**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 30, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2015AP356-CR** **Cir. Ct. No. 2011CF2926**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JACQUIS LAMONT LEICHMAN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Jacquis Lamont Leichman, *pro se*, appeals from a judgment of conviction, entered upon a jury's verdict, on one count of first-degree intentional homicide as a party to a crime. Leichman also appeals from an order

denying his postconviction motion without a hearing. We conclude the trial court properly denied the motion and affirm.

## BACKGROUND

¶2 On June 17, 2011, a group of women was standing on a Milwaukee street. Leichman's aunt, Felicia Leichman,[1] approached the group and began to argue with them. Kenda Baker, the brother of one of the women in the group, was nearby and told Felicia not to insult his sister. The other women had to separate Felicia and Baker. A man then walked up and shot Baker multiple times, killing him. Felicia and at least one of the women identified Leichman as the shooter. At trial, Felicia testified that Leichman, with whom she shared a residence, approached Baker and hit him in the head with the gun more than once before shooting him.

¶3 Leichman was charged with first-degree intentional homicide as a party to a crime with the use of a dangerous weapon. A jury convicted him. The trial court imposed a life sentence with no opportunity for extended supervision. Leichman filed a postconviction motion on multiple grounds.[2] The trial court denied the motion without a hearing. Leichman appeals. Additional facts will be discussed as necessary.

[1] We will refer to Felicia Leichman as "Felicia" throughout this opinion.

[2] To the extent there are issues raised in the postconviction motion that Leichman does not raise on appeal, we do not consider them. *See* ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed deemed abandoned).

## DISCUSSION

¶4 "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a motion alleges sufficient facts to warrant a hearing is subject to a mixed standard of review. *See* ***id.***, ¶9. The facial sufficiency of the motion is a question of law, and if the motion alleges sufficient facts, the trial court must hold an evidentiary hearing. *See* ***id.*** If the motion does not raise sufficient facts, or if it presents only conclusory allegations, or if the record conclusively demonstrates the defendant is not entitled to relief, then the trial court may grant or deny a hearing at its discretion. *See* ***id.*** We review the trial court's discretionary decision for an erroneous exercise of that discretion. *See* ***id.***

### *I. Ineffective Assistance of Trial Counsel*

¶5 Leichman contends that his trial attorney—actually, his *third* appointed trial attorney—was ineffective because she failed to adequately investigate, interview, and call Vincent Juarez, Willa Leichman, or Marshall Smith as witnesses. He also claims counsel was ineffective for failing to move to suppress a receipt and two gun magazines recovered in a search of his residence.

¶6 To prevail on a claim of ineffective assistance, the movant must establish that counsel's performance was deficient—that is, that it fell below an objective standard of reasonableness—and that the deficient performance was prejudicial. *See* ***State v. Wood***, 2010 WI 17, ¶70, 323 Wis. 2d 321, 780 N.W.2d 63. To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

have been different. *See* ***State v. Williams***, 2015 WI 75, ¶74, 364 Wis. 2d 126, 867 N.W.2d 736.

*A. The failure to call witnesses*

¶7 "It is within an attorney's discretion to call or not call a particular witness, if the circumstances of the case reasonably support such a decision." ***Wood***, 323 Wis. 2d 321, ¶73. We generally do not second-guess counsel's discretionary decisions at trial if the decisions were rational in light of the law and the facts of the case. *See* ***id.***

*1. Vincent Juarez*

¶8 Juarez was a witness to the shooting. Leichman complains that counsel should have called Juarez to cast doubt on Leichman's identity as the shooter. Juarez had described the shooter as a black male with a light complexion, but Leichman describes himself as dark-complected.[3]

¶9 During trial, Leichman wrote to the trial court about counsel's refusal to call Juarez. The trial court addressed the letter outside the jury's presence. Juarez had been unable to identify the shooter from a photo array, but told police that if he saw the shooter in person, he could identify him. Defense counsel told the court she was concerned that Juarez would thus be more helpful to

[3] Leichman also argues that Juarez, who described seeing the shooter come from the back of Felicia's home, would have contradicted witness Tabitha Jones. Jones told police her sister went to the residence to get Leichman's assistance, but Juarez did not tell police that he saw a girl going to get Leichman. However, Leichman makes this argument in his postconviction motion, and our review is limited to allegations made therein. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433. In any event, Juarez's and Jones' statements are not necessarily contradictory.

the State than to the defense. Indeed, the State noted that Juarez was on its witness list, although it had been unable to find him. Defense counsel also noted that Juarez was able to connect the shooter to Felicia.

