that he had three prior felony convictions. (R. 173:92.) He also admitted that he recently pled guilty to a federal criminal charge based on his act of lending the .40 caliber handgun to Jackson. (R. 173:92–93.)

Anthony Boone testified that he and Jackson were not friends, but he recalled a night in which they were both at Brown's house. (R. 173:130–31.) Boone recognized Jackson

because he had seen him on "several" prior occasions. (R. 173:134.) Boone recalled that he saw Jackson emerge from Brown's bathroom. (R. 173:133–35.) According to Boone, it "look[ed] obvious" that Jackson had changed clothes while in Brown's bathroom. (R. 173:135.) When police showed Boone a photo array, he picked Jackson's photo as the person he saw leaving Brown's bathroom. (R. 173:138–39.)

An autopsy revealed that R.K. died of a through-and-through gunshot wound to the chest. (R. 174:8.) The bullet entered the right side of R.K.'s chest and travelled in a downward direction, exiting the left side of R.K.'s body just above the beltline. (R. 174:11–12.) The trajectory of the bullet through R.K.'s body was consistent with the shooter being in a position elevated above R.K. (R. 173:12–13.)

After the State rested, defense counsel informed the court that Jackson "would like to testify." (R. 174:61.) The court then addressed Jackson to ensure that he was knowingly and voluntarily making that decision. (R. 174:61–62.) When the court asked if the defense was going to call any other witnesses, the following colloquy occurred.

> [COUNSEL]: . . . Yes, Your Honor. The defendant's mother, Carol.
>
> THE COURT: So who's going to testify first?
>
> [COUNSEL]: She is. And I need a few minutes to check on something else here.
>
> THE COURT: I'm just wondering -- so you've got somebody testifying before him?
>
> [COUNSEL]: I know the Court's aware of the logistical issues we have with him. Let me just talk to him about that, about if it would be okay if he testifies first.
>
> THE COURT: Okay. We'll go off the record.

(R. 174:63–64.)

When the court went back on the record, the following conversation occurred.

> [COUNSEL]: Mr. Jackson has further conferred with me on this issue, and also I -- he has asked me to talk to his father who's in court behind me, and he has now decided he will not testify. But he does want his mother to testify. . .
>
> . . . .
>
> THE COURT: Now, previously you had said that you wanted to testify.
>
> [JACKSON]: Yes, sir.
>
> THE COURT: You've since changed your mind?
>
> [JACKSON]: Yes, sir.
>
> . . . .
>
> THE COURT: Counsel, you believe now that his change of heart – you've discussed that with him?
>
> [COUNSEL]: Yes . . . and I appreciate the Court gave us a few more minutes to talk about this . . . . It's not like we haven't talked about this [previously] or he[ ] [has not] thought about this.
>
> That all being said, he and I talked, he asked me to ask his father for advice, his father was absolutely clear about his advice. I think Mr. Jackson has taken all of that into consideration and made his own decision.
>
> [THE COURT:] Is that correct, Mr. Jackson?
>
> [JACKSON]: Yes, it is, Your Honor.

(R. 174:64–66.)

The defense then called Carol who testified that, on March 11, 2015, she returned home from work around 5:00 p.m. (R. 174:76.) Carol stated that, when she got home, Jackson, Jackson's girlfriend, Marsh, and Marsh's two young children were all there. (R. 174:75–76.) Carol explained that Marsh was in bed sleeping and Jackson was coming "in and

out of the bedroom." (R. 174:77.) Carol played with the children before making dinner. (R. 174:74.)

Carol explained that, shortly after Wheel of Fortune began at 6:30 p.m., "all hell broke out." (R. 174:74, 77.) Carol explained that she and Marsh got into an argument because Marsh's children were being "too noisy" which made watching Wheel of Fortune difficult. (R. 174:76–77.) Also, Jackson and Marsh got into an argument because Jackson was "taking phone calls from [Tiffany]" asking "for help" regarding "a problem over at Gerald Tucker's house." (R. 174:74–75, 85, 89.)

