COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 2019

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2018AP1835-CR **Cir. Ct. No. 2015CF207**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEANDRE M. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: WILLIAM E. HANRAHAN, Judge. *Affirmed*.

Before Blanchard, Kloppenburg, and Graham, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Deandre Smith appeals a judgment convicting him of battery and felon in possession of a firearm, as acts of domestic abuse, and an order denying his postconviction motions to vacate the judgment of conviction. Smith argues that he was denied effective assistance of counsel because his trial attorney mishandled both the victim's testimony and an unduly prejudicial photograph of a gun. He also argues that the evidence was insufficient to convict him of the felon in possession charge. Finally, he argues that the interests of justice warrant a new trial. We reject Smith's arguments and affirm the circuit court.

BACKGROUND

¶2 In 2014, Smith lived part-time with his then-girlfriend, B.M.J. In December 2014, B.M.J. gave statements to police about Smith's alleged pattern of domestic abuse. Among other things, B.M.J. described an incident that she said had occurred in her apartment two months earlier. B.M.J. told the police that on October 28, 2014, she and Smith got into an argument, that Smith retrieved a handgun from a kitchen cabinet and used it to threaten her, and that the gun went off, sending one round through B.M.J.'s arm and into a wall.

¶3 The police investigated B.M.J.'s allegations, and officers took photographs of what B.M.J. described as the bullet wound in her arm and the bullet hole in the apartment wall. At some point during the investigation, B.M.J. also provided the police with a photograph of what appeared to be a black handgun resting on bright red fabric along with what appeared to be a portion of a belt and an ammunition clip with one visible round.

¶4 The State charged Smith with multiple counts, including battery and felon in possession of a firearm. Smith's trial counsel filed a motion in limine

seeking to prohibit the State from introducing the photograph "of the purported gun involved[.]" The sole asserted basis for this motion was that the State would lack a sufficient foundation to support admission of the photo.

¶5 The circuit court denied the motion at a pretrial hearing. During the hearing, the State described the gun photo as "demonstrative" evidence, but the court did not acknowledge or address this characterization and instead ruled on the foundation objection, deciding that the gun photo would "come in" if the State could establish a foundation. We discuss additional facts about the gun photo, the motion in limine hearing, and the court's pretrial ruling in the discussion section below.

¶6 The State called B.M.J. to the stand, and prior to her testimony, the State asked the circuit court to declare her a "hostile witness" for purposes of the rules of evidence. Trial counsel did not object, and the court granted the motion.

¶7 During her direct examination, B.M.J. made a blanket denial that the abuse she reported to the police had actually occurred, and she maintained that she had fabricated the allegations out of anger at alleged infidelities by Smith. The State asked a series of leading questions to elicit the contents of B.M.J.'s prior inculpatory statements to law enforcement, and trial counsel did not object to this method of questioning. B.M.J. admitted that she provided the gun photo to law enforcement, the State offered it into evidence, and trial counsel did not object.

¶8 On cross-examination, trial counsel focused on B.M.J.'s allegedly contentious relationship with Smith in an effort to undermine the credibility of the accusations she had made to police. Trial counsel's tactic reinforced B.M.J's testimony that she had given false inculpatory statements because of Smith's alleged infidelity.

¶9 During its deliberations, the jury asked to review several exhibits, including photos of B.M.J.'s injuries, photos of the alleged bullet hole in the wall, and the gun photo. Trial counsel did not object to any of these exhibits going to the jury.

¶10 The jury convicted Smith of one count of misdemeanor battery, one count of strangulation and suffocation, and one count of felon in possession of a firearm. The jury found Smith not guilty of the remaining counts, and the strangulation and suffocation count was later vacated on grounds not pertinent to this appeal.

¶11 Nearly three years after the trial, Smith filed a supplemental post-conviction motion challenging the remaining two convictions. The circuit court held a ***Machner*** hearing,[1] and both B.M.J. and trial counsel testified The court concluded that trial counsel was not ineffective and dismissed Smith's motion in its entirety.

DISCUSSION

¶12 Smith challenges the circuit court's rulings regarding ineffective assistance of counsel. He also challenges sufficiency of the evidence to convict

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

him of felon in possession of a firearm,[2] and he asks us to grant a new trial in the interests of justice. We address each argument in turn.

I. Ineffective Assistance of Counsel

¶13 We first address Smith's argument that he received ineffective assistance of counsel. To prevail on a claim for ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the defendant suffered prejudice as a result. ***Strickland v. Washington***, 466 U.S. 668, 700, 104 S. Ct. 2052 (1984); ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. To satisfy the first prong, deficient performance, a defendant must show that counsel's performance fell "below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688; ***Thiel***, 264 Wis. 2d 571, ¶19. To satisfy the second prong, prejudice, a defendant must show a "reasonable probability" that, absent the errors, "the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. A court need not address both prongs "if the defendant makes an insufficient showing on one." ***Id.*** at 697.

¶14 An ineffective assistance of counsel claim presents a mixed question of fact and law. ***Thiel***, 264 Wis. 2d 571, ¶21. Findings of fact include "the circumstances of the case and the counsel's conduct and strategy" and we uphold the circuit court's factual findings unless clearly erroneous. ***State v. Knight,*** 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). "Whether counsel's performance

[2] Ordinarily, we would address a challenge to the sufficiency of the evidence before turning to issues that might require a new trial or other lesser remedies, in part because the remedy when the evidence is insufficient is prohibition of retrial. In this case, however, we reverse the usual order in the interest of clarity of presentation because the facts underlying Smith's somewhat involved ineffective assistance of counsel argument are central to his less involved sufficiency argument.

satisfies the constitutional standard for ineffective assistance of counsel is a question of law," which we review independently of the determination of the circuit court. ***Thiel***, 264 Wis. 2d 571, ¶21. We address Smith's arguments about B.M.J.'s testimony and the gun photo in turn.

A. B.M.J.'s Testimony

¶15 Smith argues that trial counsel mishandled B.M.J.'s testimony in three ways. For the reasons we now explain, we conclude that Smith fails to show that trial counsel was ineffective in any of the three ways.

¶16 First, Smith contends that trial counsel should have objected to the State's request to declare B.M.J. a "hostile" witness for evidentiary purposes. He argues that an objection was called for because the State asked the court to declare B.M.J. a "hostile" witness before she actually testified. According to Smith, WIS. STAT. § 972.09 (2017-18)[3] dictates that a witness may be declared hostile only after offering testimony inconsistent with a prior statement.[4]

¶17 We need not decide whether Smith's interpretation of WIS. STAT. § 972.09 is correct or whether the failure to object constituted deficient performance, since we conclude that Smith fails to show that he was prejudiced by the lack of an objection. The record reflects that as soon as B.M.J. started

[3] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[4] WISCONSIN STAT. § 972.09 pertains to "criminal actions." It provides in pertinent part: "Where testimony of a witness … is inconsistent with a statement previously made by the witness, the witness may be regarded as a hostile witness and examined as an adverse witness, and the party producing the witness may impeach the witness by evidence of such prior contradictory statement."

testifying, it was immediately apparent that her testimony would be inconsistent with the statements she had previously made to the police. Thus, if trial counsel had objected to the State's request on the grounds that it was premature, he would have only delayed an inevitable ruling that B.M.J. could reasonably be deemed "hostile" to the prosecution for this purpose. Under these circumstances, Smith has not shown a "reasonable probability" that the result would have been different if trial counsel had objected. ***Strickland***, 466 U.S. at 694.

¶18 Second, Smith argues that trial counsel should have objected "to the State's use of leading questions and inadmissible hearsay" during B.M.J.'s direct examination on the grounds that these questions violated the rules of evidence regarding hearsay and prior inconsistent statements.[5] The essence of Smith's argument appears to be that trial counsel could have and should have prevented the jury from learning about B.M.J's inculpatory prior statements to the police by making proper objections. Smith acknowledges that a witness may be impeached with prior statements that are not consistent with the witness's trial testimony. What was improper, according to Smith, was that the prosecutor elicited the substance of B.M.J.'s prior statements *without first* eliciting B.M.J.'s trial testimony on the same topics.

¶19 Putting aside other potential problems with Smith's argument, Smith fails to show that trial counsel's failure to object to the prosecutor's method of questioning B.M.J. was deficient, much less that it prejudiced his defense.

[5] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). Prior inconsistent statements are not hearsay and are admissible if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony. WIS. STAT. § 908.01(4)(a)1.

¶20 As to deficiency, the circuit court found that trial counsel's decision not to object was based on reasonable trial strategy. Courts "will not second-guess a reasonable trial strategy unless it was based on an irrational trial tactic or based upon caprice rather than upon judgment." ***Strickland,*** 466 U.S. at 689; ***State v. Breitzman***, 2017 WI 100, ¶65, 378 Wis. 2d 431, 904 N.W.2d 93. Here, trial counsel testified that he thought the State's performance was coming across poorly to the jury because the State appeared to be forcing B.M.J. to say "only what [the prosecutor] wanted to hear." He testified that he decided not to object because he thought the State's questioning was ineffective, and that making numerous formal objections would have alienated the jury. Smith fails to show that the circuit court's finding that this was reasonable trial strategy was clearly erroneous.

¶21 As to prejudice, Smith fails to show that his defense was prejudiced because he does not explain how trial counsel could have prevented the jury from learning about B.M.J.'s prior statements to the police by objecting. If trial counsel had objected and the circuit court had sustained the objection, the State could have readily cured any problem by simply changing the order of its questioning. Specifically, the prosecutor could have first asked B.M.J. whether the incidents she reported to the police had occurred, and then impeached her with her prior statements. Smith does not identify a single statement that B.M.J. made to the police that could not have been properly admitted in this manner.