¶10 In denying the postconviction motion, the trial court noted that Juarez had recognized Felicia at the scene and saw the shooter coming from the rear of her home. The trial court thus accepted counsel's representation that she had made a reasoned decision against calling Juarez. We agree with this assessment. It is not ineffective to decline to call a witness who would likely be more helpful to the State. *See* ***State v. Eckert***, 203 Wis. 2d 497, 515, 553 N.W.2d 539 (Ct. App. 1996).

*2. Willa Leichman and Marshall Smith*

¶11 Leichman claims that Willa Leichman—his mother—and Marshall Smith—relationship unknown—could provide him with an alibi. He complains that counsel was informed of this well in advance of the trial but she never investigated them as potential witnesses and never explained why she thought they should not be called. The trial court concluded that the postconviction claim regarding these witnesses was insufficiently pled.

¶12 A postconviction motion sufficient to satisfy the "sufficient material facts" standard "allege[s] the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." ***Allen***, 274 Wis. 2d 568, ¶23. The postconviction motion only alleges that these two witnesses could provide him with an alibi. It does not

provide any of the details of their potential testimony, such as where they were with Leichman, when they were there with him, or what they were doing.[4]

¶13 Leichman faults his attorney for not conducting a "reasonable investigation" to find out these details. *See* ***Washington v. Smith***, 219 F.3d 620, 631 (7th Cir. 2000) (failure to investigate can constitute ineffective assistance). However, Leichman still has the burden to demonstrate prejudice from his attorney's failure to investigate. *See* ***id.*** at 632. He has not met this burden: if these witnesses were to provide an alibi for Leichman because they were together, then Leichman himself should have some knowledge of how the witnesses would testify. We agree with the trial court that the claim of ineffective assistance for failure to investigate or call these two witnesses is insufficiently pled.

*B. Failure to File a Suppression Motion*

¶14 Leichman also complains that his attorney was ineffective for failing to move to suppress a "receipt used as an identifier" and two Glock magazines. Counsel had sought to suppress those and other items as more prejudicial than probative, and succeeded with respect to many of the other items. However, Leichman believes that counsel should have filed a formal motion to suppress the magazines based on what he believes was an invalid, warrantless search.

¶15 The day after the shooting, officers went to Leichman's home to look for him. The only person in the house was Clay Johnson (Clay), brother of

[4] We note, though, that in its response to Leichman's postconviction motion, the State points out that Leichman's prior trial attorney disclosed she had spoken with both of these witnesses, and neither told her anything beneficial to Leichman.

co-resident Randy Johnson (Johnson).[5] Clay told police that Leichman had invited him to spend the night, and he allowed the officers in to look for Leichman. When the officers spotted the butt of a gun sticking out from between a mattress and box spring, they secured the scene and applied for a search warrant. Proceeding with the warrant, officers recovered a receipt that identified Leichman and two Glock magazines that matched the caliber of bullet used in the shooting.[6] Other guns and drugs found in the house were not admitted at trial.

¶16 In the postconviction motion, Leichman made no mention of the search warrant, he merely asserted that Clay Johnson lacked standing to consent to any search. The trial court determined that consent had been validly given. The appellate brief also fails to mention the search warrant, but in his reply brief, Leichman invokes the "fruit of the poisonous tree" theory for suppression. *See* ***Wong Sun v. United States***, 371 U.S. 471, 488 (1963).

¶17 On this issue, we agree with the State: the receipt and the magazines were discovered pursuant to a valid search warrant, the validity of which Leichman did not challenge until his reply brief. There would have been no basis on which to grant a suppression motion.[7] *See* ***State v. Hurley***, 2015 WI 35, ¶29,

[5] Leichman complains about a lack of proof that Johnson lived in the home; however, Felicia testified that he did. Documentary evidence to prove tenancy is not required.

[6] The actual gun used in the shooting was not recovered.

[7] We do, however, also agree with the alternate theories presented: Clay Johnson, even though he was a guest, had sufficient authority to consent to the officers' search for Leichman because he was the brother of one of the residents, had been invited to spend the night by another, and was permitted to be in the residence alone. *See* ***State v. Sobczak***, 2013 WI 52, ¶¶20-25, 347 Wis. 2d 724, 833 N.W.2d 59. Additionally, even if Clay Johnson did not have sufficient standing as a guest to consent to the search, the warrant application had sufficient untainted information supporting it, *see* ***State v. St. Martin***, 2011 WI 44, ¶30, 334 Wis. 2d 290, 800 N.W.2d 858, so the recovery of the receipt and magazines still stands.