Carol testified that, from the time she returned home from work to the time she went to bed at 9:00 p.m., Jackson did not leave the house. (R. 174:78.) She explained that her home is equipped with an alarm. When either the front or back door is opened, an audible "door ajar" alarm will sound. (R. 174:79.) Carol testified she did not hear the alarm before going to bed. (R. 174:79, 85.)

On cross-examination, Carol stated that police contacted her about R.K.'s murder. She acknowledged that, before speaking with police, she read a police report, which reflected that R.K. was shot on March 11, 2015. (R. 174:81.) She also admitted that she told police that she "did not know where [Jackson] was" on that date. (R. 174:81–82.) She acknowledged that she did not tell police that Jackson was with her on March 11, 2015. (R. 174:84.)

Carol also acknowledged that police asked her to provide them with her daughter Crystal's address and phone number. (R. 174:85.) However, Carol told police that there was "no way" she could help police contact Crystal. (R. 174:85.) Carol explained that she and Crystal did not "get along." (R. 174:90–91.) She also explained that Crystal did not live with her and, instead, Crystal temporarily stayed in

various other people's homes, so Carol did not know where Crystal lived or how to contact her. (R. 174:90, 97.)

After Carol testified, the defense rested. (R. 174:92.) The jury found Jackson guilty of both first-degree intentional homicide, use of a deadly weapon, and being a felon in possession of a firearm. (R. 176:3.) The court then ordered a pre-sentence investigation (PSI). (R. 78.)

Sentencing proceedings

The parties first addressed the PSI. The PSI noted that Crystal was convicted of, inter alia, substantial battery, which is a Class I felony. (R. 79:17–18.)

After both sides presented their arguments, the court sentenced Jackson to life imprisonment on the first-degree intentional homicide conviction. (R. 177:52.) The court found that Jackson could be released to extended supervision in 2051. (R. 177:52.) On the felon in possession of a firearm conviction, the court imposed a consecutive sentence of five years, consisting of two years of initial confinement and three years of extended supervision. (R. 177:53.)

Postconviction proceedings

On January 24, 2020, Jackson filed a postconviction motion in which he raised three ineffective assistance of counsel claims. (R. 124.)

He argued that counsel was ineffective for failing to call Crystal and Marsh as alibi witnesses. (R. 124:5.) Jackson explained that both Crystal and Marsh would have testified that Jackson was with them at Carol's house when R.K. was shot. (R. 124:6–8.) He attached affidavits from Crystal and Marsh supporting his argument. (A-App. 43–47.)

Jackson also alleged that his attorney was ineffective for failing to interview Carol before calling her as an alibi witness. (R. 124:8.) He also argued that his attorney failed to

properly prepare Carol before her being questioned by police. (R. 124:8–9.) Specifically, he noted that when police contacted Carol, she told them that she did not know where Jackson was on the day of the shooting. (R. 124:8.) Jackson argued that his trial counsel should have prepared Carol before she spoke to police. (R. 124:9.)

Jackson also alleged that his counsel incorrectly advised him of the law. Specifically, Jackson argued that he wanted to testify at trial. (R. 124:10.) He claimed that, before he could testify, his trial counsel "told him that the trial court was going to require him to testify before any of the other defense witnesses were called." (R. 124:10.) Jackson wanted Carol to testify first, so he decided not to testify at all. Jackson argued that, "[t]he only event intervening between [ ] Jackson's initial intention to testify, and his final decision not to testify, was his trial attorney's informing him that he would have to testify before any other defense witnesses were called." (R. 124:11.)

To support this allegation, Jackson attached his own affidavit and one from his father. (A-App. 40–42, 48–49.) Both affidavits allege that, during a brief break at trial, Jackson, Jackson's father, and Jackson's trial counsel met together to discuss whether Jackson should testify. (A-App. 40–41, 48.) During that meeting, counsel allegedly stated "that the trial court was going to require [Jackson] to testify before any of the other defense witnesses testified." (A-App. 41, 48.)