¶22 Third, Smith argues that during cross examination, trial counsel should have asked B.M.J. to tell "her story" about what "actually happened" on the dates of the alleged domestic abuse and how she actually got her injuries. Initially, we note that this argument rests on a false premise. Trial counsel *did* ask questions about B.M.J.'s injuries when, as he later explained at the ***Machner*** hearing, there was "verification or some substantiation that [Smith] was not

responsible for the injuries[.]" For example, trial counsel knew that B.M.J. told her doctor that an injury to her eye had been caused by her infant son, and trial counsel asked B.M.J. about that incident. Thus, although trial counsel did not ask many questions about the incidents, he did ask questions when he had a basis to anticipate an exculpatory favorable answer.

¶23 Additionally, Smith fails to show that trial counsel's decision not to ask questions about the other incidents was deficient performance. During the ***Machner*** hearing, trial counsel testified that B.M.J. had refused to meet with him at his request before trial, and therefore, he could not anticipate what she would say at trial about many of the alleged incidents of abuse. Trial counsel explained that he declined to ask questions when he did not know the answers because it risked eliciting surprise testimony damaging to Smith and would have opened the door to a potentially damaging redirect. And trial counsel had another excellent reason to ask few questions about B.M.J.'s story—her testimony during direct examination was favorable to his client. B.M.J. had already denied that any of the alleged incidents occurred, testified that she lied about the incidents to the police, and offered jealousy as her motive for lying. As the circuit court aptly noted, "[i]t doesn't get much better than that" for a defense attorney. The court found that trial counsel's strategy was reasonable, and Smith fails to show that this finding was clearly erroneous.

¶24 For the above reasons, we conclude that Smith fails to show that trial counsel was ineffective in his handling of B.M.J.'s testimony.

B. Gun Photo

¶25 Smith contends that trial counsel should have opposed admission of the gun photo on the grounds that it was not relevant and unduly prejudicial, and

further, that trial counsel should have taken steps during trial to prevent the jury from inferring that the photo depicted the gun that Smith was charged with possessing. For reasons we now explain, we conclude that Smith's arguments about the gun photo fail because they are built around an erroneous interpretation of the transcript from the pretrial hearing.

¶26 According to Smith, the circuit court imposed a limitation on the State's use of the gun photo by specifically ruling that the photo was admissible as demonstrative evidence only.[6] We recognize the basis for Smith's belief—during the course of discussion in the pretrial hearing, the prosecutor referred to the photo as "demonstrative" and then said "[w]e're not claiming that it was the gun" but rather that the gun was "consistent with" the photo.

¶27 The State's reference to the photo as "demonstrative" is puzzling, given the reported source of the photo, its appearance, and the nature of the felon in possession charge against Smith. Under the circumstances, we have difficulty seeing how this photo could reasonably have been presented to the jury as mere demonstrative evidence, and the State's reference may well have puzzled the circuit court for the same reasons.

¶28 More importantly, our independent review of the record reveals that the circuit court did not understand the prosecutor to be stipulating that the gun photo would be merely "demonstrative" evidence, and we conclude that no reasonable attorney in trial counsel's position would have believed that the court

[6] The term "demonstrative evidence" generally refers to evidence "used simply to lend clarity and interest to oral testimony" and "in lieu of [substantive] evidence." ***Anderson v. State***, 66 Wis. 2d 233, 248, 223 N.W.2d 879 (1974) (citations omitted).

limited the photo to demonstrative use. Instead, a reasonable attorney, knowing what trial counsel knew at the time and having heard the circuit court's ruling, would have concluded that the photo was admissible as substantive evidence, provided that the State was able to establish foundation. We now explain in more detail why the record supports this conclusion, and then show how a proper reading of the record disposes of Smith's arguments.

¶29 First, it is apparent from the record that trial counsel knew that B.M.J. had told the police that the photo depicted the gun Smith had threatened her with—not some unknown gun that was merely "consistent" with that gun. In accordance with what he appeared to understand at this time, trial counsel's motion in limine described the gun photo as a photograph "of the purported gun involved." Then, during the motion hearing, trial counsel explained his understanding of the facts: "the alleged victim here e-mailed [the detective] a picture of a gun that she purported was the gun that was used in the incident." Thus, it is apparent that trial counsel understood and represented to the circuit court that the State would not offer the photo merely as demonstrative evidence, but instead as substantive evidence depicting the gun that B.M.J. accused Smith of possessing.

¶30 Second, it is also apparent from the transcript[7] that the circuit court based its admissibility ruling on the foundation grounds argued by trial counsel—

[7] The transcript of the exchange provides in pertinent part:

(continued)

not on any possible stipulation by the State about how it intended to refer to the photo once it was in evidence. The court asked how the photograph would be authenticated, and the prosecutor represented that B.M.J. would provide the foundation. The prosecutor then made the puzzling assertion that the photo was "demonstrative," but the court did not acknowledge this comment. Instead, the court ruled on the topic that had been presented to it, namely, foundation. On that topic, the court ruled that the photo could be admitted if the State established that

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> [TRIAL COUNSEL]: There was a sequence of events in which the alleged victim here e-mailed Officer Peterson a picture of a gun that she purported was the gun that was used in the incident. There was no identifying markers on that picture. It was something that she pulled from an Instagram account that was not associated with my client in any way. The user name was gibberish if nothing else. It was some kind of fictional name, and so there was no opportunity for us to inquire as to what the source of that picture fundamentally was. So those were our primary concerns with introducing that photograph of some otherwise unknown picture of a gun and trying to tie it to my client.
>
> ….
>
> THE COURT: All right. This photograph, is there someone that's going to authenticate that photograph, or is it just at random?
>
> STATE ATTORNEY: Yes. We do intend to authenticate it through [B.M.J.], and it's demonstrative, just saying that the gun was consistent with that. We're not claiming that it was the gun, but that she—she gave the photograph to say that the gun was consistent with this gun.
>
> THE COURT: Is she the one that sent the photograph?
>
> STATE ATTORNEY: She did. She e-mailed it to our detective.
>
> THE COURT: And, if that can be established foundationally, then the photograph comes in. If it can't be, the photograph is out.

B.M.J. provided it to police.[8] Thus, there is no suggestion that the court understood the State to be stipulating that it would use the gun photo exclusively as "demonstrative" evidence or that the court limited the gun photo to demonstrative use, and trial counsel had no basis to think that the photo was in fact admitted only for demonstrative purposes.

¶31 The ***Machner*** hearing was not held until more than three years after the trial. During that hearing, Smith's new postconviction counsel asserted that the circuit court had limited the State's use of the gun photo to demonstrative purposes only, and no one challenged that characterization. Postconviction counsel represented that "the State *repeatedly* assured the Court that it was only going to use this photo as demonstrative evidence," and that "the Court, *relying on [the State's] assertions*, said it would be *admissible for that purpose* …." (Emphasis added.) As shown above, postconviction counsel's summary does not accurately reflect the transcript of the pretrial hearing. And as explained below, it appears that the circuit court and trial counsel both accepted postconviction counsel's representation about the nature of the court's pretrial ruling at face value, without examining the relevant portions of the transcript.

¶32 For its part, the circuit court seemed puzzled by postconviction counsel's representations about the record,[9] and did not appear to have any independent recollection of limiting the State's use of the gun photo to

[8] Smith does not point us to any other occasion in the trial record where the gun photo was referred to as "demonstrative," and we have found none.

[9] During the ***Machner*** hearing, the court asked postconviction counsel: "Would [Smith's trial counsel have had] a good reason for [objecting to the photo on grounds of relevance and prejudice]? I'm not tracking here. Do you think that the gun that this witness, the female witness, identified as [being] his gun that was on her couch is not relevant in a shooting case?"

demonstrative use. Although the circuit court eventually referred to the gun photo as a "demonstrative" exhibit later in the same hearing, it did so without apparent reference to the transcript and without making any findings about the nature of its pretrial ruling. Instead, the circuit court appeared to rely on postconviction counsel's mistaken representations about the record.

¶33 For his part, trial counsel testified that he believed that the circuit court had ruled that the gun photo could be admitted only as demonstrative evidence, but that trial counsel had not considered whether the State's use of the photo during trial violated the court's ruling or whether he should object. It is not surprising that trial counsel could not recall considering an objection since, as we have explained, the court did not actually limit the use of the gun photo. If trial counsel really did believe at the time of trial that the pretrial ruling had imposed that limitation, his subjective belief would not control our objective analysis—we consider instead what reasonable counsel in trial counsel's position would have believed.[10] More likely, by the time of the ***Machner*** hearing, trial counsel mistakenly assumed that postconviction counsel's interpretation of the transcript was accurate since the photo was only a small part of a fact-intensive trial that had concluded three years earlier.

¶34 For the reasons explained above, we conclude that a reasonable attorney in trial counsel's position would not have believed that the pretrial ruling limited the use of the gun photo to demonstrative evidence. We now explain why

[10] See ***Harrington v. Richter***, 562 U.S. 86, 110, 131 S. Ct. 770 (2011) (we do not evaluate trial counsel's actions based on counsel's subjective state of mind, but based on an objective standard of reasonableness); ***State v. Koller***, 2001 WI App 253, ¶8, 248 Wis. 2d 259, 635 N.W.2d 838 (we may "rely on reasoning which trial counsel overlooked or even disavowed").

this determination resolves Smith's remaining ineffective assistance arguments. Smith makes several arguments about trial counsel's handling of the gun photo, but each depends on the premise that the photo was admissible as demonstrative evidence only—a premise that we have expressly rejected.

