APPENDIX

TABLE OF APPENDICES

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted September 5, 2025
Decided September 15, 2025

Before

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 24-3223

DEANDRE SMITH,
Petitioner-Appellant,

v.

DAN CROMWELL,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 22-cv-21-wmc

William M. Conley,
Judge.

O R D E R

Deandre Smith has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DEANDRE M. SMITH,

Petitioner,

v.

LANCE WIERSMA,[1]

Respondent.

OPINION AND ORDER

22-cv-21-wmc

Petitioner Deandre M. Smith, who is represented by counsel, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, seeking to challenge his 2015 conviction for felon in possession of a firearm and misdemeanor battery. Smith contends that his conviction should be vacated and he should be granted a new trial because his trial counsel, Attorney Murali Jasti, violated his Sixth Amendment right to effective assistance of counsel by mishandling the cross-examination of the victim and the admission into evidence of a photograph of a gun. As explained below, Smith's petition to this federal court will be denied because he has failed to establish that the Wisconsin courts unreasonably applied clearly established federal law or based their decision on an unreasonable interpretation of the facts.

BACKGROUND[2]

A. Criminal Charges

The 11 counts against Smith originated from seven, separate incidents occurring in

[1] Smith was released to extended supervision after filing his petition, so he is now a supervisee in the custody of Respondent Lance Wiersma, the Administrator of the Division of Community Corrections.

[2] The following facts are taken from Smith's petition and the state court records provided by Smith and the state.

Dane County, Wisconsin, between September and December 2014, although only two are relevant to this petition. During both of the relevant incidents, Smith was living part-time with his then-girlfriend, "BMJ," and their two children, aged two and five at the time.[3]

The first relevant incident occurred in the early hours of October 28, 2014, when a verbal argument at BMJ's apartment led to a physical altercation between Smith and her, resulting in BMJ allegedly being shot in the arm, although Smith was not convicted for that shooting, but instead for being a felon in possession of a firearm in relation to this incident.

The second incident resulting in a conviction for misdemeanor battery occurred on December 27, 2014, after BMJ's sister called the police about what she thought was Smith beating BMJ while she was speaking to her on the phone. Later that day, BMJ called the police herself to report that Smith had taken some of her property, but she wouldn't talk about the events further because she did not want Smith to go to jail. Again that night, however, BMJ told the responding officers that she was fine. Still, on December 28, 2014, BMJ told Officer Davenport, who had responded the night before, that Smith had gotten on top of her on the ground, slapped her three or four times, choked her, and slammed her into the ground from behind. Davenport noticed a small bruise above her eye and scratches on her back, but when he asked for her permission to photograph them for evidence, she declined.

During a subsequent interview on December 30, 2014, BMJ told then Police Officer (now Detective) Peterson about some seven disputes that she had with Smith, several of which occurred when their children were in the home. BMJ said that the incident that made her most upset was when Smith shot her in the arm on October 28, 2014. She described how that

[3] The court will follow the lead of the parties and refer to BMJ by her initials to protect her privacy.

incident began with a verbal argument, which quickly devolved into a physical altercation with Smith taunting her with his gun and BMJ holding a knife. When BMJ attempted to spray Smith in the eyes with perfume, she explained that he shot her, after which they both got in a car with their son to dispose of the gun at Smith's mother's house. While they also initially planned on going to the hospital, Smith argued against it, resulting in another argument where he punched BMJ in the jaw. During the December 30 interview, Officer Peterson saw the bruise on BMJ's face and scratches on her neck, and he obtained her consent to take photographs of her injuries and the apartment, including of the bullet that was allegedly lodged in the wall following the October 28 shooting incident. Throughout the police investigation, BMJ provided information to officers, including a photograph of 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." (Dkt. #9-11, at 2.) The State charged Smith with 11 counts, including battery and felon in possession of a firearm.

B. Pretrial Proceedings

In advance of trial, Attorney Jasti filed a motion in limine seeking to prohibit the State from introducing the photograph of the gun purportedly involved in the October 28 incident, arguing that the State lacked sufficient foundation to support admission of the photo because the source of the photo was unclear. The following interchange took place regarding this motion at the pretrial hearing:

> 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. 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 [BMJ], 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.

(Tr. Trans., dkt. #9-1, at 11.)

C. Trial

During Smith's two-day trial in May 2015, the State called several witnesses, beginning with BMJ, whom the state moved to have declared an adverse or hostile witness. Jasti did not object, and the court granted the request. On direct examination by the State, BMJ recanted all of her previous allegations made to the police, stating that she had fabricated those allegations because she was angry with Smith for cheating on her. The State asked a series of leading questions to elicit the contents of BMJ's prior statements to law enforcement, and Jasti again did not object. BMJ admitted that she provided the gun photo to law enforcement, and the State offered it into evidence without objection from Jasti. On cross-examination, Jasti focused on BMJ's contentious relationship with Smith in an effort to reinforce BMJ's testimony that she had made false, inculpatory statements to the police because of Smith's alleged infidelity.

Next, the State called the responding police officers, Davenport and Peterson, to detail their interactions with BMJ. During her testimony, Peterson identified the photograph of a gun that BMJ had said she found on Instagram and emailed to Peterson, along with a statement that it "might be the gun that was used by the defendant in the October 28 incident, [b]ut at a minimum, it resembled the gun." (Dkt. #9-2, at 92.) The State also called several other witnesses, including medical professionals who saw injuries to BMJ's eye, two people who were present in BMJ's apartment building and interacted with her during an incident in mid-December 2014, and one person who oversaw the property damage complaints to BMJ's building. The defense called no witnesses.