The court denied Jackson's motion without a hearing. It found that, even assuming deficient performance, Jackson was not prejudiced because the evidence against him was "overwhelming." (A-App. 18.) The court explained that two eyewitnesses identified Jackson as the shooter. (A-App. 18.) And Jackson confessed to his friend Brown that he shot R.K. (A-App. 18.) The court also noted that "several corroborating witnesses [ ] strengthened and corroborated the State's

witnesses." (A-App. 18.) The court concluded that, "[g]iven the strength of the State's evidence of guilt and the motivations of [Crystal and Marsh] to provide [Jackson] with an alibi, there is no reasonable probability that their testimony would have altered the result of the trial." (A-App. 18.)

The court found Jackson's allegations regarding counsel's failure to interview or prepare Carol "conclusory." (A-App. 18.) The court noted that Jackson failed to explain "what steps counsel should have taken" to prepare Carol. (A-App. 18.) The court also found that, "[e]ven assuming" deficient performance, Jackson "has not demonstrated" prejudice given the strength of the State's case. (A-App. 18.)

Addressing Jackson's final argument, the court found that "the record does not support [Jackson's] claim that the order of testimony was the reason he decided not to testify." (A-App. 18.) The court also found that, given the "weight" of the State's evidence, Jackson cannot establish prejudice. (A-App. 19.) Thus, the court concluded that Jackson failed to establish prejudice. (A-App. 18–19.)

Appellate court affirmed

In a per curiam opinion, the appellate court affirmed. Addressing counsel's failure to call Crystal and Marsh as alibi witnesses, the court assumed, without deciding,[4] that "trial counsel was deficient" for failing to call them. *State v. Jackson*, No. 2020AP2119-CR, 2021 WL 4736615, ¶ 24 (Wis. Ct. App. Oct. 12, 2021) (unpublished). However, the court

[4] Jackson contends that the appellate court "acknowledged" that his trial counsel's performance was "deficient." (Jackson's Br. 34.) Jackson is wrong. A *Machner* hearing never occurred, so a finding of deficient performance could not have been made. *See State v. Sholar*, 2018 WI 53, ¶ 50, 381 Wis. 2d 560, 912 N.W.2d 89 ("A *Machner* hearing is a prerequisite for consideration of an ineffective assistance claim."). Instead, the appellate court *assumed* deficient performance.

found that, "even assuming that trial counsel was deficient[,] . . . Jackson has not established that this was a prejudicial error due to the strength of the State's case against him." *Id.* The court noted that both Brown and Gerald's testimony pointed to Jackson as R.K.'s shooter. *Id.* ¶ 26. In addition, "the State provided ballistics evidence . . . as well as other corroborating identification evidence such as the testimony of Dorsey and [C.W.], who both placed Jackson at the scene of the shooting, and Boone, who placed Jackson at Brown's apartment after the shooting." *Id.* Thus, the court concluded that Jackson cannot establish prejudice "given the compelling nature of the State's case." *Id.* ¶ 27.

Addressing Jackson's allegation that his trial counsel failed to adequately prepare Carol, the appellate court found that the argument was both "conclusory" and "insufficient." *Id.* ¶ 22. Specifically, the court noted that Jackson failed to explain "how counsel should have prepared her." *Id.*

Turning to Jackson's final claim, the appellate court found that, even assuming that trial counsel was deficient by telling Jackson that he had to testify first, "Jackson has not established he was prejudiced . . . due to the strength of the State's case." *Id.* ¶ 29. The court noted that, although Jackson alleged in his postconviction motion that the erroneous advice was the reason he chose not to testify, Jackson did "not allege that his testimony would have provided any different or additional information relating to his alibi" than that already provided by Carol. *Id.* Therefore, the appellate court concluded that "the trial court did not err in denying [Jackson's] postconviction motion without a hearing." *Id.* ¶ 30.

This Court granted Jackson's petition for review.

ARGUMENT

The circuit court properly denied Jackson's ineffective claims without conducting a *Machner* hearing.

A. Standard of review.

"Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review." *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. First, this Court reviews de novo "whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." *Id*. However, "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *Id*.

This Court reviews a circuit court's discretionary decisions "under the deferential erroneous exercise of discretion standard." *Id*.

B. A defendant bears a heavy burden to establish ineffective assistance.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one." *State v. Smith*, 2003 WI App 234, ¶ 15, 268 Wis. 2d 138, 671 N.W.2d 854.