¶35 First, Smith argues that trial counsel should have objected to the gun photo on the basis of relevance and prejudice. He argues that a photograph merely "demonstrative" of the gun that Smith was charged with possessing could have only marginal relevance, and any relevance is outweighed by undue prejudice because jurors would erroneously believe it to be a photo of the gun Smith possessed. Given that trial counsel knew that B.M.J. told police that the picture was of "the gun that was used in the incident," we conclude that Smith fails to show that his failure to make these arguments was deficient performance.

¶36 Second, Smith makes various arguments asserting that trial counsel erred by failing to ensure that the State used the gun photo for demonstrative purposes only. Smith argues that trial counsel should have objected to the State's direct examination of B.M.J, which arguably raised the inference that the photo showed the gun Smith allegedly possessed when he allegedly used it to threaten her.[11] He argues that trial counsel should have objected when a police officer testified that the gun in the photo "might be the gun that was used by the defendant in the October 28th incident … [b]ut, at a minimum, it resembled the gun."

[11] During this examination, the State asked B.M.J. whether she had described the gun Smith used to threaten her on October 28, 2014, to a detective, and B.M.J. testified she had described "a gun." The State asked B.M.J. whether she told the detective that "a friend of [Smith] had taken a picture of a gun while it was sitting on your couch" and had posted it on social media. B.M.J. admitted that she told the detective that "they took a picture of a gun … or they had a picture of a gun on their wall," and that she had emailed "that picture of a gun" to the detective.

Finally, he argues that trial counsel should have objected to the gun photo's submission to the jury during deliberations and requested a limiting instruction directing the jury to consider the gun photo only as demonstrative evidence. All of these arguments fail, since the pretrial ruling did not limit the use of the photo to demonstrative evidence.

¶37 For the reasons stated above, we have concluded that Smith fails to show that trial counsel's performance regarding the gun photo fell below an objective standard of reasonableness. Although we could resolve all of Smith's arguments about this gun photo on this basis, we also conclude that Smith fails to show that he was prejudiced by trial counsel's handling of the gun photo. As with his arguments about deficiency, Smith's prejudice arguments depend on the assumption that the circuit court restricted the use of the gun photo. Specifically, Smith argues that the jury was led to consider the gun photo as substantive evidence, rather than demonstrative evidence, and this may have factored into its verdict. Even if true, it would only be prejudicial had the circuit court actually restricted the gun photo to demonstrative use. Smith's prejudice argument fails for the same reasons as his argument about deficient performance.

II. Sufficiency of the Evidence

¶38 We now turn to Smith's argument that there was insufficient evidence to convict him of felon in possession of a firearm. To support the conviction, there must be sufficient evidence that Smith (1) had previously been convicted of a felony, and (2) possessed a firearm on or about October 28, 2014. *See* WIS. STAT. § 941.29(1m)(a). Smith disputes the sufficiency of the evidence of the second element.

¶39 We may only reverse a conviction for insufficiency of evidence when "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We review independently whether the evidence was sufficient to sustain the verdict. ***State v. Grandberry***, 2018 WI 29, ¶10, 380 Wis. 2d 541, 910 N.W.2d 214.

¶40 Smith contends that the evidence offered to show he possessed a firearm consists solely of B.M.J.'s uncorroborated prior inconsistent statements. He acknowledges that unsworn prior inconsistent statements are admissible as substantive evidence to support a conviction. ***Vogel v. State***, 96 Wis. 2d 372, 386, 291 N.W.2d 838 (1980). However, he asserts that Wisconsin law is unsettled as to whether such evidence alone, without corroboration, can prove guilt beyond a reasonable doubt. He asserts that in other jurisdictions, prior inconsistent statements are not, by themselves, sufficient to support a criminal conviction, and he asks us to adopt a similar rule.

¶41 We need not decide whether Smith correctly characterizes the law, because he incorrectly characterizes the evidence. There was ample evidence introduced at trial to corroborate B.M.J.'s prior statement to police that Smith possessed a firearm, including photos of B.M.J.'s alleged bullet wound, photos of the alleged bullet hole, and the gun photo. Smith contends that these items do not corroborate B.M.J.'s statements to the police because they "get their only relevance" from B.M.J.'s recanted accusation. But Smith does not explain why that matters. He cites no authority for the proposition that once a victim recants inculpatory statements, evidence that would be relevant to corroborate the original statement is no longer admissible. If this were true, domestic abuse cases would

regularly fail for lack of evidence, because such cases often involve recanting accusers. *See, e.g.*, ***State v. Schaller***, 199 Wis. 2d 23, 42, 544 N.W.2d 247 (Ct. App. 1995) (noting that domestic abuse cases often involve alleged victims who recant the original statements to police, requiring factfinders to decide whether the original statement or the recantation is more credible). We conclude that the circuit court did not err by ruling that the evidence was sufficient to convict Smith on the felon in possession of a firearm count.

III. Interests of Justice

¶42 Smith's final argument is that he is entitled to a new trial in the interests of justice. This court may in its discretion set aside a verdict and order a new trial in the interests of justice where "it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried …." WIS. STAT. § 752.35.

¶43 Smith argues that the "real controversy" was not tried because trial counsel did not elicit additional testimony from B.M.J. about how she really sustained her injuries. Smith quotes ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996), which held that the "real controversy" is not tried if the jury is "erroneously not given the opportunity to hear important testimony that bore on an important issue of the case." We have already concluded that trial counsel's choice not to elicit this testimony was not erroneous, but instead based on reasonable trial strategy.

¶44 Additionally, the record suggests that B.M.J. would not provide the testimony he seeks at a new trial. During the ***Machner*** hearing, Smith's postconviction counsel questioned B.M.J. about the alleged incidents of alleged abuse, and B.M.J. repeatedly denied any recollection of the incidents. We have no

reason to believe that B.M.J. would provide at a new trial the testimony she declined to provide at the ***Machner*** hearing. Smith identifies only one concrete detail that B.M.J. might testify to: during presentence investigations and at the sentencing hearing, B.M.J. stated that she received the scars on her arm not from a bullet wound but when a woman stabbed her with a grilling fork. Notably, however, these were not sworn statements. Even assuming that B.M.J. would say the same under oath, this new testimony would merely add context to more relevant testimony she gave at trial—that Smith did not shoot her in the arm on October 28, 2014 as the State alleged. *See* ***State v. Avery***, 2013 WI 13, ¶18, 345 Wis. 2d 407, 826 N.W.2d 60 (new evidence that "merely chipped away" at the State's case was insufficient to warrant a new trial under WIS. STAT. § 752.35).

¶45 Typically, when courts grant new trials based on missing evidence, the value of the evidence is clear and compelling.[12] Smith identifies no case granting a new trial where, as here, the value of the missing evidence is instead almost entirely speculative. On these facts, we conclude that Smith fails to show that "the real controversy" has not been tried and that he is entitled to a new trial in the interests of justice.

¶46 For the reasons stated above, we affirm.

[12] *See, e.g.*, ***State v. Armstrong***, 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98 (granting a new trial where DNA evidence would have excluded the defendant as a DNA match for hair and semen samples used at trial to identify the defendant as the perpetrator); ***State v. Hicks***, 202 Wis. 2d 150, 549 N.W.2d 435 (1996) (granting a new trial where DNA evidence would have excluded the defendant as a DNA match for a hair specimen used at trial to identify the defendant as the perpetrator); ***State v. Jeffrey A.W.***, 2010 WI App 29, 323 Wis. 2d 541, 780 N.W.2d 231 (granting a new trial in a sexual assault case where the perpetrator was alleged to have infected the victim with herpes and new evidence showed that the defendant did not have herpes).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

Appendix B

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DISTRICT IV

December 23, 2019

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You are hereby notified that the Court has entered the following order:

2018AP1835-CR State of Wisconsin v. Deandre M. Smith (L.C. # 2015CF207)

Before Blanchard, Kloppenburg and Graham, JJ.

Deandre Smith moves for reconsideration of the opinion issued by this court on November 27, 2019. Nothing in the materials presented alters our decision to affirm the judgment and order. We will, however, issue an errata sheet to reflect changes to paragraphs 20 and 23 of the opinion. Therefore,

IT IS ORDERED that the motion for reconsideration is denied.

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2018AP1835-CR **Cir. Ct. No. 2015CF207**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEANDRE M. SMITH,

DEFENDANT-APPELLANT.

ERRATA SHEET

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PLEASE TAKE NOTICE that corrections were made to paragraphs 20 and 23 in the above-captioned opinion which was released on November 27, 2019. A corrected electronic version in its entirety is available on the court's website at www.wicourts.gov.

¶20 As to deficiency, the circuit court concluded that trial counsel's decision not to object was based on reasonable trial strategy. Courts "will not second-guess a reasonable trial strategy unless it was based on an irrational trial tactic or based upon caprice rather than upon judgment." ***Strickland,*** 466 U.S. at 689; ***State v. Breitzman***, 2017 WI 100, ¶65, 378 Wis. 2d 431, 904 N.W.2d 93. Here, trial counsel testified that he thought the State's performance was coming across poorly to the jury because the State appeared to be forcing B.M.J. to say "only what [the prosecutor] wanted to hear." He testified that he decided not to object because he thought the State's questioning was ineffective, and that making numerous formal objections would have alienated the jury. We agree with the circuit court that this was reasonable trial strategy.

