COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1325-CR **Cir. Ct. No. 2012CF1509**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE D. TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: DAVID L. BOROWSKI and DANIEL L. KONKOL, Judges. *Judgment affirmed; orders reversed in part; and cause remanded for further proceedings*.

Before Kloppenburg, P.J, Sherman, and Blanchard, JJ.

¶1 BLANCHARD, J. George Taylor appeals a judgment of conviction for felony murder following a jury trial at which the State presented

evidence that Taylor, together with Steven Hopgood and Laquan Riley, participated in an armed robbery that resulted in the fatal shooting of Vincent Cort.[1] Taylor asks that we remand to the circuit court for a new trial. In the alternative, Taylor requests remand for an evidentiary hearing to address issues raised in his motion for post-conviction relief.

¶2 Taylor argues that a new trial is required because: (1) the State failed to disclose three categories of material, exculpatory evidence in time for his use at trial, in violation of the constitutional principles described in ***Brady v. Maryland***, 373 U.S. 83, 87 (1963); (2) the circuit court erroneously exercised its discretion in denying a mistrial motion based on improper statements by a prosecutor; (3) the circuit court unconstitutionally truncated his right to confront a witness; (4) the circuit court violated his due process rights by not trying Taylor separately from his codefendants; (5) his trial counsel provided ineffective assistance in multiple ways and the circuit court should have granted a ***Machner***[2] hearing on these claims; and (6) the interest of justice requires it. In addition, Taylor argues that resentencing is required because the sentencing court relied on inaccurate information.

¶3 We reject each of Taylor's arguments except one, his argument that he is entitled to a ***Machner*** hearing on his claim that his trial counsel provided

[1] Taylor, Hopgood, and Riley were codefendants in a single December 2012 trial, resulting in convictions of each, and each pursued a direct appeal. Last year, we affirmed Hopgood's conviction in ***State v. Hopgood***, No. 2014AP2742-CR, unpublished slip op. (WI App June 2, 2016). By separate opinion issued today, we affirm Riley's conviction. ***State v. Riley***, No. 2015AP2125-CR. The Honorable David L. Borowski presided over the joint trial of Taylor, Hopgood, and Riley, and sentenced Taylor, while the Honorable Daniel L. Konkol addressed Taylor's post-conviction motions.

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

ineffective assistance in failing to call a witness at trial who could have directly impeached testimony of the State's main witness at trial, Paris Saffold, that Taylor drove a white BMW as the getaway car for alleged shooter Riley. We therefore affirm in part, reverse in part, and remand for further proceedings, namely, a ***Machner*** hearing.

BACKGROUND

¶4 The following basic background provided in ***State v. Hopgood***, No. 2014AP2742-CR, unpublished slip op. (WI App June 2, 2016), is not now disputed by either party:

> One evening in June 2010, Vincent Cort pulled his orange Oldsmobile sedan into a Milwaukee liquor store parking lot. Cort entered the store, exited with a bottle, and returned to his car. A person approached Cort, pointed a gun at him, and yelled, "Give it up." Cort did not immediately submit, and the person fired at least one round, hitting Cort. Cort managed to drive out of the parking lot, and he was transported to a hospital, where he later died.
>
> In February 2012, 20 months later, police arrested Paris Saffold in connection with a drug investigation unrelated to Cort's homicide. At that time, Saffold told police that he had been an eyewitness to events leading up to and including Cort's homicide. More specifically, Saffold said that, at the time of Cort's homicide, Saffold had been living in an apartment complex across the street from the liquor store where Cort was fatally shot, and that Saffold had witnessed three individuals—whom police identified as [Steven] Hopgood, Laquan Riley, and George Taylor—plan the armed robbery. Saffold told police that Riley shot Cort using a gun that Hopgood had just provided to Riley.
>
> … [A]t the joint trial of Hopgood, Riley, and Taylor, the State relied heavily on Saffold's eyewitness testimony.

Id., ¶¶4-6. We reference additional pertinent facts in the Discussion section below.

¶5 The jury convicted Taylor of felony murder-armed robbery, in violation of WIS. STAT. § 940.03 (2015-16).[3] Taylor filed a post-conviction motion, which the court denied in a written decision without holding an evidentiary hearing. Taylor filed a motion for reconsideration, which the court denied in a written decision. Taylor appeals these post-conviction decisions of the circuit court, as well as rulings during trial and at sentencing.

DISCUSSION

I. *BRADY* ISSUES

¶6 Taylor argues that a new trial is required because the State failed to timely disclose the following three categories of evidence, which he asserts are each favorable to Taylor and material to guilt: (1) surveillance camera video images that undermine the testimony of the State's main witness, Saffold; (2) evidence that the State provided $770 in housing assistance to Saffold; and (3) evidence that one of the lead detectives on the Cort case was at the time of Taylor's trial "under investigation for allegations of professional misconduct and dishonesty."

