CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutions of the United States

Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law: nor shall private property be taken for public use, without just compensation.

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Constitution of Wisconsin

Article I, Section 7: In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

Federal Rules of Criminal Procedure, Rule 33
Rule 33. New Trial

FRCrP 33(a)--Ineffective Assistance of Counsel:

U.S. v. Arny, 831 F.3d 725, 730-31 (6th Cir.2016). "Although [Rule 33(a)] does not define 'interest of justice,' a violation of a defendant's Sixth Amendment right to the effective assistance of trial counsel constitutes a 'substantial legal error' such that a new trial is warranted." *See also* **U.S. v. Simpson**, 864 F.3d 830, 834 n.16 (7th Cir.2017).**U.S. v. Wilkerson**, 251 F.3d 273, 278-79 (1st Cir.2001). "[T]here is no formal bar to the court's *sua sponte* consideration of the ineffectiveness of counsel in evaluating a timely motion for a new trial. In rare instances, when the record for review is adequate, we will consider an ineffective assistance of counsel claim on direct appeal and order appropriate relief if there has been a denial of the Sixth Amendment right to counsel. Similarly, if the trial court considering a motion for a

new trial concluded that it had an adequate basis for finding that a defendant had been denied his Sixth Amendment right to the assistance of counsel, the court could rule that a new trial was necessary to avoid a miscarriage of justice. [¶] The more likely impediment to such a ruling is a practical one. Determining the existence of ineffective assistance generally requires an independent factual inquiry into the merits of the claim, usually in the form of an evidentiary hearing in a collateral proceeding." (Internal quotes omitted.) *See also* **U.S. v. Blake**, 965 F.3d 554, 561 (7th Cir.2020); **U.S. v. Munoz**, 605 F.3d 359, 373 (6th Cir.2010)

COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2022

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. 2019AP2145-CR

Cir. Ct. No. 2016CF4456

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS J. BROOKSHIRE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARK A. SANDERS and STEPHANIE ROTHSTEIN, Judges. *Affirmed.*

Before Brash, C.J., Donald, P.J., and Dugan, J.

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).

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¶1 PER CURIAM. Dennis J. Brookshire appeals a judgment of conviction entered after a jury found him guilty of first-degree intentional homicide, two counts of first-degree recklessly endangering safety, and felony bail jumping. He also appeals an order denying his postconviction motion.[1] Brookshire argues that his trial counsel was ineffective for two reasons: (1) for failing to object to out-of-court identifications of him that he contends were the result of impermissibly suggestive procedures; and (2) for not objecting to testimony that he contends constituted an impermissible opinion on other witnesses' credibility. We reject Brookshire's ineffective assistance claims and affirm.

I. BACKGROUND

¶2 The charges against Brookshire stemmed from an incident that occurred on August 29, 2016. The complaint alleged that on that date, L.R. was part of a funeral procession. L.R.'s two cousins, JuL and JoL, were riding in L.R.'s car with him.[2] Brookshire and another individual drove a white SUV through the procession and pulled up next to L.R.'s vehicle. Brookshire, who was in the passenger seat, produced a gun and began shooting at L.R., JuL, and JoL. L.R. was shot multiple times and died as a result. JuL and JoL both suffered gunshot wounds but survived. At the time of the incident, Brookshire was released on bail for drug charges.

[1] The Honorable Mark A. Sanders entered the judgment of conviction in this matter. The Honorable Stephanie Rothstein issued the decision and order denying Brookshire's postconviction motion.

[2] We refer to the witnesses and the victims using the same initials as those used by the parties.

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¶3 The case proceeded to a jury trial. The following is some of the evidence that was presented. JuL testified about riding in L.R.'s car with L.R. and JoL during the funeral procession. JuL testified that a white SUV pulled up alongside L.R.'s car. He said that he recognized Brookshire as the front seat passenger in the SUV because he had seen Brookshire before. According to JuL, Brookshire said one sentence but JuL did not hear what he said. Brookshire then opened fire on L.R.'s vehicle. JuL testified that he, JoL, and L.R. all tried to duck. JuL was shot in the arm but lived.