¶21 As to prejudice, Smith fails to show that his defense was prejudiced because he does not explain how trial counsel could have prevented the jury from learning about B.M.J.'s prior statements to the police by objecting. If trial counsel had objected and the circuit court had sustained the objection, the State could have readily cured any problem by simply changing the order of its questioning. Specifically, the prosecutor could have first asked B.M.J. whether the incidents she reported to the police had occurred, and then impeached her with her prior statements. Smith does not identify a single statement that B.M.J. made to the police that could not have been properly admitted in this manner.

¶22 Third, Smith argues that during cross examination, trial counsel should have asked B.M.J. to tell "her story" about what "actually happened" on the dates of the alleged domestic abuse and how she actually got her injuries. Initially, we note that this argument rests on a false premise. Trial counsel *did* ask questions about B.M.J.'s injuries when, as he later explained at the ***Machner*** hearing, there was "verification or some substantiation that [Smith] was not

responsible for the injuries[.]" For example, trial counsel knew that B.M.J. told her doctor that an injury to her eye had been caused by her infant son, and trial counsel asked B.M.J. about that incident. Thus, although trial counsel did not ask many questions about the incidents, he did ask questions when he had a basis to anticipate an exculpatory favorable answer.

¶23 Additionally, Smith fails to show that trial counsel's decision not to ask questions about the other incidents was deficient performance. During the ***Machner*** hearing, trial counsel testified that B.M.J. had refused to meet with him at his request before trial, and therefore, he could not anticipate what she would say at trial about many of the alleged incidents of abuse. Trial counsel explained that he declined to ask questions when he did not know the answers because it risked eliciting surprise testimony damaging to Smith and would have opened the door to a potentially damaging redirect. And trial counsel had another excellent reason to ask few questions about B.M.J.'s story—her testimony during direct examination was favorable to his client. B.M.J. had already denied that any of the alleged incidents occurred, testified that she lied about the incidents to the police, and offered jealousy as her motive for lying. As the circuit court aptly noted, "[i]t doesn't get much better than that" for a defense attorney. The court concluded that trial counsel's strategy was reasonable, and we agree.

¶24 For the above reasons, we conclude that Smith fails to show that trial counsel was ineffective in his handling of B.M.J.'s testimony.

B. Gun Photo

¶25 Smith contends that trial counsel should have opposed admission of the gun photo on the grounds that it was not relevant and unduly prejudicial, and further, that trial counsel should have taken steps during trial to prevent the jury

STATE OF WISCONSIN CIRCUIT COURT BRANCH 7 DANE COUNTY

STATE OF WISCONSIN,
Plaintiff,

v. Case No. 15 CF 207

DEANDRE M. SMITH,
Defendant.

Order Denying Post-Conviction Relief

The defendant filed a post-conviction motion in the above-captioned case on December 9, 2016. In a Decision and Order dated December 13, 2016, the Court denied a portion of the relief sought therein and concluded an evidentiary hearing was warranted on the remaining claims. A hearing was held on the remaining claims on March 6, 2017.

The defendant then filed a supplemental post-conviction motion in the above-captioned case on May 7, 2018, made timely by an Order of the Wisconsin Court of Appeals, District IV, dated April 26, 2018. A hearing was held on the claims therein on August 8, 2018.

The Court issued the following rulings in relation to the defendant's original and supplemental post-conviction motions:

1. That portion of the defendant's original (December 9, 2016) post-conviction motion which moved the Court to vacate Smith's judgment of

conviction on Counts 2 and 8 on grounds of insufficiency is hereby denied for the reasons stated in the December 13, 2016, Decision and Order of the Court.

2. For the reasons stated on the record by the Court at the March 6, 2017, hearing, that portion of the defendant's original (December 9, 2016) post-conviction motion which moved the Court to vacate Smith's judgment of conviction on Count 8 and dismiss Count 8 with prejudice is hereby granted. An amended Judgment of Conviction has been entered reflecting that the verdict on Count 8 has been reversed and that the conviction and sentence on Count 8 have been vacated.
3. The defendant's supplemental (May 7, 2018) motion is hereby denied in its entirety for the reasons stated on the record by the Court at the August 8, 2018, hearing.

A copy of the amended Judgment of Conviction referenced above will be forwarded to the Department of Corrections forthwith.

Dated this 31st day of August, 2018

BY THE COURT:
Electronically signed by Hon. William E. Hanrahan
Circuit Court Judge

STATE OF WISCONSIN : CIRCUIT COURT : COUNTY OF DANE
BRANCH 7

STATE OF WISCONSIN,
Plaintiff,
Case No. 2015CF000207
v.

DEANDRE M. SMITH,
Defendant.

PROCEEDINGS: Motion on Postconviction Relief Hearing

DATE: August 8, 2018

BEFORE: The Honorable Judge WILLIAM E. HANRAHAN

APPEARANCES: The State of Wisconsin appeared by Assistant District Attorney WILLIAM L. BROWN; Madison, Wisconsin.

Defendant DEANDRE M. SMITH appeared in person and with Attorney DANA L. LESMONDE of LesMonde Law Office; 354 West Main Street; Madison, Wisconsin 53703.

PATRICK A. WEISHAN, RPR
Official Court Reporter
Branch 7

prior inconsistent statements, not--not when--not when this started in particular, you know, when the State basically just feeds the witness her prior statement without asking her whatsoever what happened that day, getting any kind of inconsistency. That's what happened here. They just started feeding it to her, and it continued that way, and it just snowballed upon itself, and mostly her testimony really ended up being not about what happened but about what she said. The vast majority of the testimony that came in was her confirming or denying a prior statement, not about what actually happened, so the trial became about what did you say previously.

THE COURT: I got it.

ATTORNEY LESMONDE: Okay.

THE COURT: First of all, a gun, the gun situation, I've got to say I'm still wrapping my head around that. You know, countless trials involve someone testifying, yes, that's the type of car or that's the type of stop sign that I observed or that's the type of knife or that's the type of shoes or that's the type of gun. And that testimony, of course, is admissible, the testimony itself, and then often times demonstrative exhibits are offered so that the jury has a concept of what it is that the witness is describing, and the more inarticulate the witness, the more lack of precision in the witness's vocabulary, the more likely the court is to admit a demonstrative exhibit to support the witness's testimony, and in

I.D. cases, the sketch artist that I spoke of, that looks like the guy. I'm emphasizing the word "like," a simile, not saying that is the guy. That might be the car or the type of car. Right on down the line.

The testimony here, I think it's replete in the record that nobody identified this as the gun, and in fact this mysterious friend that posted it on their wall or took a picture of it or may have set it on the victim's couch, I don't think there was any inference throughout the trial that that friend was the defendant and posted it on his wall. I don't recall him having a wall or anyone attributing that gun to him. That was a picture of the type that was relevant evidence that was offered by the purported victim in her statement in describing the firearm, and relevant, and the court's pretrial ruling I find was complied with. There was no failure to object. There was no grounds for objection.

Now, in terms of the leading questions asked of the witness, you know, quite frankly, once we started with the witness today, and I wouldn't have said this in jest or flippantly, but I was going to ask you if you wanted to ask the witness leading questions to develop her testimony. It was painful, absolutely painful. I had no idea what she was going to testify to. There was-- It was unfocused. She had claimed non-recollection on some, and then her recollection was refreshed only to vanish again, and it was all over the map, and

that certainly would have been consistent with the court's abilities under Section 906.11 to allow leading questions of the witness under those circumstances.

Ultimately the crux of the matter, though, is what questions were asked that were inadmissible hearsay? I don't know which ones were inconsistent, prior inconsistent statements. There were some that were prior inconsistent statements on their face, as the prosecution pointed out on one. The defense has conceded that, well, some were claimed non-recollection á la *Lenarchick,* and some could have been inadmissible hearsay. Now, those that were argued to have been inadmissible hearsay, I have no idea what those questions were, and in fact I have no idea what Jasti would have said as to why he didn't object to those questions. Yeah, there was a blanket assertion that I didn't object to these questions, but it was in response to a blanket general question that was asked.

Generally speaking, he didn't object, and I find for good reasons because he didn't know what the heck she was going to say, and as I mentioned before, it seems like it doesn't get much better than that for a trial attorney as to the State's witness being bullied by a prosecutor, as the defense contends. Indeed the postconviction counsel here also seems to agree that the witness was bullied, but in front of the jury, it doesn't get any better than that for the trial attorney with blanket denials of not telling the police anything and a failure to

recover evidence and a reasonable explanation for eye injuries and that. Her credibility was called into question, and the jury more often than not chose to believe her, and indeed trial counsel got several acquittals as a result of that.

Now, I don't know what specific statements would have made the difference here, those inadmissible hearsay statements, but I do find that what Attorney Jasti testified to here is that--is that he didn't know what she would say, it could only get worse for him, and that she was not cooperative during trial prep. There was no reason to believe that she would be cooperative or give the answers that he would have wanted at the time, and indeed to this day it remains a mystery as to what she would say, what she would have said. She doesn't know what she would have said now. I find that to be incredible myself. You know, her denials here were just as implausible as her denials at trial, which is consistent with her fear that she would be prosecuted and the granting of immunity. So I really can't conclude that any of the statements that were admitted, these unspecified statements that were admitted, even if trial counsel was--failed in objecting to them, I don't know what effect it would have under those circumstances. I find that the defense has not met its burden in that regard either, and so I do deny the defense motion.