During its deliberations, the jury asked to review several exhibits: photos of BMJ's injuries, including scars on her arm; photos of the alleged bullet hole in the wall; and the gun photo. Defense counsel did not object to any of these exhibits going to the jury.

Ultimately, the jury found Smith guilty on three out of the eleven charged counts: felon in possession of a firearm, Wis. Stat. § 941.29(2)(a); strangulation and suffocation, Wis. Stat. § 940.235(1); and misdemeanor battery, Wis. Stat. § 940.19(1). On July 7, 2015, Dane County Circuit Judge Hanrahan sentenced Smith to six years for being a felon in possession, five years for strangulation and suffocation, and two years for misdemeanor battery, all to be served consecutively for a total of 13 years.[4]

D. Postconviction and Appellate Proceedings

Smith filed a postconviction motion with the Dane County Circuit Court in early December 2016, after which the court vacated the strangulation and suffocation conviction on grounds not relevant to this petition, leaving Smith to serve eight years. Then, in May 2018, Smith filed a supplemental postconviction motion, which challenged the remaining two convictions on the ground that his trial counsel was ineffective. On August 8, 2018, the circuit court held a hearing on that motion pursuant to *State v. Machner*, 92 Wis. 2d 797,285 N.W.2d 905 (Ct. App. 1979), at which both BMJ and Jasti testified. Jasti testified that he did not have any strategic reason for failing to object to the following at trial: the State's request to treat BMJ as an adverse witness; the State's leading questions as posed to BMJ; witness testimony regarding the gun photograph; and the gun photograph being submitted to the jury without a limiting instruction on its use. (*See* dkt. #15-9, at 19-23.) However, Jasti further testified that

[4] Each conviction carried a repeater enhancer, Wis. Stat. § 939.62(1), and a domestic abuse enhancer, Wis. Stat. § 968.075(1)(a).

he did not think that the State's questioning of BMJ was damaging to Smith because it came across as "controlling" and "was not particularly effective." (*Id.* at 23.) Jasti also explained that he did not try to elicit even more explanation and exculpatory testimony from BMJ because she had not been cooperative with him before trial, and he did not like to ask questions to which the answer was unknown. Finally, Jasti felt that the State had not proved their case with her testimony on direct examination. Concluding that Jasti's representation was reasonable under the circumstances, the circuit court dismissed Smith's supplemental postconviction motion in its entirety.

Smith filed a timely appeal in May 2019, arguing in relevant part that he was denied effective assistance of counsel because his trial attorney (1) mishandled BMJ's testimony and (2) failed to object to the admission of the photograph of a gun into evidence.[5] However, the Wisconsin Court of Appeals rejected Smith's arguments and affirmed the circuit court's rulings, finding that Smith failed to show that Jasti's performance fell below an objective standard of reasonableness or that he was prejudiced by trial counsel's handling of this evidence. Smith filed a motion for reconsideration, which the court of appeals denied with the exception of an errata sheet issued to reflect changes to certain paragraphs in the opinion.

The Wisconsin Supreme Court denied Smith's petition for review in May 2020, after which the United States Supreme Court denied Smith's writ of certiorari. Smith then filed a timely petition for writ of habeas corpus in this court in January 2022.

[5] Smith also argued on appeal that (3) the evidence was insufficient to convict him of being a felon in possession and (4) the interests of justice warranted a new trial in his case. However, he has not raised either of those issues in his petition before this court. (*See* Pet., dkt. #2, at ¶ 2 (identifying only issue as ineffective assistance of trial counsel).)

OPINION

Smith argues that his felon-in-possession and battery convictions should be vacated because ineffective assistance by his trial counsel violated the Sixth Amendment. Specifically, he argues that defense counsel failed to make a number of necessary objections related to BMJ's direct testimony as the State's adverse witness and to the admission of the gun photograph into evidence. He also argues that his trial counsel failed to take steps to mitigate the prejudice resulting from the admission of this evidence.

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), a petitioner must demonstrate constitutionally deficient performance by counsel that caused actual prejudice. *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). To show that a counsel's performance was constitutionally deficient, the petitioner must show "that counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms . . . considering all the circumstances." *Strickland*, 466 U.S. at 687-88. To show actual prejudice, the petitioner must demonstrate, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

Further, because the Wisconsin Court of Appeals addressed the merits of Smith's ineffective assistance of counsel claims, this court's review is subject to the particularly deferential standard of review under 28 U.S.C. § 2254(d). Specifically, Smith is not entitled to relief unless he shows that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). A decision is contrary to clearly established federal law if its governing rule of law "differs from governing law set forth in Supreme Court cases," *Bailey v.*

Lemke, 735 F.3d 945, 949-50 (7th Cir. 2013) (citations omitted), while a decision involves an unreasonable application of Supreme Court precedent "if the decision, while identifying the correct governing rule of law, applies it unreasonably to the facts of the case." *Id*. Alternatively, Smith can obtain relief by showing that the state court's adjudication of his claims "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Again, however, a federal court owes particular deference to the state court, and especially to the underlying state court findings of fact and credibility determinations, which are all presumed correct unless the petitioner presents "clear and convincing" evidence to the contrary. 28 U.S.C. § 2254(e)(1); *Campbell v. Smith*, 770 F.3d 540, 546 (7th Cir. 2014); *Newman v. Harrington*, 726 F.3d 921, 928 (7th Cir. 2013).

Thus, to prevail on an ineffective assistance of counsel claim under § 2254(d), Smith must overcome what has been referred to as a "doubly deferential" form of review, which essentially asks "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 89 (2011). This court must deny relief so long as the state court of appeals "took the constitutional standard seriously and produced an answer within the range of defensible positions." *Taylor v. Bradley*, 448 F.3d 942, 948 (7th Cir. 2006) (citations omitted); *see also Allen v. Chandler*, 555 F.3d 596, 600 (7th Cir. 2009) (This means that only a clear error in applying *Strickland* will support a writ of habeas corpus.). Applying this particularly deferential standard, the court will start by addressing Smith's arguments regarding BMJ's testimony, then turn to the admission of a gun photograph.