¶4 At the hospital, JuL described the shooter as a skinny black male, aged twenty-five or twenty-six, with a light complexion, afro, and a six-piece gold grill. On September 25, 2016, nearly one month after the shooting, JuL identified Brookshire from a six-person photo array. This was the only time he was shown a photo of Brookshire, and at the time of the identification, JuL indicated that he was "1,000 percent certain[.]" He also identified Brookshire in court.[3]

¶5 JoL, the other surviving victim, testified that he was riding in the funeral procession in the front passenger seat of L.R.'s vehicle. He testified that a white SUV drove up next to them. According to JoL, Brookshire stuck his head out of the SUV and asked L.R. something along the lines of, "Are you ready to die?" Brookshire then opened fire. JoL testified that he saw that L.R. was shot in the head. After JoL got out of the car, he realized he was shot in the leg. JoL was hospitalized but survived.

[3] JuL's identification of Brookshire is not at issue on appeal.

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¶6 JoL testified that initially he was in a state of shock and told an officer on the way to the hospital that he could not give a good description of the vehicle or the shooter. At the hospital, however, JoL told police that the vehicle was a newer white SUV. He also described the shooter as an African American male, twenty-one or twenty-two years old, "thin build, light complexion," with a short afro.

¶7 JoL attended a live police lineup on September 30, 2016. He identified Brookshire as the shooter and stated that seeing Brookshire in the lineup caused him to have flashbacks to the shooting. He testified that the police instructed him not to talk to JuL about potential witnesses or suspects, that he complied with this order, and that JuL never talked to him about identifying the shooter. JoL also identified Brookshire as the shooter in court. A detective who spoke to JoL following the live lineup testified that JoL said he was "positive" of his identification and explained, "I wouldn't forget that face for nothing. It haunts me."

¶8 K.W., a citizen witness who was not part of the funeral procession, testified that while walking in the area on the day of the incident, she heard gunshots. As she walked toward the direction of the gunshots, she said she was almost run over by what she described as a "white mid-sized truck, van" or "white SUV-type vehicle." K.W. testified that she did not see the shooting and could not identify the shooter.

¶9 Approximately ten to fifteen minutes after dodging the white SUV, K.W. said that she saw a man talking on a cell phone and heard him say, "I'm here. It's done." She identified Brookshire in court as the man she saw talking on

the phone. K.W. testified that she told a detective at the crime scene about what she heard Brookshire say.

¶10 K.W. testified that a couple of days after the incident, detectives showed her small photographs. She testified that they were "little, bitty" pictures and that she did not remember if one of them was Brookshire. During his trial testimony, Detective Timothy Graham explained that he showed K.W. two small photographs: one of Brookshire and one of another individual. He additionally testified that K.W. said one of the photos looked like it might be the driver of the SUV and the person who was talking on a cell phone at the scene.

¶11 On October 1, 2016, more than a month later, police presented K.W. with a six-photo array. She identified Brookshire from the photo array as the person she saw talking on the phone, and potentially driving the white SUV that nearly struck her.

¶12 During trial, the jury saw a video of an African American man getting out of a vehicle and talking on the phone. Detective Terrence Wright testified that the vehicle and the man on the phone in the video appeared consistent with K.W.'s description of what she witnessed after the shooting.

¶13 Officer Luke Ardis testified that on the day of the shooting, he responded to a call to find a white SUV that had been set on fire in a vacant lot. M.B., who lived next to the vacant lot, testified that on the day of the shooting, he came home to find a dark grey car blocking his driveway. The car was near a white SUV, which was parked in the vacant lot. M.B. watched an African American man grab something from the passenger side of the car that was blocking his driveway and throw it into the white SUV. According to M.B.,

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within three seconds, the white SUV "burst in flames." The man then got into the passenger's seat of the car that was blocking the driveway and the car took off.

¶14 Police subsequently located the car that was blocking M.B.'s driveway, a Hyundai Genesis. Brookshire's fingerprints were found on the car and on items recovered from inside of it.