To establish deficient performance, the defendant must point to specific acts or omissions that are "outside the wide range of professionally competent assistance." *Strickland*,

466 U.S. at 690. There is a "strong presumption" that "counsel acted reasonably within professional norms." *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

With respect to the prejudice component, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding[s] would have been different." *State v. Jenkins*, 2014 WI 59, ¶ 37, 355 Wis. 2d 180, 848 N.W.2d 786 (citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (citation omitted).

"A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." *State v. Prescott*, 2012 WI App 136, ¶ 11, 345 Wis. 2d 313, 825 N.W.2d 515 (citation omitted). If a defendant argues that counsel was deficient for not calling a witness to testify, he "must allege with specificity what the particular witness would have said." *State v. Arredondo*, 2004 WI App 7, ¶ 40, 269 Wis. 2d 369, 674 N.W.2d 647.

A defendant is not automatically entitled to a *Machner* hearing. *Allen*, 274 Wis. 2d 568, ¶ 9. "[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the trial court may deny the motion without a hearing. *Id*. "[C]ourts frequently decide—even in the absence of a *Machner* hearing—that the record conclusively demonstrates a defendant was <u>not</u> prejudiced by alleged deficient conduct, often presuming without deciding that counsel's performance was deficient." *State v. Sholar*, 2018 WI 53, ¶ 54, 381 Wis. 2d 560, 912 N.W.2d 89.

To allege sufficient facts that, if true, would entitle a defendant to relief, "a defendant must allege 'sufficient

material facts' that would allow a reviewing court 'to meaningfully assess a defendant's claim.'" *State v. Sulla*, 2016 WI 46, ¶ 26, 369 Wis. 2d 225, 880 N.W.2d 659 (quoting *Allen*, 274 Wis. 2d 568, ¶ 23). "Specifically, a defendant should 'allege the five "w's" and one "h"; that is, who, what, where, when, why, and how.'" *Id*. When reviewing the adequacy of a defendant's postconviction allegations, a court considers only the allegations contained in the four corners of the motion, not allegations contained in the defendant's appellate briefs. *Allen*, 274 Wis. 2d 568, ¶ 27.

C. The record conclusively shows that Jackson is not entitled to relief due to his trial counsel's failure to investigate or call Crystal or Marsh as potential alibi witnesses.

In his postconviction motion, Jackson noted that, pretrial, he told his trial counsel that Carol, Crystal, and Marsh "could testify that [Jackson] was at his mother's house at the time [R.K. was shot]." (R. 124:5.) He also noted that, "[n]either Crystal [ ] nor Marsh [ ] were ever contacted by [ ] Jackson's trial attorney." (R. 124:8.) Thus, Jackson concluded that "[t]rial counsel was deficient in her performance by failing to investigate or call Crystal [ ] and [ ] Marsh as alibi witnesses." (R. 124:8.) However, the record refutes Jackson's claim of ineffective assistance.

The record conclusively shows that counsel's alleged failure to contact Crystal and Marsh did not prejudice Jackson's defense. First, the contents of their affidavits show that neither Crystal nor Marsh could have provided Jackson with an alibi. Second, given the overwhelming evidence against Jackson, there is no reasonable probability that the result of the proceedings would have been different.

Marsh's affidavit establishes that she lacked personal knowledge of where Jackson was at the time R.K. was shot.

As Jackson acknowledged in his postconviction motion, "R.K. was shot at approximately 8:10 p.m. on March 11, 2015." (R. 124:8.) However, in her affidavit, Marsh admits that, on March 11, she was "feeling extremely ill" so, "sometime between 5:00 p.m. and 6:00 p.m.," she laid down for a nap. (A-App. 43–44.) Shortly thereafter, Marsh "fell asleep" and did not wake up until 9:30 p.m. (A-App. 44.) "[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." *State v. Brown*, 2003 WI App 34, ¶ 14 n.5, 260 Wis. 2d 125, 659 N.W.2d 110 (citation omitted). Based on Marsh's affidavit, she is unable to provide Jackson with an alibi. Therefore, even assuming deficient performance, trial counsel's failure to call her as an alibi witness did not result in prejudice.