A. BMJ's Testimony

Before the Wisconsin Court of Appeals, Smith argued, as he does again in his petition to this court, that his trial counsel mishandled BMJ's testimony in three ways. *See State of Wis. v. Smith*, Case No. 2018AP1835-CR (Ct. App. Nov. 27, 2019) (dkt. #9-11, at 6-8). However, like the court of appeals, this court does not find Smith's arguments persuasive.

First, Smith argues that his trial attorney should have objected to the State's request to consider BMJ an adverse witness justifying use of leading questions under Wis. Stat. § 906.11(3), because that statute only applies in civil cases. *See State v. Bergenthal*, 47 Wis. 2d 668, 688, 178 N.W.2d 16 (Wis. 1970). In contrast, Wis. Stat. § 972.09, which expressly applies in criminal cases, provides that a witness can only be declared hostile *after* offering testimony inconsistent with a prior statement.[6] Without addressing whether there was a material difference between the application of § 906.11(3) and § 972.09, the Wisconsin Court of Appeals determined that Smith had failed to show he suffered any actual prejudice as a result of Jasti's failure to object to the State's allegedly premature request to question BMJ adversely. Specifically, the court of appeals determined that it was "immediately apparent" from the trial record that BMJ's testimony "would be inconsistent with the statements she had previously made to the police," so even if Jasti had objected to the State's request as initially premature, "he would have only delayed the inevitable ruling that [BMJ] could reasonably be deemed 'hostile' to the prosecution," entitling it to use leading questions. (Dkt. #9-11, at ¶ 17 (citing *Strickland*, 466 U.S. at 694)). Although Smith criticizes the court of appeals for not

[6] At the time of trial, Wisconsin Stat. § 972.09 (2017-18) provided in relevant part that: "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."

even addressing § 906.11 and its limitations, any such discussion would *not* change the court of appeals' plainly correct prejudice analysis under *Strickland*.

Second, Smith asserts that the trial counsel should have objected to the State's use of inadmissible hearsay during BMJ's direct examination. (Dkt. #9-11, at 7.) Specifically, Smith takes issue with the fact that the prosecutor read certain of BMJ's out-of-court statements to law enforcement, then asked her to confirm she made those statements, without first eliciting any testimony from BMJ that contradicted the statements. However, the court of appeals correctly emphasized that 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." (Dkt. #9-11, at ¶ 20 (citing *Strickland*, 466 U.S. at 689); *State v. Breitzman*, 2017 WI 100, ¶ 65, 378 Wis. 2d 431, 904 N.W.2d 93).) While Smith points out that Attorney Jasti admitted at the *Machner* hearing that he did not base his failure to object on any specific trial strategy, the court of appeals correctly noted that Jasti did not consider the State's leading questions problematic. Rather, he thought by forcing BMJ to say only what the prosecutor wanted to hear, the state's questioning was actually coming across poorly to the jury. Since Smith has failed to show that Jasti acted irrationally or without judgment, he fails to establish that his counsel's performance was constitutionally deficient.

As to prejudice, the court of appeals also reasonably concluded that Smith failed to show Jasti's objection would have prevented the jury from learning about BMJ's prior statements to the police, noting to the contrary that, "[i]f 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." (Dkt. #9-11, at ¶ 21.) Thus, regardless of whether trial counsel had succeeded in objecting to and changed the order of BMJ's

testimony during the prosecutor's initial questioning, there was no reasonable likelihood that the jury's decision would be different because they would have heard the same testimony once the prosecutor rephrased his questions. Certainly, the Wisconsin Court of Appeals' finding that this order would not have actually prejudiced Smith is not one this federal court can overturn under a "doubly deferential" standard of review.

Third, and finally, Smith contends that his trial counsel was deficient for failing to ask BMJ during cross examination to tell her story in full about what actually happened during the alleged domestic abuse incidents, including how she sustained the scars on her arm pictured in a photograph shown to the jury.[7] However, the Wisconsin Court of Appeals found that even though trial counsel did not ask BMJ many questions about the incidents, he did ask questions when he had a basis to anticipate a favorable answer (such as BMJ's contentious relationship with Smith). In addition, Attorney Jasti testified at the *Machner* hearing that he could not anticipate what BMJ would say about many of the alleged incidents because BMJ had refused to meet with him before trial, and did not want to risk eliciting surprise testimony damaging to Smith. Moreover, BMJ's testimony on direct was generally favorable to Smith, BMJ had already denied that any of the alleged incidents occurred, and she testified to lying to the police initially because she was angry with Smith at that time.

[7] The court of appeals noted that BMJ made *unsworn* statements during presentence investigations and at the sentencing hearing that she received the scars from a woman stabbing her with a grilling fork and not a bullet. However, in rejecting Smith's request for a new trial in the interests of justice, the court of appeals reasonably determined that even assuming that BMJ would say the same under oath, which was entirely speculative, "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." (Dkt. #9-11, at ¶¶ 44-45.) Smith did not specifically challenge this finding in his habeas petition, so the court will not consider it further.

While Smith argues that further explanation from BMJ could have ensured a full acquittal, that is mere speculation on Smith's part. Regardless, Smith has not shown that Jasti performed unreasonably under all the circumstances, nor that there was a reasonable probability he would have been acquitted had Jasti asked BMJ more questions on cross examination. Indeed, the fact that the jury acquitted Smith on eight out of 11 counts suggests the opposite.