¶15 The jury found Brookshire guilty of all of the charges. He filed a postconviction motion arguing that his trial counsel was ineffective. The circuit court denied the motion without a hearing, and this appeal follows.

II. DISCUSSION

¶16 Brookshire continues to argue that his trial counsel was ineffective. Our analysis of his claims involves the familiar two-pronged test: the defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional prejudice, the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (citations and one set of quotation marks omitted).

¶17 The court "need not address both components of this inquiry if the defendant does not make a sufficient showing on one." ***State v. Smith***, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854. "The ultimate determination of

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whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶18 Brookshire seeks a ***Machner*** hearing for his ineffective assistance of counsel claim.[4] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, a defendant is not automatically entitled to an evidentiary hearing relating to his or her postconviction motion. ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). Rather, the circuit court is required to hold an evidentiary hearing only if the defendant has alleged "sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. If, on the other hand, the postconviction motion "does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the circuit court, in its discretion, may either grant or deny a hearing. ***Id.***, ¶9.

(1) *Trial counsel was not ineffective for not challenging K.W.'s and JoL's out-of-court identifications.*

¶19 Brookshire argues that trial counsel was ineffective for failing to challenge K.W.'s and JoL's out-of-court identifications of him.[5] He contends that K.W.'s out-of-court identification was unduly suggestive because she was shown a

[4] Brookshire additionally seeks a new trial. However, a new trial is not appropriate on an ineffective-assistance claim until a ***Machner*** hearing has occurred. *See* ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998).

[5] We decline the State's invitation to apply the forfeiture rule to Brookshire's argument regarding JoL's out-of-court identification. Instead, like the postconviction court, we opt to address this claim.

photo of Brookshire prior to the identification. He contends that "[t]here can be no question that the photograph may have influenced her identification and likely led to ... K[.]W[.]'s identification of Brookshire." Brookshire additionally argues that K.W.'s identification is not reliable because she was not at the scene of the crime when the shooting occurred and had only a limited opportunity to view the individual who was in the white SUV.

¶20 As for JoL's identification, Brookshire asserts that suggestiveness arose because "it appears that during the live lineup involving JoL, Brookshire was the only individual in the live lineup with gold teeth." Brookshire acknowledges that "[t]he record at trial lacks any information as to whether or not Brookshire's gold teeth were a factor in [JoL]'s indication of Brookshire." He nevertheless contends that the fact that Brookshire "*may have been*" the only individual with gold teeth during the live lineup, in addition to being one of the individuals with tattoos, results in the conclusion that the live lineup was impermissibly suggestive. (Emphasis added.)

¶21 To resolve this issue, we turn directly to the prejudice prong of the ineffective assistance analysis. Even if we accept Brookshire's proposition that that the out-of-court identifications by K.W. and JoL were unduly suggestive, we conclude he was not prejudiced by trial counsel's failure to challenge the identification evidence. As summed up by the State and supported by the record:

> [T]he evidence of Brookshire's guilt was overwhelming even in the absence of K[.]W[.] and JoL's identifications. Several witnesses testified that they saw a white SUV drive up next to L[.]R[.]'s vehicle and then heard gunshots. JuL saw the shooter from only a few feet away, and accurately described the [sic] him in great detail: a young, thin, black male with an afro, a light complexion, and a 6-piece gold grill. He later identified Brookshire from a six-photo array with "1,000 percent" certainty. The jury saw a video of the

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> white SUV speeding away from the scene after the shooting.
>
> ... The jury [also] saw a video of a man setting the SUV on fire and escaping in the Hyundai, as well as photographs of the burned SUV. The Hyundai was tracked down and recovered that same day, and Brookshire's fingerprints were found in four different places in and on the Hyundai.

(Record citations omitted.)

¶22 In light of the overwhelming eyewitness, video, and forensic evidence of Brookshire's guilt, he has not met his burden of showing a reasonable probability that, but for trial counsel's failure to seek suppression of K.W. or JoL's identifications, the result of the proceeding would have been different. *See* ***Strickland,*** 466 U.S. at 694.