ATTORNEY LESMONDE: I just want to clarify. Your Honor is unwilling to use the statements as I've identified them

in the motion?

THE COURT: Well, you didn't--you didn't ask Jasti why he with those specific statements [*sic*]. You asked him a general blanket statement about why didn't you object, and he said that the court ruled that the--that the prosecution could ask leading statements. There was no question about--proffered or asked of him regarding specific statements and why it was in that particular statement he allowed inadmissible hearsay, and indeed I find that his trial strategy was not defective by not asking her any questions that he didn't already know the answer to. She was a live wire both at trial and here in the postconviction hearing.

ATTORNEY LESMONDE: I understand the ruling, the Court's ruling, on the issue of not crossing her, but not objecting, as I said, I've laid them out. His testimony was to in general, and I mean, his purported reason as testified to for not objecting to hearsay even though he said it was fairly consistent in that ADA Schlipper was running through line by line in the report was that he did not find it an effective strategy with the jury.

THE COURT: Yeah.

ATTORNEY LESMONDE: And that--that testimony, I confirmed with him, is that your reasoning with regard to all of these incidents, any statements where Attorney Schlipper did do just that and run line by line through the report, and he

indicated it was. Is-- I mean, this Court's position then is the evidence was insufficient because even with the motion and even with Attorney Jasti, which specified that was his reasoning for not objecting, is still insufficient?

THE COURT: Yeah. That's a pretty broad brush that you're painting with.

ATTORNEY LESMONDE: I'm just trying to understand.

THE COURT: Yeah. A pretty broad brush that you're painting with when you asked him questions. Indeed you indicated that it would not have been worthwhile to go through each of the questions, that it was too time-consuming. It seemed clear, since you had to refresh Attorney Jasti's recollection on the witness stand, that it would have been helpful to identify the questions that you believed were inadmissible hearsay and give him the opportunity to explain specifically rather than say generally all of the questions were inadmissible hearsay, and that seems not to be the case from a review of the transcripts. That was not the case, and so not all of it was objectionable, and I don't know which he would have believed to be objectionable or whether his objection would have had any merit or whether the result of him failing to object would cause substantial prejudice to the defendant, entitling him to a new trial.

ATTORNEY LESMONDE: In the interest of avoiding the possibility of the court of appeals remanding this for a second

evidentiary hearing, would the Court entertain the possibility of reopening the record for me to do that?

THE COURT: No. I think primarily the-- I thought that Jasti's remarks, which I'm repeating myself, Jasti's remarks I thought was a reasonable trial strategy to just let this go in, make it look like the prosecution was a bully, get her outright blanket denials, repeated denials, ultimately on the record. He could see where this was going. It doesn't take a weatherman to tell you which way the wind is blowing. We've got a person that's reluctant to come to court. She's secreted her child away or spirited her child away to a different state to duck the subpoena. She's asked for immunity, and the reason she's asking for immunity is because she's going to admit lying. Boy, it just doesn't get any better than that. I can't imagine why a trial attorney in the presence of a jury would want to open a can of worms and not what--know not which type of worms are in the can or how many are in there. It just doesn't make any sense. So that's the primary basis of the court's ruling.

Secondarily, I really don't know what--if there's some as a matter of law I could find that would be inadmissible and that he had an obligation, despite his strategic decisions, to raise and then I could find that somehow that there was substantial prejudice to the defendant, despite, postconviction counsel here, your passionate arguments to the contrary.

So I do deny the motion, and if you would like to submit a

written order consistent with the court's ruling, this is a final ruling for the purposes of appeal.

ATTORNEY LESMONDE: And then just to clarify for the court of appeals, are you denying it on both prongs as far as deficient performance and prejudice, or are you ruling on the deficient performance and not ruling on prejudice?

THE COURT: Yeah. As to which part? As to the gun?

ATTORNEY LESMONDE: Well, I mean, prejudice must be assessed cumulatively, so that would be a cumulative assessment.

THE COURT: Right.

ATTORNEY LESMONDE: I'm just wanting to make sure that when we get up to the court of appeals they understand.

THE COURT: Sure. Not deficient performance when it comes to any failure to object to the exceeding the scope of the use of the demonstrative evidence, the picture of the gun, and in terms of the defense counsel's explanation for allowing leading questions, and that's all I've really got right now are leading questions, and I don't know enough about the hearsay, but as to the leading questions, I find that his performance was not deficient, and overall I do find that there is sufficient evidence that the jury could choose from in this case to convict, and indeed they, or acquit, and they did choose to acquit on some pretty key charges here. So I don't find that there's any substantial prejudice to the defendant even if there were purported errors by trial counsel.

ATTORNEY LESMONDE: And I presume that the same reasons stands for the interest of justice?

(The court reporter asked for a restatement.)

ATTORNEY LESMONDE: I presume that your same reasoning stands relating to the interest of justice?

THE COURT: Yeah. Certainly I believe that the whole controversy has been tried. It's not pretty. It's messy. But that is consistent with the experience that I've had over the last three decades dealing with crimes of domestic abuse, and I think it's consistent with the statutory citation on mandatory arrest, the legislative intent that's evidenced in the opening section of 968.075, and I think with the experience of anyone that's practiced in criminal courts for any period of time.

ATTORNEY LESMONDE: Thank you, Your Honor.

THE COURT: All right. Thank you.

(Proceedings concluded at approximately 4:08 p.m.)

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN

Plaintiff,

v. Case No. 15-CF-207

DEANDRE M. SMITH,

Defendant,

DECISION AND ORDER

UPON ALL OF THE FILINGS, CORRESPONDENCE AND PROCEEDINGS RELEVANT HERETO, THIS COURT FINDS THAT:

Defendant in his post-conviction motion makes two claims: 1.) That the prior inconsistent statements of the crime victim were uncorroborated and therefore insufficient to uphold his convictions; and 2.) That trial counsel was ineffective for failing to request jury instructions that specifically informed the jury as to the requirement of unanimity on counts 8 & 9. The state has not requested an opportunity to file a responsive brief.

Inconsistent Statements:

Defendant correctly asserts that prior inconsistent statements may be relied upon by a jury as substantive evidence. The defendant however, is incorrect in his assertion that the prior inconsistent statements of the victim accusing the defendant of possessing a firearm and strangling her were uncorroborated. Having a gunshot wound in her arm and a bullet hole in the wall of her apartment, sufficiently corroborates her earlier claims that the defendant caused her bodily harm while in the possession of a firearm. Similarly, the existence of visible injuries and the testimony of an expert witness as to the mechanics of strangulation sufficiently corroborate the victim's earlier statements regarding being strangled by the defendant.

Unanimity Instruction

The defendant has made a sufficient showing under State v. Marcum, 166 Wis.2d916, 480 N.W.2d 545 (1992) that he is entitled to a *Machner* hearing.

NOW, THEREFORE, BASED UPON THE FOREGOING:

The claim of insufficiency of evidence is, hereby, DENIED.

The claim of ineffectiveness of counsel is sufficient to entitle the defendant to a *Machner* hearing and therefore the request for a hearing is, hereby, GRANTED.

Dated this this 13th Day of December, 2016

BY THE COURT:

Hon. William E. Hanrahan
Judge, Dane County Circuit Court
Br. 7

Appendix F

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May 19, 2020

To:

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You are hereby notified that the Court has entered the following order:

No. 2018AP1835-CR State v. Smith L.C. #2015CF207

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Deandre M. Smith, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

STATE OF WISCONSIN : CIRCUIT COURT : COUNTY OF DANE
BRANCH 7

STATE OF WISCONSIN,
Plaintiff,

Case No. 2015CF000207

v.

DEANDRE M. SMITH,
Defendant.

PROCEEDINGS: Jury Trial, Morning Proceedings

DATE: May 27, 2015

BEFORE: The Honorable Judge WILLIAM E. HANRAHAN

APPEARANCES: The state of Wisconsin appeared by Assistant District Attorneys DIANE L. SCHLIPPER and CARA J. THROCKMORTON; Madison, Wisconsin.
Detective KATHY PETERSON of the city of Madison Police Department appeared in person.
Defendant DEANDRE M. SMITH appeared in person and with Assistant State Public Defender MURALI S. JASTI; Madison, Wisconsin.

PATRICK A. WEISHAN, RPR
Official Court Reporter
Branch 7

THE COURT: Correct.

ATTORNEY JASTI: Thank you.

THE COURT: The State's not--didn't plan on going any further than that; correct?

ATTORNEY THROCKMORTON: Correct.

THE COURT: Yeah. Number 4, "…State … prohibited from introducing the picture of the purported gun involved, as the source of that picture has not been determined except by an alias." What do you mean by that?

ATTORNEY JASTI: There was a sequence of events in which the alleged victim here e-mailed Officer Peterson a picture of a gun that she purported was the gun that was used in the incident. There was no identifying markers on that picture. It was something that she had pulled from an Instagram account that was not associated with my client in any way. The user name was gibberish if nothing else. It was some kind of fictional name, and so there was no opportunity for us to inquire as to what the source of that picture fundamentally was. So those were our primary concerns with introducing that photograph of some otherwise unknown picture of a gun and trying to tie that to my client.

THE COURT: All right. I'm assuming that there was no bullet recovered; is that right?

ATTORNEY THROCKMORTON: That's correct.

THE COURT: All right. And I'm assuming that,

police officers, that if they're going to testify that what appears to be a hole in the front and back of the purported victim's arm was made by a bullet, that they would not be able to accurately or with any measure or degree of accuracy state that that's the type of bullet that came from that type of gun; is that right?