Similarly, Crystal's affidavit shows that she lacked personal knowledge of Jackson's whereabouts at the time R.K. was shot. That is, she contends that, around 6:30 p.m., Jackson and Marsh went into their bedroom to "take a nap." (A-App. 46.) Crystal also contends that, "[Jackson and Marsh] stayed in their room until [Marsh] had to leave for work." (A-App. 46.) While Crystal does not specify what time Marsh left for work, Marsh's affidavit explains that it was around 10:00 p.m. (A-App. 44.) Crystal's affidavit contains no indication that she either saw or heard Jackson between 6:30 p.m. and 10:00 p.m. Therefore, her knowledge is limited to the fact that Jackson entered his bedroom around 6:30 p.m. and that she did not see him again until around 10:00 p.m.

Moreover, Crystal is not only a convicted felon,[5] but her affidavit conflicts with Carol's testimony. (R. 79:17–18.) As noted above, in her affidavit Crystal alleges that Jackson and Marsh "stayed in their [bed]room until [Marsh] had to leave for work." (A-App. 46.) In contrast, Carol testified that, while Marsh was in bed sleeping, Jackson was coming "in and out of the bedroom." (R. 174:77.) In addition, Carol testified that, on the day R.K. was shot, she was at home with Jackson, Marsh, and Marsh's two young children. (R. 174:75–76.) Carol made no reference to Crystal being present in her home on March 11, 2015. (Jackson's Br. 41.) In fact, Carol testified that she and Crystal did not "get along" and that Crystal would temporarily stay in various other people's homes. (R. 174:90.) Thus, Carol did not know where Crystal actually lived. (R. 174:90.) As a result, Crystal would not have been much of an alibi witness. *See Brown*, 260 Wis. 2d 125, ¶ 14 n.5.

Therefore, of the three potential alibi witnesses (i.e., Carol, Crystal, and Marsh), only Carol was able to actually provide Jackson with an alibi. However, the jury considered and rejected Carol's alibi testimony.

In addition, the evidence against Jackson was overwhelming. (R. 155:3.) As both the circuit court and appellate court explained, two eyewitnesses, Gerald and Dorsey, identified Jackson as the shooter. C.W. also identified Jackson as the person who ran past her window moments after the shooting. Although C.W.'s identification was not "a hundred percent" positive, Dorsey's and Gerald's identification was. (R. 172:64). And, while Gerald and Dorsey have prior criminal convictions, C.W. does not. Moreover, Jackson confessed to his friend Brown that he shot R.K.

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[5] As noted in the Statement of the Case above, Crystal was convicted of, inter alia, substantial battery, which is a Class I felony. (R. 79:17–18.)

And, as the courts also noted, "corroborating" witnesses and forensic evidence also strengthened the State's case. (R. 155:3); *Jackson*, 2021 WL 4736615, ¶ 26. For example, Brown testified that, about an hour before the shooting, Jackson asked Brown if he could borrow his .40 caliber gun. (R. 173:81–82.) Brown agreed. (R. 173:81.) About 45 minutes later, Jackson returned with the gun and changed his clothes in Brown's bathroom. (R. 173:83.) Anthony Boone was also at Brown's house at that time. (R. 173:85.) After Jackson left the house, Brown counted the bullets in the .40 caliber gun and discovered that five bullets were missing. (R. 173:84.) When Brown later asked Jackson about the missing bullets, Jackson admitted that "he shot somebody" because his friend "Gerald" needed help with the "downstairs" neighbors. (R. 173:85–87.)

Boone corroborated Brown's testimony by confirming that, after R.K. was killed, he saw Jackson at Brown's house changing his clothes. (R. 173:135.) Further, Jackson's own mother, Carol, corroborated both Brown's and Gerald's testimony by acknowledging that Tiffany called Jackson the night of the shooting and asked him to help her with a problem she and Gerald were having with R.K. (R. 174:85, 89.)