(2) ***Trial counsel was not ineffective for not objecting to Police Officer Ardis's testimony.***

¶23 Next, Brookshire argues that trial counsel was ineffective for failing to object to a statement that he contends vouched for the credibility of complaining witnesses. This claim hinges on a single statement by Police Officer Luke Ardis during trial.

¶24 The prosecutor asked Officer Ardis: "Okay. Additionally, Officer, this type of vehicle or vehicle matching the description was potentially believed to have been maybe used in a homicide just earlier that same day. Is that correct?" Officer Ardis responded: "That's what I was told." According to Brookshire, this statement constituted improper vouching for the credibility of every witness who said a white SUV was involved in the homicide.

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¶25 Once again, even if we conclude, for purposes of resolving this appeal, that Officer Ardis's testimony was improper, Brookshire cannot prove prejudice. In his postconviction motion, he offered only the following conclusory allegation regarding Officer Ardis's answer: "This questioning was improper and unfairly prejudiced Brookshire." This was wholly inadequate to warrant a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶¶9, 27 (presenting only conclusory allegations is insufficient, and on appeal, "we ... review only the allegations contained in the four corners of [the] postconviction motion"). Moreover, Officer Ardis's response was not an opinion on any witness's truthfulness but rather a statement of fact supported by not only the testimony of other witnesses, but by video evidence. *See* ***State v. Smith***, 170 Wis. 2d 701, 718, 490 N.W.2d 40 (Ct. App. 1992) (concluding that a witness's testimony does not amount to an opinion about another witness's truthfulness if "neither the purpose nor effect of the testimony was to attest to [the witness's] truthfulness").

By the Court.—Judgment and order affirmed.

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

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STATE OF WISCONSIN CIRCUIT COURT Branch 25 MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

DENNIS J. BROOKSHIRE,

Defendant.

Case No. 16CF004456

DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION RELIEF

On August 27, 2019, the defendant by his attorney filed a motion for a new trial on the grounds that trial counsel was ineffective for failing to object to the out-of-court and subsequent in-court identifications made by witnesses due to unduly suggestive photo and live lineups. He also argues that trial counsel was ineffective for failing to object to testimony of Milwaukee Police Officer Luke Ardis as an improper comment on the credibility of other witnesses. The court ordered a briefing schedule in this matter,[1] to which the parties have responded. The court has reviewed the record, the parties' briefs as well as the relevant *original* trial exhibits and adopts the State's briefs as part of its decision.

The defendant was convicted of first degree intentional homicide, use of weapon, party to a crime; bail jumping; and two counts of first degree recklessly endangering safety, use of weapon, party to a crime. The homicide victim, L R , was driving a vehicle in a

[1] Judge Mark Sanders entered the briefing schedule order. At the same time, Judge Sanders denied the defendant's constitutional challenge to WI JI-Criminal 140 based on the Wisconsin Supreme Court's decision in ***State v. Trammell***, 387 Wis. 156 (2019). Due to the system of judicial rotation in Milwaukee County, Judge Sanders is not currently assigned to the criminal division, and therefore, the case has been transferred to this court as the current successor to his former homicide calendar. After the defendant filed his reply, the State filed a second response to correct an error of fact in the defendant's reply.

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funeral procession en route to the cemetery. J L , a cousin of L , was seated in the rear passenger seat. Ju L brother, Jo L was seated in the front passenger seat. While they were riding along in the procession, a white SUV drove alongside the driver's side of the vehicle. The front passenger produced a firearm and fired several shots into the vehicle, striking L R and both L brothers. R sustained multiple gunshot wounds, including one to the head, and died from his injuries. Ju L was shot in the arm. Jo L was shot in the leg. Ju identified the defendant as the shooter in a photo array and in court. Jo L identified the defendant as the shooter during a live lineup and in court.