Because this court finds the Wisconsin Court of Appeals' analysis as to all three of Smith's challenges to be based on essentially unassailable findings of fact and a reasonable application of *Strickland*, as well as Wisconsin state court cases applying *Strickland*, Smith has identified *no* basis on which this court could conclude that the state court's rejection of Smith's ineffective assistance claim regarding BMJ's testimony fell "well outside" the boundaries of permissible differences of opinion. *See Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002) (federal court cannot grant habeas relief unless state court decision was "'unreasonable,' which means something like lying well outside the boundaries of permissible differences of opinion").

B. Gun Photograph

Smith makes two primary arguments related to the admission of a gun photograph into evidence, just as he did before the Wisconsin Court of Appeals. *First*, Smith argues that his trial counsel should have opposed admission of the photo as irrelevant and unduly prejudicial, because the gun depicted in it could not be tied to Smith. *Second*, Smith argues that after the circuit court admitted the gun photograph for demonstrative purposes only,[8] Jasti should have

[8] As the court of appeals noted, "[t]he term 'demonstrative evidence' generally refers to evidence 'used simply to lend clarity and interest to oral testimony' . . . 'in lieu of [substantive] evidence'." (Dkt. #9-11, at ¶ 26 n.6 (quoting *Anderson v. State*, 66 Wis. 2d 233, 248,223 N.W.2d 879 (1974)).)

taken further steps to prevent the jury from inferring the photo depicted the *actual* gun that Smith was charged with possessing, including by objecting to BMJ's and Peterson's testimony about the photo, objecting to the submission of the photo to the jury during deliberations, and requesting that the jury be instructed to consider the photo only as demonstrative. However, the court of appeals reasonably rejected both arguments on the ground that each is based on an erroneous interpretation of the pretrial hearing transcript.

While the court of appeals was puzzled by the State's reference to the photo as "demonstrative," especially given the reported source of the photo, its appearance, and the nature of the felon-in-possession charge against Smith, it held that the circuit court did not acknowledge or address this characterization and instead ruled on the foundation objection, holding that the gun photo would come in if the State could establish a foundation. Specifically, the court of appeals ruled an "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 limited the photo to demonstrative use." (Dkt. 9-11, at ¶ 29.)

Contrary to Smith's contentions, the court of appeals' reading of the pretrial transcript is reasonable and within the boundaries of permissible differences of opinion, meaning it is unassailable on review by this court. In particular, while Smith points out that during questioning by postconviction counsel at the *Machner* hearing, Jasti confirmed his understanding that the photo had been admitted for demonstrative use (*see* dkt. #9-9, at 16), a review of the transcript of that hearing supports the court of appeals' determination that both Jasti and the circuit court accepted postconviction counsel's representation about the nature of

the circuit court's three-year-old, pretrial ruling at face value, without examining the relevant portions of the transcript. As a result, Smith has failed to present clear and convincing evidence that the circuit court limited the photo to demonstrative use or understood the State to be stipulating to using the photo only as demonstrative evidence.

In fact, given both the parties' *and* the circuit court's conduct with respect to the photograph, beginning with the circuit court's apparent agreement to "admit" it as a fair depiction of what the gun looked like through its being sent back to the jury during deliberations, the court of appeals' finding is both reasonable and essentially non-reviewable in federal court. Moreover, absent some evidence that it was admitted or used at trial as more than a picture of a gun "like that used by Smith," there is not showing of jury confusion, and hence no proof of prejudice. Regardless, there being no clear error in the court of appeals' findings or application of *Strickland* as to this issue, this court will not overturn Smith's conviction on this basis either.

C. Certificate of Appealability

The only remaining question on habeas review is whether to grant Smith a certificate of appealability. Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Tennard v. Dretke*, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented

were adequate to deserve encouragement to proceed further." *Miller El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Here, Smith has not made a showing, substantial or otherwise, that his conviction was obtained in violation of clearly established federal law as decided by the United States Supreme Court. Because no reasonable jurist would debate this issue under clearly established federal law or its application to a reasonable interpretation of the facts, the court will not issue petitioner a certificate of appealability.

ORDER

IT IS ORDERED that petitioner Deandre Smith's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is DENIED, and Smith is DENIED a certificate of appealability.

Entered this 6th day of November, 2024.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 2, 2025

Before

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 24-3223

DEANDRE M. SMITH,
Petitioner-Appellant,

v.

DAN CROMWELL, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 22-cv-21-wmc

William M. Conley,
Judge.

O R D E R

Petitioner-Appellant filed a petition for rehearing on September 29, 2025. All the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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, J.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).

Exhibit 11

¶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

---

> [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.

OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

December 23, 2019

To:

Hon. William E. Hanrahan
Circuit Court Judge
Dane County Courthouse
215 S. Hamilton St., Rm. 4103
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

William L. Brown
Assistant District Attorney
215 S. Hamilton St., Ste. 3000
Madison, WI 53703

Dana Lynn LesMonde
LesMonde Law Office
354 W. Main St.
Madison, WI 53703-3115

Aaron R. O'Neil
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

Sheila T. Reiff
Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Court of Appeals District I
330 East Kilbourn Avenue, Suite 1020
Milwaukee, Wisconsin 53202-3161

Court of Appeals District II
2727 N. Grandview Blvd.
Waukesha, WI 53188-1672

Court of Appeals District III
2100 Stewart Ave., Suite 310
Wausau, WI 54401

Court of Appeals District IV
Ten East Doty Street, Suite 700
Madison, WI 53703

Jenny Andrews, Sarah Motiff
Court of Appeals
Ten East Doty Street, Suite 700
Madison, WI 53703

Hon. William E. Hanrahan
Circuit Court Judge
Dane County Courthouse
215 S. Hamilton St., Rm. 4103
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

William L. Brown
Assistant District Attorney
215 S. Hamilton St., Ste. 3000
Madison, WI 53703

Dana Lynn LesMonde
LesMonde Law Office
354 W. Main St.
Madison, WI 53703-3115

Aaron R. O'Neil
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

Exhibit 9
App.D:1

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

not to suggest that this was the gun. The State went outside the bounds of the motion in limine order after the Court, relying on their assertions, said it would be admissible for that purpose if they could establish a foundation that she was the one to forward this unidentified photo to law enforcement. The origin of the photo was never identified. It could not be identified. There was no testimony that she knew the origin of the photo. And this court's motion in limine ruling appeared to limit that to demonstrative only, which then the State did not comply with, is our argument.