Brown also testified that Jackson also told him that, after Gerald was arrested in connection with R.K.'s shooting, Jackson put money on Gerald's inmate account. (R. 173:91.) Milwaukee County Jail records show that Jackson added a total of $81 to Gerald's inmate account. (R. 173:148–49.) It is reasonable to infer that Jackson did this because he felt bad that Gerald was arrested for a murder Jackson committed.

And, Brown testified that, "a few days" after the shooting, he and Jackson returned to the duplex to help Tiffany move since Gerald was in jail. (R. 173:90–91; 174:71.) That testimony corroborated C.W. in two ways. First, it corroborated her testimony that, a few days after the

shooting, she saw the shooter with Tiffany in the common first floor hallway of the duplex. (R. 172:57.) It also lends additional credibility to her identification of Jackson as the shooter. (R. 172:58; 173:14.)

The forensic evidence also corroborated the evidence against Jackson. For example, Gerald testified that he tried to prevent Jackson from shooting anyone by "grabb[ing]" Jackson and walking him up the front steps[6] and into the duplex through the front door. (R. 174:24–25.) Once inside the duplex, Jackson turned around, re-opened the front door, and shot R.K. (R. 174:26.)

Police recovered a total of five .40 caliber cartridge cases from the front of the duplex. (R. 17; 173:120–21.) Four cases were found on the steps leading into the front door and one was found in the grass next to the steps. (R. 172:24–27, 30, 35.) R.K.'s autopsy revealed that the trajectory of the bullet through R.K.'s body was consistent with the shooter being in a position elevated above R.K. (R. 174:12–13.) Thus, the forensic evidence corroborates Dorsey's and Gerald's testimony that Jackson shot R.K. while standing at the top of the steps leading into the duplex.

In addition, a forensic examination showed that Brown's gun was used to fire all five of the .40 caliber cartridge cases that were recovered from the steps. (R. 173:119–22.) It was also used to fire the bullet that was recovered near the concrete walkway connecting the duplex's front stairs to the sidewalk. (R. 173:123.) Thus, the forensic evidence corroborated Brown's testimony that Jackson used Brown's .40 caliber handgun to shoot R.K., as well as his

[6] As noted in footnote 2 above, there are two concrete steps leading into the duplex's front door. (R. 16.)

testimony that the gun was missing five bullets when Jackson returned it.

The circuit court correctly concluded that, given the strength of the State's case, "there is no reasonable probability that [Crystal or Marsh's] testimony would have altered the result of the trial." (R. 155:3.) The court properly denied the claim without a hearing. *See Sholar*, 381 Wis. 2d 560, ¶ 54.

D. Jackson's allegation that his trial counsel failed to prepare Carol is conclusory and insufficient.

Jackson also contended that his trial counsel performed deficiently because she failed to "interview [Carol] prior to listing her as an alibi witness [and] prior to calling [her] as a witness at trial." (R. 124:8.) He argued that, as a result, Carol "became very defensive" when speaking with police, which led her to claim that she did not know where Jackson was on the day R.K. was shot. (R. 124:8.) However, Jackson's allegations are conclusory and, therefore, the circuit court properly denied them without a hearing. (R. 155:3.)

Jackson also failed to explain how interviewing Carol before she spoke with police or prior to her testimony would have altered the outcome of the trial. Again, "[a] defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." *Prescott*, 345 Wis. 2d 313, ¶ 11 (citation omitted). As noted in section C above, Carol's testimony damaged Jackson's defense in several ways, including her admission that, about an hour before R.K. was shot, Tiffany called Jackson to ask him for help with a problem she and Gerald were having with R.K. (R. 174:85, 89.) However, Carol acknowledged those damaging facts only

in response to specific questions asked on cross examination. No amount of preparation would have changed the fact that Tiffany called Jackson on the night of the shooting and asked him to help. Thus, short of committing perjury, Carol's answers to those questions would not have changed regardless of how many times she met with counsel before trial.

Jackson also alleges that, had trial counsel interviewed Carol before trial, she "could have made the determination that [Carol] should not [have been called] as an alibi witness." (R. 124:9.) However, as the circuit court noted, not calling Carol "would have left [Jackson] without an alibi defense." (R. 155:3.) As explained in section C above, even if Crystal and Marsh had been called as witnesses, they could not provide an alibi for Jackson since they did not know where he was from 6:30 p.m. until 9:30 p.m.