K W was walking in the area at the time of the homicide and heard gunshots. She observed a white SUV going fast with two people inside. She had to jump out of the way of the vehicle to avoid being hit. During the aftermath of the shooting, she observed a man talking on a cell phone stating, "I'm here. It's done." Based on what Ms. W heard the man say at the homicide scene, she approached Detective Terrence Wright. According to Detective Wright, Ms. W described the man as wearing a white tank top shirt and tan shorts with a light skin complexion, a short afro and "possibly . . . gold teeth." She did not state that she saw the shooter. She did not mention nearly being struck by a white SUV. She did not mention if the defendant had arm tattoos. She testified that she was concentrating more on his face than his arms when she saw him on the phone.

A couple days later, two detectives reinterviewed Ms. W She told them she had almost been run over by the SUV. The detectives showed her two photos: one of the defendant and one of D A [2] The photos were smaller photos, like an ID photo, and not the larger

[2] Deonta Ames and another individual named Christopher Anderson were each charged with an attempt to kill Ju L . *See* Milwaukee County Circuit Court case nos. 16CF005355 and 16CF004687.

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photos that are shown in a photo array. Ms. W wasn't able to identify the individuals in the two photos. She described the photos as "so little. I mean, you can't identify someone with a little, bitty picture." (Tr. 1/24/17 p.m., p. 139). However, she told the detectives that one of the photos looked like it might be the driver of the SUV and the person who was talking on a cell phone at the scene. On the same date, a different group of detectives showed Ms. W another photo, not of the defendant, but of another individual. Ms. W did not make an identification during that encounter. About 30 days later, Ms. W was supposed to attend the same live lineup as Jo L , however, she did not attend. Detective Graham created a photo array from the live lineup photos (Exhibit 137) and showed them to Ms. W , who identified the defendant as the person she saw in the white SUV and on the phone. She indicated that her identification was "100 percent."

In court, Ms. W testified that she did not see the shooting and did not know the identity of the shooter. She identified the defendant in court as the person she saw in the white SUV and talking on the cell phone.

The defendant argues that the lineups presented to the witnesses were unduly suggestive. He states that he has a unique identifying characteristic by having gold teeth but that there were no photos or other lineups involving individuals where teeth were shown. He also states that he has a significant amount of neck and arm tattoos and that not providing individuals with similar identifying characteristics in the lineups made the out-of-court identifications, and consequently the in-court identifications, unreliable.

Strickland v. Washington, 466 U.S. 668, 694 (1984), sets forth a two-part test for determining whether an attorney's actions constitute ineffective assistance: deficient performance and prejudice to the defendant. Under the second prong, the defendant is required to show "that

there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Id.*** at 694; also ***State v. Johnson***, 153 Wis. 2d 121, 128 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** A court need not consider whether counsel's performance was deficient if the matter can be resolved on the ground of lack of prejudice. ***State v. Moats***, 156 Wis. 2d 74, 101 (1990). "Prejudice occurs where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, 'the result of the proceeding would have been different.' ***Strickland***, 466 U.S. at 694 . . . . " ***State v. Erickson***, 227 Wis. 2d 758, 769 (1999).

A defendant who alleges that pretrial identification procedures by photograph were impermissibly suggestive and not otherwise reliable has the initial burden to prove that the photo identification was impermissibly suggestive. *See* ***State v. Mosely***, 102 Wis. 2d 636, 652 (1981). If this burden is not met, no further inquiry is needed. ***Id.*** If this burden is met, the burden then shifts to the State to show that despite the suggestiveness, the identification was nonetheless reliable under the totality of the circumstances. ***Id.*** Where a subsequent in-court identification is also challenged as tainted by the prior one, the State must show that the in-court identification derives from an independent basis. ***Id.***

The State's brief ably demonstrates that the out-of-court identifications were not unduly suggestive. Jo L was an eyewitness to the homicide and identified the defendant as the shooter during a live lineup and in court. The live lineup was conducted on September 30, 2016. Detective Alexander Klabunde testified that he chose five filler individuals "that are of similar age and physical description." (Tr. 1/25/17, p. 233). Because the defendant had a distinguishing tattoo around his neck, the detective had him and the other five fillers wear bandanas around their necks to avoid undue suggestion because of the neck tattoo. (*See* Exhibit