361 Wis. 2d 529, 861 N.W.2d 174 (we may affirm for reasons other than those relied upon by the trial court). Counsel is not ineffective for failing to pursue a meritless motion. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

*II. "Improper Admission of Documentary Evidence, And Testimony Related To It's [sic] Admission"*

¶18 Leichman also complains about the admission of the contents of a letter, which the State described as a "hit list," that he supposedly wrote to Johnson. Leichman also wanted to exclude related testimony from Milwaukee police officer Daniel Roufus. Leichman's postconviction motion asserted there was insufficient foundation for this hearsay testimony.[8]

¶19 On appeal, Leichman asserts that the letter, recovered from Johnson's coat pocket during a traffic stop, lacked foundation; specifically, he says that the trial court had said the letter would not be admitted unless Felicia recognized the handwriting, but she did not, so the trial court erred in allowing the letter to come in. Leichman also complains it was error to allow admission of a photocopy instead of the original, and that Roufus's testimony about the letter's contents was inadmissible hearsay.

¶20 The admission or exclusion of evidence is committed to the trial court's discretion. *See* ***State v. Rhodes***, 2011 WI 73, ¶22, 336 Wis. 2d 64, 799 N.W.2d 850. On review, we consider whether the trial court reviewed the relevant

[8] The trial court correctly noted that a party's own statements are not hearsay. *See* WIS. STAT. § 908.01(4)(b)1. (2013-14).

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

facts, applied the proper standard of law, and used a rational process to reach a reasonable conclusion. *See* ***id.***

*A. Admission of the Letter's Contents*

¶21 Authentication "as a condition precedent to admissibility [is] satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." WIS. STAT. § 909.01. There are many examples given for what constitutes satisfactory authentication, including "[t]estimony of a witness with knowledge that a matter is what it is claimed to be," but the list is illustrative only. *See generally* WIS. STAT. § 909.015. In other words, the acceptable methods for authenticating a document are not limited to those specified in the statute.

¶22 First, we reject Leichman's assertion that the trial court determined the letter would be authenticated only if Felicia identified the handwriting. When discussing the potential admission of the letter, the trial court observed:

> [T]he State mentioned that it believes Ms. Leichman … was sent letters from the Defendant that she may be able to testify that she's familiar with his handwriting. And if she can, I think that is a fair part of the authentication chain. And for that I would cite 909.015(2) …. So she may well have that knowledge. I don't know. But the State is certainly entitled to inquire.
>
> Also in terms of authentication, 909.015(4), distinctive characteristics … taken in conjunction with the circumstances, can serve to further authentication or laying of foundation.
>
> If the content itself references witnesses in this case or other identifiers associated with this case, coupled with recognizing the handwriting, coupled with finding it on the person of a person that can be established as a friend … et cetera. I mean, if the State can put all those links together, I think that's going to be fair identification ….

> ….
>
> I just think that either the foundation is going to get laid or it's not. And if she can't recognize the handwriting, it's never going to get admitted, and no one is going to talk about the contents.…
>
> [State,] anything to add to that record?
>
> [DISTRICT ATTORNEY]: No. Other than that the Court wouldn't foreclose the possibility of other foundation no matter what - -
>
> THE COURT: Yeah. It's not exhaustive. I was just using some of the examples you gave. And in particular, the handwriting because I think [defense counsel] wasn't sure whether that was fair game.

It is clear that the trial court did not hold that the only means of authenticating the letter would be Felicia's identification of Leichman's handwriting. Rather, the trial court was noting that it was the State's burden to provide the appropriate foundation for the letter.

¶23 The evidence offered by the State to authenticate the letter included the following. The letter was recovered from Johnson, who lived with the Leichmans. Part of Leichman's first name—"Jacqu"—was visible in the return address of the torn envelope. The visible portion of the return address matched Leichman's jail pod location. Felicia testified that she recognized the handwriting as Leichman's because she had received two letters from him while she was in the House of Correction. She then volunteered that she did not "know if he wrote the letters, but I do know the letters came from him to me." Felicia also admitted she was not certain if he had done the actual writing. However, she had recognized the letter's heading, "death before dishonor," as words from a tattoo on Leichman's neck.