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. The version of the statutes applied here was the 2009-10 version, but there is no difference between the two versions.

A. *Brady* Legal Standards

¶7 The State must disclose evidence favorable to an accused if the evidence is material either to guilt or punishment. ***State v. Harris***, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737 (citing ***Brady***, 373 U.S. at 87). "Evidence is favorable to an accused, when, 'if disclosed and used effectively, it may make the difference between conviction and acquittal.'" ***Harris***, ¶12 (quoting ***United States v. Bagley***, 473 U.S. 667, 676 (1985)). Evidence may be favorable to the accused either because it is exculpatory or because it has value in impeaching a witness. ***Harris***, 272 Wis. 2d 80, ¶12. At the same time, "there is never a real '***Brady*** violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." ***Id.***, ¶14 (quoted source omitted).

¶8 Because a ***Brady*** violation "entails prejudice to the accused," it "necessarily entitles the defendant to a new trial." ***State v. Harris***, 2008 WI 15, ¶62, 307 Wis. 2d 555, 745 N.W.2d 397.

B. Additional Background & Analysis

*1. Video-based **Brady** Argument*

¶9 Taylor submitted a DVD with his post-conviction motion. The DVD contained video images of the area of the liquor store taken around the time of the shooting. The State does not dispute that it produced the DVD to Taylor too late for his use at trial. The DVD includes multiple video files, to which we will refer,

both individually and collectively, as "the late-disclosed video."[4] Taylor argues that the late-disclosed video "destroys Saffold's credibility," because it undermines his testimony about the whereabouts of Taylor and alleged shooter Riley shortly before the shooting.

¶10 Understanding Taylor's video-based ***Brady*** argument requires the following additional background regarding testimony at trial and the late-disclosed video. We first summarize pertinent trial testimony, which came from two witnesses: Saffold and Latoria Dodson.

¶11 Saffold testified that he, Taylor, Hopgood, and Riley were at an apartment building, where Saffold lived, across the street from the liquor store shortly before the shooting. While outside, they spotted Cort's orange car pull into the liquor store lot, Taylor made a comment about Cort, and Hopgood suggested that the men rob Cort, specifically suggesting that they "take his car." Riley "chim[ed] in" and "volunteered to go take the car." Hopgood went to an apartment and retrieved a .380 caliber automatic handgun, which he handed to Riley. In the meantime, Riley donned a dark hoodie, which he "would have"

[4] Separate from the late-disclosed video, the State offered at trial other video ("the trial video") from surveillance cameras to which Taylor raises no challenge. Taylor fails to include in the record of this appeal the trial video, even though it is potentially pertinent to Taylor's video-related ***Brady*** argument, because the trial video may shed light on what effect the late-disclosed video could have had on the jury. Based on this failing alone we could affirm on the video-related ***Brady*** issue, presuming that video shown to the jury would negate Taylor's video-related ***Brady*** arguments. *See* ***Butcher v. Ameritech Corp.***, 2007 WI App 5, ¶35, 298 Wis. 2d 468, 727 N.W.2d 546 (2006) (in the absence of pertinent exhibits "we presume that every fact essential to sustain the circuit court's decision is supported by the record."). However, we choose to address the merits of Taylor's video-related ***Brady*** argument.

obtained from Taylor, and tightened the hood to conceal his face.[5] Hopgood "instruct[ed]" Riley as to "what to do," and cautioned Riley to "be careful" because there was "only one bullet" in the handgun.

¶12 Saffold further testified that, as Cort left the liquor store, Riley crossed the street from the apartment building to a median area. By the time Cort reached his car, Riley had reached the liquor store lot. As Cort tried to drive off, Riley grabbed the car door handle, opened the door, and fired a single shot into the car. As Cort sped away, Riley ran back across the street.

¶13 In making his video-related ***Brady*** argument, Taylor emphasizes that, after Saffold testified that he "socialized" with Taylor, Hopgood, and Riley at the apartment building, before Cort arrived at the liquor store, the following exchange occurred on cross examination:

> Q. … What I'm trying to find out is had you been together all afternoon? Or was it just [that] you happened to be passing by, ["H]ey, hello, how is your family, fine, thank you,["] something like that?
>
> A. No, we hadn't been together all afternoon.
>
> Q. How long had you been out there before [Cort's] car pulled in?
>
> A. Probably about twenty minutes.

In addition, Taylor emphasizes the following related testimony by Saffold:

[5] Amplifying the hoodie-related testimony, on cross examination, Saffold again maintained that Riley "would have to have got [the dark hoodie] from George [Taylor]," but when pressed testified that he could not recall the specifics of how Riley got the dark hoodie that Riley put on before shooting Cort. However, Saffold subsequently testified, "[I]f I'm not mistaken, George hands [Riley] a hoodie. [Riley] puts on the hoodie. While [Riley is] putting on the hoodie, Steven Hopgood is going in his house." Saffold's testimony regarding the hoodie resurfaces in the context of Taylor's sentencing challenge. *See infra*, ¶¶76-77.