ATTORNEY THROCKMORTON: I think they can say it's consistent because she described the gun and she described the picture that she sent was-- She said that that was consistent with the gun that the defendant used, and I believe that there could be testimony that the size of the hole in the wall and the size of the scar could be consistent with the type of bullet from the gun that she was describing.

THE COURT: All right. This photograph, is there someone that's going to authenticate that photograph, or is it just at random?

ATTORNEY THROCKMORTON: Yes. We do intend to authenticate it through Breana, and it's demonstrative, just saying that the gun was consistent with that. We're not claiming that it was the gun, but that she--she gave the photograph to say that the gun was consistent with this gun.

THE COURT: Is she the one that sent the photograph?

ATTORNEY THROCKMORTON: She did. She e-mailed it to our detective.

THE COURT: And, if that can be established

foundationally, then the photograph comes in. If it can't be, the photograph is out.

ATTORNEY JASTI: Just a follow-up to that, there was no information in any of the discovery talking about any kind of correlation between the size of the hole in the wall and the size of her scars and, you know, the caliber of this gun that's in the photograph, so we've not been provided notice of any of that proposed testimony that the State has just indicated that they would be offering.

THE COURT: Yeah. I'm sorry I asked those questions. I'm going to remain very skeptical if you offer evidence regarding the caliber of the bullets based on the size of the hole in the wall or the size of the hole in the arm. Just be aware, and I know that Attorney Jasti will be on his toes; correct?

ATTORNEY JASTI: Yes.

THE COURT: But my ruling is confined here to the motion in limine that was just evaluated here, the photograph of the gun. That's number 4.

Number 5, "…State … precluded from introducing any evidence regarding the defendant's 'lifestyle' as it pertains to alleged drug dealing." What's the State's position on that?

ATTORNEY THROCKMORTON: We have no objection. We're not intending…

THE COURT: Number 6, disclosure of credentials,

the bathroom and the defendant was trying to push through, push the door open?

A. Um, kind of, not necessarily. I actually, um, so I hit him, and then I ran in the bathroom, and that's how that happened, so I guess to some extent. He wasn't trying to, like, break down the door. He was cursing and stuff, as we both were, and I was cussing through the door, so yeah.

Q. Okay. Okay. Thank you. So you went to the police station on December 28th, and then on December 29th, the following day, isn't it true that you called Detective Kathy Peterson?

A. Yeah, to see if she had heard about-- Well, she was the neighborhood officer at the time, so to see if she heard about the thing, because like I said, I was worried that I was going to be put out or whatever because he wasn't supposed to be there, and I had to call, and I run a business, so a lot of different factors.

Q. How did you know, I guess, at the time, Officer Peterson?

A. She's the neighborhood police officer, or she's the-- Yeah. They have her plastered on the-- Her number, her name. I've been staying there for six years. She's been there for five years.

Q. So she's the neighborhood police officer for Wexford Ridge?

A. Yeah.

Q. Which means that she comes out and just monitors what's happening around there?

A. Yeah. I just knew who she was, yeah.

Q. When you called her on December 29th, didn't you admit that you weren't as forthcoming and honest with the officers two days before because you didn't want to see the defendant go to jail?

A. Um, well, you just said that I told them that he did all of this stuff, so that couldn't have been true. Actually, what I was contacting Kathy for, because the officer, the first officer, he didn't really believe me because I said the night before nothing happened or whatever, which it hadn't, and then I went back and thought about it, like, damn, you fixing to lose all your stuff or whatever, you fixing to lose everything or whatever, so he's going to pay, and I was hurt, and he did all of this stuff. He was cheating on me and everything like that, so I went and I told--

Q. So you were-- I'm just going to stop you. So you were worried about the defendant, yes or no?

A. I never said I was worried about the defendant. I was worried about me at that point. I wasn't thinking about Deandre. I was worried about me, what I was going to lose, me being hurt, my feelings being hurt, what I was fixing to lose in the process.

Q. Yep.

A. So it was me.

Q. So a lot of these questions can probably be answered with yes or no unless maybe I ask for some clarification. Isn't it true that when you-- Well, scratch that. Strike that, I mean. So, while on the phone with Detective Peterson on December 29th, didn't you tell her that there had been numerous domestic incidents that had occurred between you and the defendant over the last several months, and you were debating about whether you should come forward and talk to her about those altercations?

A. I probably said that, like, out of spite because I wanted Deandre to get in trouble, so sure, yeah.

Q. Okay. And didn't you then tell her wrong is wrong, and there had been some various serious things that the defendant had done to you that you knew weren't right?

A. Yeah. Again, I wanted Deandre to get in trouble, so yep.

Q. Okay. And didn't you also tell her that Deandre Jr., your five-year-old son, had witnessed several of these incidents and had been very upset, and you were concerned about him?

A. I said he was upset for--

Q. Do you remember making that statement?

A. That my son was upset? No.

Q. And that you were concerned about him.

A. That I was concerned about him because he was upset?

Q. Just I guess the question is do you remember telling Detective Peterson--

A. Well, I probably said that my kids were there. I mean, they were sometimes there during fights that me and Deandre had that I started or whatever. So, sure, I probably did say that.

Q. Okay. And isn't it true that after this phone call with Detective Peterson, that she made an appointment and actually came over to your apartment the next day, on December 30th?

A. I don't remember if it was the exact next day, but yes, she did within the next couple of days, yep.

Q. And Deandre Jr. was home at the time?

A. Yes.

Q. And so was Des'marie?

A. Des'marie, she was next door getting her hair braided.

Q. Didn't you tell Detective Peterson then on December 30th that your daughter had been present for a number of the domestic incidents that you were going to talk to her about?

A. Probably. As I said, they were sometimes there.

Q. And, again, didn't you tell her that your son, Deandre, had witnessed quite a few, and you were willing to have Deandre speak with her at that point?

A. Yeah, because she asked me what he--would I allow him to speak with me or something, or with her, I mean.

Q. So, when you talked to her on December 30th, it was a really long interview. Do you remember that?

A. Yep.

Q. About three hours; right?

A. Could have been. I don't remember the exact time.

Q. And, in that interview, you told her about a lot of different things; isn't that true?

A. Mm-hmm.

Q. Is that a yes?

A. Yes.

Q. Thank you. And one incident you told her you were most upset about was when the defendant actually shot you in the arm; isn't that true?

A. You said that I told her that I was most upset about that? Um…

Q. Did you tell her that you were most upset when the defendant shot you in the arm?

A. I don't know if I told her I was most upset about that, but yeah, I told her that he shot me in the arm.

Q. And didn't you tell her that there was also a bullet hole in the wall of your bedroom?

A. Um, I told her that.

Q. And that you had injuries on your arm?

A. Yes.

Q. And didn't you tell her that that had happened on or around October 28th of 2014?

A. Yes.

Q. Didn't you tell her that you and the defendant had been arguing, and you asked him to leave?

A. From?

Q. On October 28th.

A. Um, yeah, I probably said that. We argued a lot.

Q. Isn't it true that you told her that while-- Well, isn't it true that the defendant, while he was packing up some things, getting ready to leave, he went into the kitchen and retrieved a handgun?

A. I told her that.

Q. And this handgun he had been storing above the kitchen cabinets?

A. It was above the kitchen cabinets, yes, at that time.

Q. And didn't you ask the defendant at that time why do you need that right now?

A. I told her that I said that, yes.

Q. Didn't you describe the defendant as taunting you with the gun?

A. I told her that, yes.

Q. Didn't you tell her that initially he didn't point it directly at you, but he was pointing it up in the air pretending

to pull the trigger?

A. I did tell her that, yeah.

Q. Didn't this make you uncomfortable?

A. Um, I told her that it did. Actually, he wasn't taunting me, but yes, I did tell her that.

Q. Didn't you think at the time that he was trying to intimidate you?

A. I didn't think that, but I did tell her that, yes.

Q. Wasn't the defendant smirking at you when he was pointing the gun and aiming it around your head and your body?

A. No, he wasn't aiming it around me, towards me, to me, or anything, actually, but I did tell her that.

Q. Didn't you believe that he enjoyed making you nervous?

A. I told her that, yes.

Q. Didn't you describe to her also kind of him taking the top part of the gun and pulling it back and letting it go forward again?

A. I told her that, yes.

Q. And you don't have a lot of experience with guns; isn't that true?

A. Um, what do you mean?

Q. You don't have a lot of knowledge about how guns work; isn't that true?

A. Sure I do.

Q. Didn't you tell Detective Peterson that you were not

familiar with guns at that time?

A. Um, yeah, because I wanted her to-- I was telling her something, like, trying to please, like I was the victim and trying to really get her to believe me, so I did tell her a lot of things, yes.

Q. Okay. And, again, well, and didn't the defendant get the gun down while you were in the kitchen?

A. While I was in the kitchen?

Q. Both of you were in the kitchen.

A. No, but I did tell her that.

Q. Weren't you feeling scared at that point?

A. No, I was not scared, not at all.

Q. Do you remember telling Detective Peterson that you were scared?

A. I did tell her that.

Q. And you had never had a gun pointed at you before; right?

A. Actually, I did. I was in an armed robbery in 2011 and when I was younger, so yes.

Q. Okay. But you had told Detective Peterson--

A. I did tell her that.

Q. --that you had never had a gun pointed at you before? Didn't you repeatedly tell him to put the gun down?

A. I told her that I said that, yes.

Q. Didn't you tell him that he needed to get his things

and get out of the apartment?