THE COURT: Got you.

BY ATTORNEY LESMONDE:

Q. As I've kind of just expounded, is it your recollection that the Court limited the use of the photograph to demonstrative or illustrative evidence based on the motion in limine?

A. Yes.

Q. And, during that hearing, did the State assure the Court that it would be limiting itself to that?

A. I think so.

Q. Do you recall the State's questions to Ms. Mitchell-Johnson, the alleged victim, when they were admitting and introducing the photograph at trial?

A. I don't recall them from my own personal memory at this point. I obviously have reviewed your motion.

Q. Would reviewing the transcript from the trial, that portion of the trial, help to refresh your recollection?

A. Well, I think that's in your motion, so I do recall those questions.

Q. When the State did introduce the photograph of the gun, do you recall specifically how they did that?

A. I couldn't tell you off hand, no.

BREANA MITCHELL-JOHNSON: Sorry I'm late.

ATTORNEY LESMONDE: Your Honor, another witness has shown up. I'll just inform her of the sequestration order.

(Attorney LesMonde and Breana Mitchell-Johnson conferred privately.)

ATTORNEY BROWN: I won't object to leading questions on the transcript if you would like to.

ATTORNEY LESMONDE: Okay. Yes.

THE COURT: All right.

BY ATTORNEY LESMONDE:

Q. Do you recall that in introducing the photograph and admitting it through Breana's testimony, Ms. Mitchell-Johnson's testimony, that the State used a question that was both leading and called for hearsay?

ATTORNEY BROWN: Objection. Calls for a legal conclusion.

THE COURT: Sustained.

BY ATTORNEY LESMONDE:

Q. Do you recall if you had any concerns about the appropriateness of the question that was asked of Ms. Mitchell-Johnson in introducing the photograph of the gun into evidence?

A. I don't recall that I made an objection.

Q. Okay. Do you recall if the question asked Ms. Mitchell-Johnson to confirm a prior statement that she had made outside of court?

A. I believe it did.

Q. And do you recall if that particular question indicated what answer the respondent--that the State was seeking?

A. I believe it did.

Q. Did you object to that line of questioning by the State?

A. I didn't.

Q. Why did you not object to those questions?

A. It was generally the format of the questioning that was occurring with the witness throughout her testimony. I just don't recall objecting to the format in which she was asking questions.

Q. Did you have any concerns in your professional opinion that this was calling for hearsay?

A. I didn't make the objection, no.

Q. Did you object at all on--to any of the questions the

State was asking on grounds that they were leading?

A. I didn't.

Q. So did you have any specific strategic reason for not objecting on leading grounds to any of the questions posed by the State?

ATTORNEY BROWN: Objection. Just vague as to which witness we're talking about.

THE COURT: Sustained.

BY ATTORNEY LESMONDE:

Q. Did you have any strategic reason for not objecting to questions posed by the State to Ms. Mitchell-Johnson on grounds that they were leading?

A. I didn't. I didn't think it was a particularly effective means of questioning their own witness, and so I let Ms. Schlipper, I believe was the prosecutor, conduct her questioning in that manner. I didn't think it was effective, her approach.

Q. Did you object at all to the line of questioning as being or did you have any concerns, I should ask, did you have any concerns about that line of questioning regarding introduction of the photograph of the gun with Ms. Mitchell-Johnson being outside the scope of the Court's ruling on the motion in limine?

A. To be honest, it was not something I thought of at the time.

Q. The State then did question Detective Peterson regarding the circumstances surrounding that photograph. Do you recall that line of questioning?

A. I do.

Q. Did you have any concerns at that point that that line of questioning exceeded the scope of the motion in limine order?

A. I didn't at the time.

Q. And I'm sorry. I just want to clarify. You didn't consider it, or you didn't think it was a problem?

A. I didn't consider it at the time.

Q. Did you at any point consider asking the Court to strike that testimony as falling outside the bounds set by the motion in limine ruling?

A. I did not.

Q. Would it be fair to say that those things that you didn't consider, you didn't have a strategic reason for?

A. That would be fair.

Q. At the conclusion or near the conclusion of trial at the jury instruction conference, do you recall if you requested an instruction limiting the use by the jury of the photograph to be consistent with the motion in limine ruling?

A. I didn't make that request.

Q. Did you have any reason for not making that request?

A. I didn't.

Q. Do you recall that the jury asked for submission of

the photo to it during deliberations?

A. I didn't recall that on my own, but I've obviously read your motion, so that helped to refresh my memory.

Q. And that is--

A. They did.

Q. --consistent?

A. Yes.

Q. Did you object at that point to the photograph being submitted to the jury?

A. I did not.

Q. Did you have any reason for not objecting?

A. No.

Q. I've been making reference to Ms. Mitchell-Johnson. She was the alleged victim in nearly all of the counts that Mr. Smith faced; correct?

A. I think all of the counts aside from felon in possession of a firearm.

Q. And, at the beginning of her testimony, do you recall that Ms. Mitchell-Johnson was offered and granted immunity for her testimony?