137). Although the defendant also had arm tattoos, four individuals in the lineup photos had arm tattoos, and another individual was wearing long sleeves.[3] The presence of multiple individuals with arm tattoos in the lineup does not suggest any of them as being the shooter. The fact that the defendant has gold teeth is not suggestive of anything because no teeth are showing in any of the lineup photos.[4] (*See* Exhibit 137). During a post-lineup interview, Jo L told Detective Keith Kopcha that he had a flashback of the event.[5] He mentioned the defendant's face, facial features and structure, build, moustache and hairstyle in making his positive identification of the defendant as the shooter. He did not mention arm tattoos or gold teeth as factors when identifying the shooter. Under the circumstances, the court perceives nothing unduly suggestive about the live lineup shown to Jo L and no meritorious basis to object to his out-of-court or in-court identification.

Ju L was also an eyewitness to the homicide and identified the defendant as the shooter during a photo array and in court. He identified the defendant from the photo array with "1,000%" certainty. In court, he stated that he did not know the defendant but had seen him before. He also identified the defendant as having front gold teeth. None of the persons in the photos shown to Ju L was showing teeth. Two of the persons depicted in the "six pack" form had a tattoo on their neck or chest, but Detective Erik Gulbrandson testified that he colored in the neck area of all the array photos that were shown to Justin so that the array would

[3] The court has viewed Exhibit 137 which consists of color photographs of the live lineup individuals. All six individuals are wearing a dark colored banana around their neck. Three of the individuals have tattoos on both arms. One of the individuals has a tattoo on only one arm. Another has no arm tattoos and another is wearing long white sleeves covering both arms. No teeth are showing in any of the photos.

[4] The defendant asserts in his reply that the record "lacks any information as to whether or not Brookshire's gold teeth were a factor in Jo identification of Brookshire." (Defendant's reply at p. 3). That is a pleading problem for the defendant because he can only speculate that his gold teeth played a role in Joseph's identification during the live lineup. Speculation is not a viable basis to mount a successful ineffective assistance of counsel claim. *See* ***State v. Bentley***, 201 Wis. 2d 303 (1996).

[5] Detective Kopcha testified that he wrote down Jo L words about a flashback verbatim as he was speaking them: "I'm positive it's him. I wouldn't miss that face for nothing. It haunts me. When I saw him, I had a flashback of it." (Tr. 7/25/17, p. 245).

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not be suggestive. (*See* Exhibit 139).[6] The court perceives nothing unduly suggestive about the photo lineup shown to Ju L and no meritorious basis to object to his out-of-court or in-court identification. Neither does the defendant as it goes because he withdrew any challenge to Ju identification in his reply brief.

K W never identified the defendant as the shooter. She was only shown a photo of the defendant on two occasions.[7] On the first occasion, she was shown small ID photos of the defendant and Deonta Ames. Although she told detectives that the defendant looked like he might be the driver of the SUV, she testified that the photos were too small to make a positive identification. The second occasion was when she was shown the photos from the live lineup 30 days later. (Exhibit 137). Ms. W did not state that her identification of the defendant from the lineup photos was assisted by having viewed a small ID photo of the defendant a month earlier. In fact, she testified that she could not recall seeing a picture of the defendant on that day because it was a "little, bitty picture . . . no bigger than an ID." (Tr. 1/24/17 p.m., p. 139.). To the extent that the defendant argues that his arm tattoos made the lineup photos unduly suggestive, Ms. W never mentioned arm tattoos when she spoke with Detective Wright on the scene or when she identified the defendant from the lineup photos. Moreover, the defendant was not the only person depicted in the lineup photos with arm tattoos (he was one of four), and therefore, the defendant's arm tattoos did not make the photos unduly suggestive as to who she saw in the white SUV and talking on the phone.

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[6] The court has viewed Exhibit 139 which consists of a "six pack" showing all six individuals used in the photo array and the six individual photos that were shown to Ju L . The neck area of each person depicted in the individual photos has been colored in with marker.