A. Um, um, before, yes, I did tell him. When we first started arguing, I said get--I said get your stuff and get out, which he was packing his stuff and he was getting out.

Q. Didn't you again repeatedly tell him that he could get his gun right before he left, but he just needed to put the gun down and finish packing?

A. I told her that I said that, yes.

Q. But he didn't do that. He refused to put the gun down, didn't he?

A. No, actually, he didn't, but I did tell her that.

Q. And in fact he continued to point the gun at and around you; isn't that true?

A. No, he didn't, but I did tell her that again.

Q. At one point didn't he put the gun down towards his side briefly, and while you were in the kitchen, you reached in the drawer and grabbed a paring knife?

A. No. I told her that though.

Q. Okay. And didn't the defendant ask you what you got that for?

A. I did tell her that.

Q. Didn't you feel scared, like you had to have the knife to defend yourself?

A. No. I did tell her that though.

Q. At that point didn't you back out of the kitchen and

walk backwards down the hallway from the kitchen towards your bedroom?

A. Nope. That's actually a lie. Actually, Deandre was backing with his back out, backing towards the kitchen, and I was coming at him with the knife, the same knife that you took a picture of, but I did tell her that.

Q. But you remember or do you remember telling Detective Peterson that you were walking backwards down the hallway?

A. I did-- I said I did tell her that.

Q. Okay. Sorry.

A. Mm-hmm.

Q. Isn't it true that at no point did you actually try to lunge or swipe the knife, and the whole time you were just holding it in your hand?

A. That's a lie.

Q. Do you remember telling Detective Peterson that?

A. I did tell her that.

Q. And, ultimately, you ended up in the bedroom; right?

A. Yes.

Q. And you could tell that the defendant's arm was getting kind of tired, as the gun would start to drop down just a bit; isn't that true?

A. I did tell her that, but no. Yeah, I did tell her that.

Q. But he never actually lowered the gun. He continued

to have it pointed at you, didn't he?

A. I told her that, but that's not true.

Q. At some point didn't the defendant tell you that you needed to drop the knife?

A. Um, I'm-- He actually didn't tell me, like, drop the knife. Like, he was actually kind of saying it in a pleading way, like drop the knife, because we had a knife situation before, so yeah.

Q. And didn't you in fact tell him this is a knife in a gunfight?

A. I told her that I said that.

Q. Didn't you tell him that it takes one shot and a pull of your finger, and you can kill me?

A. I told her that, yes, but I didn't say that to him. That was a lie.

Q. Didn't you describe sort of moving around in the bedroom with the defendant to Detective Peterson?

A. Um, that me and him moved around?

Q. Yes.

A. Actually, I did tell her that, but in fact we really didn't because his-- Okay. So when you go into--

Q. I'll, yeah, I'll ask follow-ups.

A. Yes, I told her that, sure.

Q. Thank you. Wasn't the defendant in fact standing towards the back of your bedroom kind of facing you right near

the dresser?

A. At one point.

Q. And you were facing him with your back to the closet?

A. At one point.

Q. And didn't you then at some point reach for a bottle of perfume that you had tried to spray in his face?

A. Yes.

Q. It didn't work, though, did it?

A. What? Yeah. I sprayed him in his eyes.

Q. Didn't you-- Weren't you too far away?

A. No. I sprayed him in his eye. I was like this distance, so I leaned forward and, shhh, sprayed him in his eye.

Q. Do you remember telling Detective Peterson that you attempted to spray it in his face, but you were too far away? The perfume just came out in a cloud in his direction?

A. You know, I probably said that. I don't even remember.

Q. And, as soon as you sprayed this perfume, it's true that the defendant turned his face away, and at the same time you heard a gun go off, isn't it?

A. No.

Q. Do you remember telling Detective Peterson that?

A. I told her that, but he didn't have a gun, but yes, I did tell her that. That was a made-up situation. So, yes, I did at that time. He didn't have a gun at that very moment, I

meant.

Q. And didn't you, just after you sprayed the perfume, and I think you just kind of motioned it, you sort of--you took a step back and to your left right after you sprayed the perfume?

A. No.

Q. Didn't you tell that to Detective Peterson?

A. I told her a lot of things, yes, that I could go on.

Q. And that you took that step back and to the left right as the gun was going off?

A. I never said that.

Q. And, as soon as you heard the gun go off, did your arm start ringing and go numb?

A. No.

Q. Do you remember telling Detective Peterson that?

A. I told her that. You said as soon as I heard the gun? I didn't hear a gun go off. There was no gun going off.

Q. Okay. At that time weren't you in shock because you realized that you had been shot in the arm?

A. No.

Q. Do you remember telling Detective Peterson that?

A. Yep. That was part of the lie.

Q. And do you remember telling her that your arm started ringing and went numb as soon as you heard the gunshot?

A. Yeah, I did tell her that.

Q. And weren't you concerned that had you not taken that step back and to the left, you feel like the bullet would have gone into your chest area?

A. No. I told her that though, but that wasn't my concern because-- No.

Q. Weren't you really upset to think that you could have been shot in the chest?

A. No, because I made up-- I made it seem like I was upset to her, but I made up that situation, but yes, I did tell her that.

Q. You told her that. Okay. And didn't you-- It's true that you said at that time, Deandre, you shot me?

A. No, I didn't say that, but I did tell her that I said that.

Q. Didn't he start apologizing?

A. Nope, but I did tell her that he did.

Q. Where was Deandre Jr. while all this was happening?

A. While all of what was happening? So this situation that I told you that I just told her or that you just asked me about, that was something that I made up, so I did say that my son was in his room. There was a situation where actually--

Q. Yeah. That's fine.

A. Okay. Well, sure.

Q. Did you tell Detective Peterson that he had most likely been in the hallway or peeking out of his door during

this entire incident?

A. That was probably something that I said.

Q. Isn't it true that the whole time that you and Deandre Sr., the defendant, had been arguing, and after he picked up the gun and then you picked up the knife, he came out into the hallway?

A. No, because he didn't have a gun. I had a knife though.

Q. Don't you remember Deandre saying something, mom, I don't want you to get shot?

A. No.

Q. Did you tell Detective Peterson that?

A. I told her that.

Q. Didn't you tell Deandre Jr. multiple times to go back to his room and close the door

A. I tell him that all the time when we're fighting and arguing. When I'm jumping on his dad, hitting his dad, punching his dad, I always tell him that. Yes, I probably said that.

Q. Weren't you fairly certain that he was in the hallway when the shot was fired?

A. No, I wasn't certain because that wasn't true, but I did tell her that though.

Q. Isn't it true that when you looked at your arm, you realized that you had an entry and an exit wound?

A. No, but I did tell her that.

Q. Okay. And that the bullet had actually gone into the wall next to the door frame?

A. Nope, but I did tell her that.

Q. Isn't it true that eventually the defendant took a blue sweater of some sort that he had been wearing and wrapped your arm to try to stop the bleeding?

A. No.

Q. Did you tell her that?

A. I told her that.

Q. Isn't it true that the blue Polo sweater that had been wrapped around your arm was then eventually taken by the defendant, and you had no idea what happened to it?

A. No. There was no Polo sweater wrapped around my arm, but it was his sweater, so I did--I did tell her that. So, I mean, it was his property, so he probably-- He took it. I mean, he wore it. That was his.

Q. Okay. And after that didn't you and Deandre Sr. and Deandre Jr. and if your daughter was there leave the apartment because you were concerned that somebody might call the police?

A. No, but we did-- Um, we weren't concerned someone would call the police because-- Wait. Concerned someone would call the police for what?

Q. Because they heard a shot?

A. No. There was no shot, but I did tell her that.

Q. Okay. But you came back a few minutes later; right?

A. I told her that.

Q. And didn't you tell her that at this point the defendant was becoming more panicky than even you were because he thought he might be going to jail?

A. That wasn't true, but I did tell her that though.

Q. And didn't he keep making comments that he needed to go, he needed to get out of there before he went to jail?

A. No, no, that wasn't true.

Q. Did you tell her that?

A. I told her that.

Q. And at this time weren't you getting more and more upset because he seemed less concerned about you?

A. Nope. That was a lie, but I did tell her that.

Q. At this point didn't you still think that you should go to the hospital?

A. No.

Q. Do you remember telling Detective Peterson that?

A. No. I never told her that. I told her that-- I said that he wanted me to go to the hospital, but I never said I inquired on going to the hospital, I wanted to go to the hospital, or anything like that.

Q. Okay.

A. But that wasn't true.

Q. So I got that wrong? You said that he wanted you to go to the hospital?

A. Yes, I did tell her that, but that wasn't true.

Q. Okay. Why did he want you to go to the hospital?

A. I just told you that. Well, you're asking me did she--did he shoot me, so that's why, but did I tell her that he shot me, so that would be why [*sic*].

Q. Okay.

A. As I told her.

Q. Okay. Isn't it also true that in addition to him wanting you to go to the hospital, he also wanted to get rid of the gun?

A. No, and I did not tell her that. What I told her was, um, that, um, I told her that we went to his mom's house, and the first thing he got out and said was, mom, can you help her, and I told him to ditch the gun and blah, blah, blah. So that was-- I did tell her that part, but that was again not true.

Q. Okay. So you went to his mom's house, and he asked his mom to help you; right?

A. Yep. That's what I told her.

Q. Okay. And didn't you actually put the gun in a brown purse that you had so that he could take it with him into his mom's house?