A. Yes.

Q. Do you recall that the Court then ruled that Ms. Mitchell-Johnson could be treated as an adverse witness?

A. Yes.

Q. Did you object to that ruling by the Court?

A. 14 years.
Q. At the time this case was tried, you were at the Public Defender's Office?
A. I was.
Q. What types of cases were you authorized to handle at that point?
A. All cases.
Q. Up to first-degree intentional homicide cases?
A. Yes.
Q. And you've in fact tried cases such as attempted homicides?
A. I have.
Q. As soon as last year?
A. Yes.
Q. Regarding the gun, I'll start there. You brought a motion in limine to prohibit the State from offering the demonstrative evidence that this was a gun that looked like the gun that was used in the incident. You brought that motion; correct?
A. I brought the motion, yes.
Q. And do you recall having a hearing on that with the Court?
A. Yes.
Q. And what was your understanding of the Court's ruling at the motion in limine hearing regarding the picture of that

gun?

A. That it was supposed to be used for a limited purpose.

Q. And what was that limited purpose?

A. As demonstrative evidence versus as actual evidence of the gun itself.

Q. When you say demonstrative evidence, do you mean something along the lines of evidence that's purported to look like or be something similar to the object in question but not actually the object in question?

A. Yes.

Q. And, when the State through Ms. Schlipper did introduce that evidence at the time, do you believe they were consistent with the Court's ruling in the way they did that?

A. In hindsight, no.

Q. I'm going to ask you a question here referencing page 77 and 78 of the court transcript, and this would have been when the victim was on the stand. Question from, excuse me, I believe Ms. Schlipper: "And didn't you e-mail…" a "picture of a gun to Detective Peterson?" Answer: "Yes, I did," a gun, "of a gun, mm-hmm." Would you agree that those--the use of the word "a gun" is consistent with the Court's ruling, rather than "the gun," which would be inconsistent with the Court's ruling?

A. Yes.

Q. So in fact the way in which the State through its witness, the victim in this matter, introduced that exhibit was

consistent with the Court's ruling?

A. I believe at that point, yes.

Q. Are you-- Do you recall that later on in the trial Detective Peterson testified when the State inquired, question: "Showing you what has already been admitted as Exhibit … 12, what is that a photo of?" And the detective stating, quote, excuse me, answer: "That's a photo that [BMJ] had emailed me, that she said that she found on an Instagram account, which she said might be the gun that was used by the defendant in the October 28th incident. But at a minimum, it resembled the gun." Do you recall that?

A. Yes.

Q. Do you agree that while that answer got a little bit closer to violating the Court's ruling, it was consistent ultimately with the Court's ruling?

A. I think so.

Q. What other evidence do you recall in this case was there that there was a gun involved?

A. There was testimony regarding there was a hole in the bedroom wall that was purportedly caused by a bullet entering that wall.

Q. Had the victim made statements to the police at any point regarding the gun?

ATTORNEY LESMONDE: Objection. Relevance. In light of the motion in limine ruling, I don't know if they're trying

to relitigate that, but that's what it appears to be to me.

THE COURT: Refresh my memory. Relitigate what?

ATTORNEY LESMONDE: The motion in limine ruling. I mean, the Court made a ruling about the limited scope of the admissibility of the photograph at trial. It seems to me that this line of questioning seeks to relitigate that issue.

ATTORNEY BROWN: Well, I suppose it does--

THE COURT: It actually seems to go to the second prong of the *Strickland* test if I'm not mistaken, whether there was prejudice to the defendant by introduction of this demonstrative exhibit or, as the defense contends, that there was actual weight given to it as a piece of evidence. So I'll allow that answer. I'll allow you to answer that.

BY ATTORNEY BROWN:

Q. I'll just re-ask the last question I asked, which is would you agree that the victim at some point had given statements to the police regarding the fact that a gun had been used by the defendant in this case?

A. She did.

Q. And those statements were introduced, albeit through prior inconsistent statements, leading questions, through the victim while she was testifying?

A. Yes.

Q. So, absent the picture being present in the case of a gun, the jury would have been left to their own devices to, I

won a big part of this case that saved his client from serving a significant portion of time of his life in prison.

THE COURT: All right. Tell me about the gun picture, the State's perspective on that. Was the jury not required to have a curative instruction or a cautionary instruction, I should say?

ATTORNEY BROWN: I think it's fully in your discretion whether you want to caution the jury with an instruction. In my time as a prosecutor, I've never once in my 28 trials that I've tried had a cautionary instruction sent to the jury on a piece of evidence. Certainly the testimony was absolutely clear.

THE COURT: Well, I think in every trial that you've had there's a cautionary instruction. It's a standard. There are several standard instructions that caution you what evidence is, what evidence isn't, what the comments of the attorneys are, what objections are, right on down the line. But, in this case, given the unique circumstances, do you believe that-- You can address the defense argument that it appears inadvertent responses of State's witnesses crossed the line into something that was ruled upon in the motion in limine.