¶24 The trial court ultimately determined that the State sufficiently authenticated the letter. Denying the postconviction motion, the trial court reaffirmed its decision. On review, we discern no error in the trial court's determination that the document was properly authenticated; there were multiple grounds used to establish that the letter was what the State claimed it was.

*B. Admission of a Photocopy*

¶25 It came to light during the trial that the State had destroyed Leichman's original letter and was using a photocopy. Leichman complains this was unfair "because authenticity of the original was questionable due to the unknown handwriting" that appeared in the margins of the letter. At trial, the trial court noted that "what this boils down to is how the best evidence rule is going to apply."

¶26 The best evidence rule, WIS. STAT. § 910.02, states: "To prove the content of a writing … the original writing … is required, except as otherwise provided" by statute. Meanwhile, WIS. STAT. § 910.03 states that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

¶27 The trial court, though dismayed by the State's last minute revelation, concluded that the best evidence rule did not preclude use of the copy. The trial court noted that the additional handwriting was three mileage notations, clearly in someone else's handwriting. Coupled with a contemporaneous police report that memorialized the contents of the original, the trial court concluded there was no bar to the duplicate under WIS. STAT. § 910.03, and any questions

relating to the mystery writing were proper for cross-examination. We discern no erroneous exercise of discretion in this conclusion.[9]

*C. Testimony of Officer Roufus*

¶28 Leichman also complains that Officer Roufus's testimony was hearsay. Roufus had participated in the traffic stop of Johnson but did not prepare a report on the stop. It appears that Leichman objects to Roufus's testimony because the State introduced the "hit list" letter's contents by having Roufus read the typed transcript of the letter from the police report.

¶29 We conclude that if there is any error in allowing Roufus to read from someone else's report, it was harmless. *See* ***State v. Deadwiller***, 2013 WI 75, ¶41, 350 Wis. 2d 138, 834 N.W.2d 362. We note that Leichman has not challenged the accuracy of the transcription. Further, Roufus, who had viewed the original letter, identified the photocopy as a true and correct copy of the letter recovered from Johnson's pocket. To avoid any hearsay problem with reading from another officer's report, the State could simply have had Roufus read from the copy of the letter itself, which was not hearsay because it purportedly contained Leichman's own statement. *See* WIS. STAT. § 908.01(4)(b)1.

*III. Prosecutorial Misconduct*

¶30 Leichman contends the State engaged in prosecutorial misconduct by knowingly using false testimony from Felicia and by improper closing

[9] Additionally, WIS. STAT. § 910.04(1) provides that an original is not required, and other evidence of the contents of a writing is admissible, if "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith[.]" No one suggests bad faith by the State.

arguments. "The determination of whether prosecutorial misconduct occurred and whether such conduct requires a new trial is within the trial court's discretion." ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996). The defendant has the burden to show the prosecutor's conduct constitutes overreaching and is intentional. *See* ***State v. Harrell***, 85 Wis. 2d 331, 337, 270 N.W.2d 428 (Ct. App. 1978). We review allegations of prosecutorial misconduct against the entire case record. *See* ***Lettice***, 205 Wis. 2d at 353.

*A. False Testimony*

¶31 Leichman contends the State presented false testimony from Felicia because she originally told police that "Lil Ron" was the shooter but then testified at trial that Leichman was the shooter. Leichman implies that the State threatened Felicia if she failed to implicate him at trial.

¶32 A conviction must be set aside if the State's case included perjured testimony, the State knew or should have known of the perjury, and there is any reasonable likelihood that the false testimony could have affected the jury's judgment. *See* ***United States v. Verser***, 916 F.2d 1268, 1271 (7th Cir. 1990); ***Napue v. Illinois***, 360 U.S. 264, 269 (1959). However, "[t]he presentation of inconsistent testimony is not to be confused with presenting perjured testimony." ***State v. Whiting***, 136 Wis. 2d 400, 418, 402 N.W.2d 723 (Ct. App. 1987). "It is the jury's role to resolve issues of credibility." ***Id.***

¶33 Here, the trial court explained that Felicia's testimony was inconsistent, not the knowing subornation of perjury. Felicia admitted to the jury that she initially denied witnessing anything, then identified someone else as the shooter before telling police that Leichman was the culprit. The jury heard about criminal charges Felicia faced after the shooting, as well as her plea negotiations

with the State and her assertion that the State was going to charge her "with murder" if she did not testify against Leichman. But Felicia also told the jury that she had agreed to testify truthfully at trial. Then, on cross-examination, this exchange occurred:

> Q Now, during this time frame that they're questioning you, do you believe that unless you tell them what … they want you to, that you're going to be charged with first-degree intentional homicide?
>
> A Oh, boy. Truthfully?
>
> Q Yes, we want you to tell the truth.
>
> A Well, truthfully, I knew who did it but I didn't want to testify because that's my nephew.