A. I told her that, yes.

Q. And didn't the defendant ask his mom if he could store the gun at her house?

A. No. He never asked her anything, but I don't even

think I told her that. I think I said that or something. I think I told her that I said, um, put it here or something like that or leave it here or something like that, but he never asked that, and that was a lie, so, but I did say something along that context, but I don't remember saying that Deandre asked his mom that, no.

Q. Okay.

A. I said I told her.

Q. And isn't it, I mean, wasn't he given permission to keep the gun in the basement at his mom's house for the time being?

A. No, he was not, but I did tell her that.

Q. And, after ditching the gun, didn't you start driving towards the hospital with the defendant?

A. No. We never drove to the hospital, and I never told her that.

Q. You never told her that?

A. No. I told her that he wanted to go, but I didn't want to go, and because they would ask why or something like that. I did tell her something like that, but I never said that I wanted to go, no. I was always telling her that he wanted to go to the hospital or I told him to ditch the gun or something like that. I never said it. That was a lie. No, it was a lie.

Q. Okay. And didn't you both realize that if you showed up at the hospital with what was clearly a gunshot wound--

A. There was no--

Q. I just have to finish my questions. That the hospital would most likely call the police?

A. There was no both realize anything. I did tell her as a part of my lie, like I'm telling you that I said, I did tell her that I told him that they would realize that it's a gunshot wound and they would want--they would call the police and all that different type of stuff. I never said that we both realized nothing, no, but that was a part of my lie, yes, so I did tell her that. That's part of my lie.

Q. Okay. You never went to the hospital; right?

A. Nope.

Q. Okay. So you drove back to the parking lot at 52 South Gammon, your apartment building; right?

A. Yeah. I told her that. That was part of the lie, yes.

Q. And you were getting more and more upset and angry because you didn't really feel like he cared about the fact that he had shot you; right?

A. That was a lie. That's a lie.

Q. Did you tell her--

A. I did tell her that.

Q. And he, the defendant, was more concerned about leaving and not getting into trouble than you; right?

A. No. That's a lie, but I could have probably told her

that part. I don't know, but that's a lie.

Q. It's true that you told him you were going to call the police at that point, didn't you?

A. That's a lie because I didn't have anything to call the police about, but I probably said that to her.

Q. At this point didn't you call him a stupid bitch?

A. Um, probably. I say that a lot to him.

Q. And it's true that he gets really angry when you call him that name, isn't it?

A. Um, not really. Actually, he's probably used to me calling him that because I always curse him out.

Q. But this time he reached over and he punched you on the left side of your jaw, didn't he?

A. No. He never punched me, but I did tell her that.

Q. It was painful, wasn't it?

A. He's never punched me in my face, so I couldn't tell you if it was painful or not.

Q. But you told Detective Peterson that?

A. I did tell her that.

Q. And, while all this was happening, Deandre Jr. was in the back seat, wasn't he?

A. I did tell her that he was, but again that wasn't true.

Q. Deandre Jr. was really upset about this for several days, wasn't he?

A. Nope.

Q. Did you tell Detective Peterson that he was?

A. Yes, I did tell her that.

Q. Didn't he keep asking you if your arm was okay?

A. No. Um, for a separate situation, for the actual reason that I got my wound, he did ask me that when I first got it.

Q. Okay. That's fine.

A. But okay.

Q. Didn't he keep asking you over and over my dad shot you?

A. No.

Q. Do you remember telling Detective Peterson that?

A. I did tell her that.

Q. And weren't you worried about-- Excuse me. Didn't you admit that you were trying to get him to stop saying things like that?

A. Who? My son?

Q. Yes.

A. Um, he actually-- I probably told her that as a part of the situation, sure, but, um, sure.

Q. And regarding-- Backing up a little bit, regarding the gun that was in the kitchen that the defendant got down, didn't he buy this from a friend of his for $300?

A. I didn't say that he got a gun down, but I did say

that there was a gun in my kitchen, and I don't know who he got the gun from because he didn't get the gun. He didn't buy it. I don't know if you're asking me if he bought the gun from somebody. I couldn't tell you if he's ever bought a gun from somebody or whatever, but he didn't buy that gun from somebody, so yeah.

Q. Didn't you tell Detective Peterson that the defendant got a gun in exchange for $300 in a sort of pawn deal?

A. I probably told her that.

Q. Isn't it true that you didn't know there was a gun in your apartment?

A. No.

Q. Do you remember telling Detective Peterson that you did not know there was a gun in your apartment?

A. I probably told her that, but there was a point that Deandre didn't know, so I could have slipped in and said that--

Q. Yeah. Sorry. It's going to go faster if you just answer what I'm asking. Thanks.

A. Sure.

Q. Didn't you describe the wounds to your arm as entry and exit wounds to Detective Peterson?

A. Possibly.

Q. And didn't you tell Detective Peterson that you didn't give the defendant permission to punch you in the face, in the jaw?

A. He never punched me in the jaw, so.

Q. Do you remember making that statement about consent, that you did not--

A. Well, yeah. She asked me did I ask him or did I allow him to do a lot of the stuff, so I would have said no, of course, that I told her that he did.

Q. On December 30th when Detective Peterson was in your apartment, it's true she called some other people to the apartment that day also, other police officers?

A. Yep.

Q. Did they take photos of what you had pointed out as a bullet hole in the wall?

A. What I told them was, yes.

Q. And it's true that they also took photos of what you describe as the entry and exit wounds to your arm; correct?

A. What I told them was, yes.

Q. And didn't you describe the gun that was used to Detective Peterson?

A. What I described to Detective Peterson was--

Q. It's a yes-or-no question.

A. Then no. Are you saying did I describe the gun that I told her that was used?

Q. Yes.

A. I described a gun.

Q. Didn't you tell Detective Peterson that a friend of

the defendant's had taken a picture of a gun while it was sitting on her couch and posted it somewhere?

A. Of a gun? Or what are you saying? Say that again. I'm sorry.

Q. Yes. Didn't you tell Detective Peterson that a friend of the defendant had taken a picture of a gun while it was sitting on your couch and posted it to I think it was Instagram or something like that?

A. I said they took a picture of a gun. Yes, I did say that, or they had a picture of a gun on their wall.

Q. And didn't you e-mail that picture of a gun to Detective Peterson?

A. Yes, I did, of a gun, mm-hmm.

ATTORNEY SCHLIPPER: May I approach?

THE COURT: Yes.

BY ATTORNEY SCHLIPPER:

Q. I'm showing you what's been marked as State's Exhibit Number 12. Do you recognize that?

A. Um, like have I seen this in person? I recognize me sending this to her, but no, I haven't seen that gun in person.

Q. Is this the e-mail--the photo that you sent to Detective Peterson?

A. Yeah. I just said that.

Q. So it is a true and accurate representation of the photo that you sent to Detective Peterson?

A. Yes.

ATTORNEY SCHLIPPER: State moves Exhibit 12 into evidence.

THE COURT: Any objection?

ATTORNEY JASTI: No.

THE COURT: Received.

ATTORNEY SCHLIPPER: Permission to publish?

THE COURT: Objection?

ATTORNEY JASTI: No.

THE COURT: You may.

ATTORNEY SCHLIPPER: Thank you.

THE COURT: While that's warming up, can I have both counsel approach?

ATTORNEY SCHLIPPER: Certainly.

(The following proceedings were had by the Court and all counsel, outside the hearing of the jury.)

THE COURT: When's a good time for a break? Is there--

ATTORNEY SCHLIPPER: I'm almost done with this specific date, so maybe after that.

THE COURT: Okay.

(Proceedings before the jury resume.)

BY ATTORNEY SCHLIPPER:

Q. And isn't it true, pointing to the Exhibit 12 that is up on the screen, isn't that true that that is the photo that

you sent to Detective Peterson and said it's consistent with the gun that the defendant had?

A. Are you saying did I say that it looked like that gun or something?

Q. Yes.

A. Um, I probably did, and again, that's something that I told her, not that he did have a gun, but that's consistent with the lie that I told her, yes.

Q. Okay. Thank you for clarifying. It's also true that you, after the defendant shot you, that you saw him pick up what's called a shell casing off of the floor?

A. No.

Q. Do you remember telling Detective Peterson that?

A. Probably so.

Q. And in fact at some point while he was taunting you with the gun, he had removed the bullets and was playing with them, wasn't he?

A. No. He wasn't taunting me with the gun, and he never removed the bullets or played with it, but I probably did say that as part of my lie, sure.

Q. And you had told Detective Peterson that the bullets were gold, didn't you?

A. Um, I probably did, but aren't all? I don't know. I probably did. I don't know.

Q. And isn't it true that you put the shell casing in a

plastic bag and threw it in some sort of water near the defendant's mother's house?

A. Nope. That's a lie too.

Q. Did you tell that to Detective Peterson?

A. I told her that.

ATTORNEY SCHLIPPER: Now I think would be a good time.

THE COURT: Okay. Folks, at this time we're going to take a lunch break. Be back here at 1:15 ready to go. Once again, you've heard more about this case. Please avoid individuals that are here in the courtroom, individuals that are associated with this case. Don't discuss this case amongst yourselves or with anyone else. We'll see you back here at 1:15.

THE BAILIFF: All rise.

(The jury exits.)

THE COURT: Thank you. Please be seated. Now, it's my understanding that the child was subpoenaed.

ATTORNEY SCHLIPPER: That is correct.

THE COURT: What possible remedies are you seeking with this witness since she's the adult responsible for the care of the child, the child not appearing in response to the subpoena? Do you wish to think about that over the lunch hour?

ATTORNEY SCHLIPPER: I do, Your Honor.

THE COURT: All right. Then we'll see you back here