> Q. Okay. And nobody from this group went over to [the liquor store] until after [Cort's] orange car had already pulled in, correct?
>
> A. Correct.
>
> Q. In fact, nobody, according to you, nobody got over there until [Cort] was getting back [into his car after leaving the liquor store], right?
>
> A. Right.

¶14 We now summarize Latoria Dodson's pertinent testimony. Dodson testified that, as she pulled her car into the liquor store lot, she saw a man walk past her car whom she believed was the same man who would shortly thereafter shoot Cort (namely, Riley, under the State's theory). Dodson testified that she then went into the liquor store for "about 10 or 15 minutes," and when she walked back out, she heard a gun shot, and saw the presumed shooter running away.

¶15 With the above testimony of Saffold and Dodson in mind, we turn to pertinent contents of the late-disclosed video. Before doing so, however, we observe that Taylor provides only scant descriptions of what he submits the late-disclosed video reveals that matters to his argument. This presents challenges, because the video files are difficult to interpret for multiple reasons—jerky images/accelerated speeds, multiple files showing a scene from multiple angles, and unclear timing issues. We have tried to understand all arguments that Taylor may mean to make based on what we discern from the late-disclosed video, but we are impeded by Taylor's failure to provide clear, detailed descriptions. With that caution, we proceed to the content of late-disclosed video.

¶16 Taylor calls our attention to two video files that show a man in red sweatpants with a white T-shirt, whom Taylor identifies as himself. The State concedes for purposes of this appeal that this person is Taylor, and does not

dispute that the late-disclosed video shows Taylor in the liquor store lot shortly before Cort's arrival.

¶17 In a similar vein, Taylor directs our attention to late-disclosed video images that he submits reveal that he was in the liquor store lot when Dodson pulled in and parked next to where Taylor then stood. The State does not contest that it is Dodson who is shown pulling in next to Taylor.

¶18 Taylor argues that the late-disclosed video establishes the following closely related facts, which he argues are contrary to Saffold's testimony: (1) Taylor could not have socialized with Saffold, Hopgood, and Riley at the apartment building across the street from the liquor store for approximately twenty minutes before the group noticed, and then commented on, Cort pulling into the lot, and (2) both Taylor and whoever shot Cort were in the liquor store lot just seconds before Cort arrived in the lot.

¶19 The State argues that Taylor overstates the number and significance of potential or actual inconsistencies between reasonable interpretations of Saffold's testimony and what is shown in the late-disclosed video, and that Taylor fails to account for the fact that the late-disclosed video "strongly corroborates the essential elements of Saffold's testimony." We agree on both points.

¶20 Taylor's video-related ***Brady*** argument in his principal brief on appeal is incomplete and largely conclusory. Notably, Taylor fails to take on the task of showing a reasonable probability that, if the late-disclosed video had been used at trial, this would have produced a different verdict, ignoring the principle, noted above, that "there is never a real '***Brady*** violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *See* ***Harris***, 272 Wis. 2d 80, ¶14. The

question is not, as Taylor seems to think, whether some aspects of the late-disclosed video might have merely enhanced one line of argument that Taylor could have made at trial. In any case, we now explain why we conclude that, even giving Taylor's argument its maximum due, the following significant details fatally undermine it.

¶21 First, as we have indicated, Taylor places great weight on the concept that Saffold "testified that he and the co-defendants had been together across from [the liquor store] for 'probably about twenty minutes' before Cort pulled into" the liquor store lot. However, as the State points out, and the testimony of Saffold quoted above shows, Saffold's testimony was ambiguous about which people, precisely, were together for "probably about twenty minutes." Taylor provides one reasonable reading of Saffold's testimony. But there are other reasonable readings, some not contradicted by aspects of the late-disclosed video now highlighted by Taylor. The cross examiner asked Saffold how long "you" had "been out there before" Cort's car arrived, and did not pose a less ambiguous formulation, such as how long the four men were together at the apartment building before Cort arrived at the liquor store. As a result, Saffold might have meant to convey in his response only that various combinations of the four men interacted at the apartment building over the course of about twenty minutes before Cort arrived. If that is how Saffold's testimony is understood, the testimony would not be contradicted by the absence of Taylor or the shooter (allegedly Riley) from the immediate area of the apartment building during any part of the twenty minutes before Cort pulled into the liquor store lot.

¶22 As for Saffold's testimony that none of the four men went over to the liquor store until after Cort returned to his car from the liquor store, this can be squared with the late-disclosed video if one uses a reasonably narrow time frame.