Regardless, as also explained in section C above, given the strength of the State's case, Jackson is unable to establish prejudice. Thus, the court properly denied this claim without a hearing. *See Sholar*, 381 Wis. 2d 560, ¶ 54.

E. The record conclusively demonstrates that Jackson's trial counsel did not advise him that he would have to testify before any other defense witnesses.

In his postconviction motion, Jackson notes that, after he informed the court that he intended to testify, the court took a recess. (R. 124:10.) Jackson alleges that, during the recess, his trial counsel "told him that he would have to testify" before any other defense witnesses testified. (R. 124:11.) Jackson alleges that, as a result, he "changed his mind about testifying." (R. 124:11.)

To support his allegation, Jackson attached his own affidavit and one from his father. (A-App. 40–42, 48–49.) Both

affidavits allege that, during the recess, Jackson, Jackson's father, and Jackson's trial counsel all met together to discuss whether Jackson should testify. (A-App. 40–41, 48.) The affidavits contend that, during that meeting, counsel allegedly stated "that the trial court was going to require [Jackson] to testify before any of the other defense witnesses testified." (A-App. 41, 48.) However, the record refutes that claim.

As explained in the Statement of the Case above, after the State rested, defense counsel informed the court that Jackson "would like to testify." (R. 174:61.) When counsel stated that Carol was also going to testify for the defense, the court asked who was going to "testify first." (R. 174:63.) Counsel responded that Carol was going to testify first. (R. 174:63.) The court and counsel then appear to address the "logistical issues" of ensuring that the jury does not see Jackson in custody status. (R. 174:63.) Thus, counsel informed the court that she would ask Jackson "if it would be okay if he testifies first" to avoid those issues. (R. 174:63). At that point, the court took a short break so counsel and Jackson could discuss. (R. 174:63–64.)

Once back on the record, Jackson's counsel informed the court that "Jackson has furthered conferred with me on this issue." (R. 175:64.) Counsel also stated that Jackson "asked me to talk to his father," who was also in court at the time. (R. 174:64.) Counsel explained that Jackson "has now decided he will not testify." (R. 174:64.) When the court inquired about why Jackson changed his mind, counsel explained that "he and I talked, he asked me to ask his father for advice, his father was absolutely clear about his advice. I think Mr. Jackson has taken all of that into consideration and made his own decision." (R. 174:65.) When the court asked Jackson if counsel's explanation was accurate, Jackson replied, "Yes, it is, Your Honor." (R. 174:66.)

In other words, counsel made clear that, contrary to the affidavits, Jackson's father was *not* part of the meeting between Jackson and his trial counsel. She also made clear, however, that Jackson wanted his father's advice about whether to testify. Thus, counsel agreed to act as a conduit between Jackson and his father so Jackson could receive his father's advice. When counsel relayed the father's "absolutely clear" advice not to testify, Jackson changed his mind about testifying. (R. 174:65.)

Based on counsel's explanation, it is clear that Jackson did not change his mind about testifying because his trial counsel misinformed him about that law. Instead, he changed his mind based on his father's advice not to testify. (R. 174:65.) Because the record conclusively demonstrates that Jackson based his decision not to testify on his father's advice as opposed to counsel misinforming him of the law, Jackson cannot establish deficient performance or prejudice.

Regardless, as noted in section C above, the evidence against Jackson was overwhelming. And, as noted by the appellate court, Jackson did "not allege that his testimony would have provided any different or additional information relating to his alibi" than that already provided by Carol. *Jackson*, 2021 WL 4736615, ¶ 29. Thus, there is not a reasonable probability that Jackson's alibi testimony would have affected the verdict. Therefore, the circuit court properly denied Jackson's motion without holding a *Machner* hearing.

CONCLUSION

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

Dated this 2nd day of March 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 7,641 words.

Dated this 2nd day of March 2022.

ERIC M. MUELLENBACH
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12) (2019-20).

I further certify that:

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

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

Dated this 2nd day of March 2022.

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