Felicia then repeated her claim that she was coerced into giving police that information with the threat of a first-degree intentional homicide charge.

¶34 In short, there is no way to know which of Felicia's statements was true and which was false, so it was ultimately for the jury to decide which of Felicia's statements to believe. Clearly, it believed her trial testimony to be true.

¶35 Leichman complains that the trial court failed to consider Felicia's "newly sworn affidavit" which was included with the postconviction motion. However, Felicia's affidavit does not include any new information that the jury did not have for its consideration; it primarily reiterates her original statement that someone else was the shooter and she was coerced into naming Leichman. The affidavit certainly does not demonstrate that the State knew or should have known her trial testimony was false. The trial court properly rejected Leichman's claim.

### *B. Improper Closing Arguments*

#### *1. Inferences from the Letters*

¶36 In its closing arguments, the State reminded the jury of the letters Leichman had sent to Johnson and Felicia. Based on the letters, the State argued:

> So the point being is that the witnesses came forward, told you what happened, but there's also substantial other evidence[.] … I want you to look at these particular letters that were sent because they're important.
>
> Not once in any of the letters that the defendant sends does he ever say he didn't do it.…
>
> … You know, he wants his friends to "breathe on the motherfuckers way before trial. Get her.["] … He says, "And I need you to get on it asap." …
>
> ….
>
> [I]t shows that Jacquis Leichman is guilty because he is the one that wrote that letter and he's the one who sent it to Randy Johnson …. Does he once say I didn't do it, bro', I've been framed, bro'? No, not once because he did it and doesn't care that he did it. He just wants to get away with it.…
>
> ….
>
> Does he ever say he didn't do it? No. Just don't testify against me. He did it.

From this line of argument, Leichman asserts, "It is clear [the State] argued to the jury Mr. Leichman confessed to this crime."

¶37 "During closing arguments, a prosecutor is entitled to 'comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors.'" ***State v. Miller***, 2012 WI App 68, ¶20, 341 Wis. 2d 737, 816 N.W.2d 331 (citation omitted). That is all the State did here.

¶38 In the context of the entire closing argument, it is clear that the State was asking the jurors to infer consciousness of guilt from Leichman's lack of any denials in his letters and his attempts to dissuade or intimidate witnesses. Awareness of one's guilt and failure to deny responsibility are not the same thing as an outright confession, and Leichman points to nothing where the State said, much less implied, any confession.

*2. The Testimony of Cassandra Hernandez*

¶39 Finally, Leichman claims that the State mischaracterized the testimony of Cassandra Hernandez. The State argued, "She sees it happen and she corroborates the fact that it happened and the manner that it happened …. She sees the shooter come up. She can't identify him. She sees the pistol whipping, him fall. She sees the shooting. She corroborates everything." Leichman asserts that Hernandez never testified about the shooter fighting nor pistol whipping the victim, so the State was trying to bolster her testimony with improper argument.

¶40 Leichman did not raise this issue in his postconviction motion. Evidently aware that we typically do not consider arguments raised for the first time on appeal, he nevertheless asks us to consider the argument in the interests of justice under WIS. STAT. § 752.35. That statute authorizes discretionary reversal if the real controversy has not been fully tried or if "it is probable that justice has for any reason miscarried[.]" ***Id.***

¶41 The State on appeal concedes that the prosecutor made a "misstatement" about Hernandez's testimony. We agree, however, that the comments do not warrant relief. Notably, Hernandez did not identify the shooter. She, like other witnesses, saw a man walk up and shoot the victim multiple times. Whether she also saw a fight and pistol whipping adds nothing to her credibility.

In light of the other evidence presented in this matter, we are not persuaded that the State's comments caused justice to miscarry, and we do not consider this argument in any other context.

*By the Court*.—Judgment and order affirmed.

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