ATTORNEY BROWN: I don't--I didn't hear any of that in evidence here today. I recited the two areas of transcript I thought were relevant, which in fact are from the defense motion, which the detective said at a minimum it resembled the

gun, referring to the e-mail that he received, and then again from the victim's direct testimony, question: "And didn't you e-mail…" a "picture of a gun to Detective Peterson?" Answer: "Yes, I did, of a gun, mm-hmm." I don't see anywhere where anyone crossed the line. Jasti testified that he believed both of those statements where the gun was mentioned were consistent with your in limine ruling prior to trial. Frankly, again I would point to the second prong of the *Strickland* test and ask you what prejudice there is. That's why I asked Mr. Jasti about other evidence of the gun being in the case. There was the hole in the wall. There was the testimony at least brought in through the prior statements of the defendant that she was shot at by the defendant, who had a gun. Certainly it's--

THE COURT: The bullet hole in the arm, was that-- That could have been considered by--

ATTORNEY BROWN: The arm, of course, slash fork wound that was later described at sentencing. Here we have a fairly standard picture of a handgun that was on an Instagram account. It was never testified to as being the gun. Everyone eventually, although Detective Peterson seems to have gotten close, came back and said it just resembled the gun, said that that was a resemblance of the gun at issue, and I think that was the purpose for which the State offered it. Frankly, I don't know why the State chose that that was a great route to go about a demonstrative piece of evidence. You could do that in

numerous ways. They could have brought in a facsimile gun. They could have had a stock photo. They chose this one because it was, I imagine, specifically what the victim had identified when she saw something and said, hey, that looks like the gun that was used, and they chose to use that one.

Frankly, I don't believe that the knowledge especially of Dane County jurors is so sufficient as it comes to firearms as to not need that demonstrative evidence. I think it's appropriate to be used. I think if you leave a Dane County jury to their devices on what gun they thought was used, they'll envision some sort of machine gun immediately. So here we have a fairly standard handgun picture off Instagram that was shown to the jury as a gun numerous times.

And I'll even note further there's been talk of the jury requesting this later on. I'm reading from the question. This is you talking. It says, referring to the jury question, quote: We would like to see the following exhibits. One, medical records from the eye injury - Dean Clinic. Two, photos from injuries. Three, photos of holes in the wall and closet. And, lastly, four, photo of gun. Not the gun. I think to the extent we can at all inquire as to or try to guess what the jury was thinking, that's our sole evidence, whether they said a gun, the gun. They just said photo of gun. Certainly I think they understood that there was just a picture of a gun that the victim had identified being consistent with the gun that was

used in this case.

I don't know of any prejudice that's been pointed to other than I suppose-- I just don't know of any. The jury simply seeing a picture of a gun, it was certainly present in this case that there was no gun recovered. That was reiterated by Mr. Jasti in argument, and today again on the stand he mentioned that. So the jury was certainly not confused that there wasn't a gun. Had there been a gun, they would have expected, I suppose, to actually see a real gun in court. They didn't. They saw this Instagram picture. Everyone described it as a gun.

THE COURT: All right. Just very narrowly, Counsel, the Detective Peterson statement, did it say more than that? Refresh my memory, if you could. Was there something more directly suggesting that that was the gun that was used?

ATTORNEY LESMONDE: The testimony from Detective Peterson?

THE COURT: Whatever you had referenced earlier.

ATTORNEY BROWN: I can reread--

ATTORNEY LESMONDE: There's two references that he's not really addressing.

THE COURT: Okay.

ATTORNEY LESMONDE: He did somewhat address Detective Peterson, which he said she came closer because she said that's a photo that the victim had e-mailed me that she

said she found on an Instagram account which she said might be the gun that was used by the defendant in the October 28th incident, but at a minimum it resembled the gun. That was Detective Peterson.

In addition to the example of the question that he likes to cite that was posed by Ms. Schlipper to Ms. Mitchell-Johnson, she also asked, and this kind of happened twice because of the witness apparently asking for the question to be repeated, "Didn't you tell Detective Peterson," and there's some minor differences between the two versions, "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?"

So it's our position that is where the suggestion comes from that this was a much more personal photo, that this was not just demonstrative, and without the jury being told anything different, the jury would think this was substantive evidence.

ATTORNEY BROWN: And then just briefly, the response to that question, though, that she just read, "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?" Answer by the victim: "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." So it was--

THE COURT: Who had a picture of a gun on the wall?

ATTORNEY BROWN: "Wall" refers to your-- I suppose it refers to Facebook, but at the time, someone could have used that for Instagram.

THE COURT: All right. Old guy question. We don't know who this unnamed individual was that it could have been his or her gun; is that right?

ATTORNEY LESMONDE: Yeah. There was no-- Attorney Jasti never investigated, per his testimony today, because the information from the State was insufficient to investigate the source of the photo.

THE COURT: All right. Well, first of all, I mean, I have to compliment the defense. You've done an outstanding job of going over this case with a fine-toothed comb and raising important and significant issues, and it's essential to quality control of this court. Let me start with the picture of the gun.

ATTORNEY LESMONDE: Might I respond briefly?

THE COURT: Yeah, if you need to. I think you pretty much--

ATTORNEY LESMONDE: Very briefly.

THE COURT: Yeah.

ATTORNEY LESMONDE: As far as the counsel's duty to object, I just want to clarify. There was absolutely no objection about the adverse-witness ruling. There was not one

objection about leading. There was not one objection about hearsay by Attorney Jasti. This isn't an issue of I'm suggesting and Attorney Jasti failed to repeatedly object to every question. There were none. I just did want to clarify that because the State seems to keep arguing something different.

ATTORNEY BROWN: That wasn't my argument. My argument is simply that the Court had made a ruling, and Jasti had chosen not to rehash that numerous times--

ATTORNEY LESMONDE: He didn't--

ATTORNEY BROWN: --because he believed the Court had made a ruling.

THE COURT: Listen, I understand what everybody is saying. I'm on track here. I didn't know what a wall was, but I'm on top of the rest of the stuff. Go ahead.

ATTORNEY LESMONDE: All right. There was one other thing that I wanted to address, and I'm not really sure what the State's position is. I can't quite grasp that, I guess. As far as the hearsay statements, as I've laid out in the motion, there wasn't an inconsistent statement. So this wasn't just they were admissible or the adverse-witness ruling made them admissible somehow, or. An attorney has a duty to object. An attorney has a duty to keep out irrelevant, inadmissible, excludable evidence. He did not do that. There are good reasons for objecting to hearsay. This was not a situation where they were

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 : 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

Exhibit 1

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,

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

ISSUES PRESENTED

1. Has Defendant-Appellant Deandre M. Smith proven that his trial counsel was ineffective for his actions relating to the State's introduction of a photograph of a gun and to the questioning of the victim at trial?