[7] The defendant asserts in his reply brief that Ms. W was shown a photo of the defendant on three occasions before making an identification. (Defendant's reply, p. 2). The record shows that Ms. W was shown the defendant's photo on *one* occasion before she identified him from the live line up photos about 30 days later. (Tr. 1/24/17 p.m., pp. 124-25). The photo that was shown to the witness between the initial photo and the live line up photos was *not* a photo of the defendant. (Id. at p. 125). *See also* Milwaukee Police Incident Report dated 9/1/16 (Attachment A to State's second response.)

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Ms. W could not make an identification from the small ID photos and couldn't even recall if the defendant was in one of those photos. Nor did she connect her view of those photos to her subsequent identification of the defendant from the live lineup photos a month later. Even if the initial photo array (the two small ID photos) was inconsistent with usual procedures, the court is persuaded by the witness's testimony that the ID pictures were too small to make an identification and by the passage of time between the first and second photo array (an entire month) that the initial photo array was not unduly suggestive. The record reflects that trial counsel moved to suppress Ms. W identification on the grounds that the identification procedures utilized by the detectives were impermissibly suggestive. (*See* Notice of Motion and Motion to Suppress Identification filed on January 19, 2017). The court held a hearing on the motion during which Ms. W testified. (Tr. 1/23/17). After questioning the witness, counsel withdrew the motion. Based on Ms. W testimony at the suppression hearing, the court finds that there is no reasonably probability that Judge Sanders would have suppressed the evidence of her identification, and therefore, trial counsel was not ineffective for failing to pursue his suppression motion.

In sum, the court finds that the out-of-court identification procedures utilized by the detectives in this case were not unduly suggestive, and therefore, the defendant cannot meet his burden under ***Strickland*** of demonstrating that trial counsel was ineffective. Even without the evidence of the out-of-court identifications, the L brothers each identified the defendant in court as the shooter.[8] In addition, for the same reasons set forth by the State, the court finds that the direct and circumstantial evidence of guilt in this case was overwhelming and that there

[8] The defendant has effectively endorsed the reliability of Ju L identification by withdrawing his challenge to Ju out-of-court identification.

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is no reasonable probability that the result would have been different, even without the limited identification made by K W.

The defendant's challenge to Officer Ardis' testimony under ***Haseltine/Romero*** is unconvincing.[9] Officer Ardis' testimony about a *possible* connection between white vehicle with interior fire damage he was dispatched to investigate and the white SUV used in the homicide provided a context for his investigation. It was not a comment on the truthfulness or the credibility of other testifying witnesses or confirmation that the burned out vehicle was involved in the homicide. His entire testimony covered about three pages of trial transcript and was *de minimis* in light of all the other direct and circumstantial evidence of guilt. Even assuming *arguendo* that trial counsel was deficient for failing to raise a ***Haseltine/Romero*** objection, the defendant was not prejudiced because there is no reasonable probability that the result of the trial would have been different without this testimony.

In sum, the court finds that the defendant has not alleged a viable Sixth Amendment claim, either on grounds that trial counsel was ineffective for failing to pursue a motion to suppress the witness identifications in this case or for failing to raise an objection to Officer Ardis' brief testimony.

THEREFORE, IT IS HEREBY ORDERED that the defendant's postconviction motion for a new trial is **DENIED.**

CIRCUIT COURT MILWAUKEE CO. WISCONSIN SEAL

Stephanie G. Rothstein
Circuit Court Judge Br. 25

Dated: 10/22/19

[9] *See* ***State v. Haseltine***, 120 Wis. 2d 92 (Ct. App. 1984); ***State v. Romero***, 147 Wis. 2d 265 (1988).

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12-15-2022
George L. Christenson
Clerk of Circuit Court
2016CF004456

December 15, 2022

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

No. 2019AP2145-CR State v. Brookshire, L.C. #2016CF4456

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

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

Sheila T. Reiff
Clerk of Supreme Court

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