The circuit court answered no.

This Court should answer no.

2. Was the evidence insufficient to convict Smith of felon in possession of a firearm?

By entering judgment on the jury's verdict, the circuit court answered no.

This Court should answer no.

3. Should this Court grant Smith a new trial in the interest of justice?

The circuit court did not address this issue.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The parties' briefs will fully develop the issues presented, which can be resolved by applying well-established precedent.

INTRODUCTION

A jury convicted Smith of battering BMJ and felon in possession of a firearm. Before trial, BMJ gave police a photograph of a gun that she said looked like the one Smith possessed. The circuit court allowed the State to use the photo only as demonstrative evidence—that is, it did not allow the State to elicit testimony that the gun in the photo was the gun that Smith possessed.

Finally, Smith compares the photo's prejudicial effect to the wrench used as demonstrative evidence in *Anderson*. (Smith's Br. 17–18.) He claims that it is possible that the photo led the jury to believe that it depicted the gun Smith possessed, which could not have happened in *Anderson* because it was clear the wrench was not the one stolen. (Smith's Br. 17–18.) And Smith notes that here, unlike the wrench in *Anderson*, the State introduced the photo into evidence. (Smith's Br. 18.)

Smith does not really develop this argument. He can only speculate that the jury must have been misled into thinking that the photo depicted the gun Smith used. As argued in the next section, that is unlikely. And the State fails to see why admitting the photo as evidence made it unfairly prejudicial under Wis. Stat. § 904.03 and *Anderson*. Even though the State did not introduce the wrench in *Anderson*, the jury still saw it and likely relied on it. *Anderson*, 66 Wis. 2d at 247–48. The admission of the photo as an exhibit did not make it prejudicial.

In sum, Smith has not demonstrated that Jasti was deficient for failing to object to the photograph as unfairly prejudicial.

3. The State did not violate the court's pretrial order on the photo.

Next, Smith argues that Jasti was deficient for not objecting to what he claims is the State's violation of the court's pretrial order about the photo. (Smith's Br. 18–20.) These violations, Smith claims, might have led the jury to believe that the State was arguing that the gun in the photo was the gun he used. (Smith's Br. 18–20.) This claim fails because the State complied with the order.

Smith lists five statements that the jury heard that he contends amounted to the State's violating the pretrial order. But neither by themselves nor together do they show that the

State used the photo as anything other than demonstrative evidence.

The first statement is that BMJ gave the photo to Detective Peterson. (Smith's Br. 19.) That is undisputed. (R. 141:92.) There is nothing in this statement that possibly suggests that the photo was of Smith's gun.

The second statement is that BMJ got the photo off an Instagram account of an unidentified friend of hers or Smith's. (Smith's Br. 19.) The State does not dispute this, either. (R. 140:77–78; 141:51.) But the statement does not say that the gun depicted was Smith's.

The third statement is the State's question of BMJ whether she told Peterson that a friend of Smith's had taken the picture of the gun while it was on BMJ's couch. (R. 140:78.) But, as argued, this question appears to be a misstatement by the prosecutor, who was restating a question whether BMJ had told Peterson that a friend of the defendant took the photo on the friend's couch. (R. 140:77–78.) It is not obvious that the jury would have been misled by the State's misstatement.

In addition, there was no evidence suggesting that the picture was taken on BMJ's couch. BMJ never acknowledged telling Peterson this, and Peterson never testified that BMJ had said it to her. (R. 140:78; 141:92.) The court instructed the jury on the meaning of evidence. (R. 140:23; 143:4.) Nothing meeting that definition established that the photo was taken on BMJ's couch.

Further, even if the jury could infer that the photo was taken on BMJ's couch, Smith fails to explain how this violated the court's order. The State was prohibited from using the photo to say that it depicted Smith's gun. That the photo might have been taken on BMJ's couch does not establish this proposition.

The fourth and fifth statements are Peterson's testimony that BMJ told her that the photo might be the gun that Smith had on October 28, 2014. (Smith's Br. 19; 141:92.) These statements did not violate the court's order. Peterson did not say that BMJ told her that the photo was of the gun. Instead, she told Peterson that it might be the gun and that it "resembled the gun." (R. 141:92.) If the gun in the photo looked like the gun Smith used, then it obviously could be the gun. But the State was prohibited only from eliciting testimony that the photo depicted Smith's gun. Peterson's testimony did not do this.

In sum, because the State's questioning and the witnesses' answers did not violate the court's pretrial order about the photo, there was no basis for Jasti to object. He was thus not deficient for failing to do so. *Wheat*, 256 Wis. 2d 270, ¶ 14.

C. Jasti's decisions not to object to the court's declaring BMJ a hostile witness, not to object to the State examination of her, and not to cross-examine her about her version of the events were reasonable.

Smith next faults Jasti for not objecting when the court found that BMJ was a hostile witness and to the method in which the State conducted its direct examination of her. (Smith's Br. 20–27.) Smith also claims that Jasti should have asked BMJ about her version of what happened on October 28 and December 27, 2014. (Smith's Br. 27–28.) Because Jasti's actions were based on reasonable strategic considerations, this Court should reject these arguments.

As Jasti explained at the postconviction hearing, he did not object to how the State examined BMJ using leading questions and hearsay because he thought that it helped the defense. (R. 147:22–23.) He believed that the State looked like it was controlling her testimony and was cutting her off from