By Taylor's own account of what the late-disclosed video shows, Taylor and the shooter left the liquor store lot before Cort arrived (if only just barely), and thus Taylor and the shooter could have arrived at the apartment building immediately after Cort's arrival and talked about Cort with Hopgood and Riley as Saffold testified.

¶23 Second, Taylor fails to come to grips with the fact that the late-disclosed video, by Taylor's own account, places him at or near the scene of the crime close to the time of the crime, which in itself corroborates Saffold's account. For this reason, it is not clear to us whether, if Taylor were to be granted a new trial, he would be well advised to introduce the late-disclosed video. And in any case, at a new trial the court would presumably permit the State to present what it believes are the most incriminating images in the late-disclosed video, if Taylor sought to introduce what he believes are the most exculpatory images. Even after the State persuasively points out that aspects of the late-disclosed video could support incriminating arguments against Taylor, Taylor persists in his reply brief taking the plainly incorrect position that the late-disclosed video could not be used in any way to corroborate Saffold's testimony relating to Taylor. Common sense dictates that details in the late-disclosed video that corroborated details of Saffold's testimony would have tended to make it more difficult for Taylor to convince the jury that Saffold was mistaken or lied about any topic, including about Taylor.

¶24 Third, in his reply brief, Taylor relies heavily on a detailed argument that he does not make in his principal brief, that is not necessarily supported by the record, and that does not carry the weight to which he assigns it. The argument is that the late-disclosed video purportedly records, on a second-by-second basis, that Taylor left the liquor store lot and crossed the street heading in the direction of

Saffold's apartment building precisely one second before Cort's car pulled into the liquor store lot—allegedly making it impossible for Taylor to have been with Saffold, Hopgood, and Riley when Cort arrived at the liquor store lot.

¶25 Explaining our conclusion about this second-by-second argument further, this detailed, specific argument cannot fairly be presented for the first time on reply. *See* ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶30 n.6, 305 Wis. 2d 658, 741 N.W.2d 256 (we generally do not consider arguments raised for the first time in a reply brief). In addition, it would be all the more inappropriate to entertain this tardy, detailed argument because Taylor fails to show that it is supported by the record.[6] Finally, even if we were to assume that the late-disclosed video establishes that Taylor could have joined Saffold, Hopgood, and Riley at the apartment building no earlier than some seconds after Cort's car pulled into the liquor store lot, this would not necessarily undermine one reasonable reading of Saffold's testimony, for reasons we have already explained.

¶26 Turning to Taylor's argument focusing on Dodson's testimony, we could ignore this argument, because after the State contends that Taylor forfeited this argument by failing to raise it in his post-conviction motion Taylor does not

[6] Taylor's second-by-second argument relies entirely on timing references made by the State in its brief on appeal, despite the fact that the State disclaims accuracy on the timing aspect of its summaries, and for apparently good reason. We are unable to independently access a second-by-second record from the late-disclosed video. However, we question the accuracy of the State's purported second-by-second record, given a problem we have already noted: the images on the late-disclosed video are highly sped up—people and cars move in a jerky fashion, more rapidly than in ordinary time. Compounding the problem, some of the video files appear to be more sped up than others. In sum, Taylor bases his second-by-second argument on facts not established in the record and which may well be inaccurate.

Separately, we observe for the benefit of any person who might examine the record after us that the DVD called Exhibit 1, submitted by the State to the circuit court on February 6, 2015, in an attempt to clarify the digital record, is devoid of content.

address the forfeiture issue in his reply brief, thereby conceding it. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession). However, we choose to overlook Taylor's conceded forfeiture and consider Taylor's argument related to Dodson's testimony. The argument is insubstantial for at least the following reason, referenced above: Dodson testified that she was in the liquor store for ten to fifteen minutes before coming out to witness the shooting. For reasons we have already explained, even if the late-disclosed video shows that Taylor and alleged shooter Riley were each in the lot one or more times during that ten to fifteen minute time period, this would not necessarily have undermined one reasonable reading of Saffold's account.

¶27 In sum, we conclude that Taylor's video-related ***Brady*** argument fails because there is not a reasonable probability that use of the late-disclosed video at trial would have produced a different result.

*2. **Brady** Argument Based On State Payment For Saffold Housing Assistance*

¶28 Taylor argues that the State violated ***Brady*** by failing to disclose to Taylor that the State paid a $770 rental unit security deposit for Saffold before trial as part of prosecution efforts to protect him and family members from friends of the defendants. The State does not dispute that Saffold received this benefit, or that this fact was not disclosed to Taylor in time for him to make use of it at trial. We reject this ***Brady*** argument for the following reasons.

¶29 Addressing the requirement of materiality, the State points out that Saffold testified at trial that he hoped his statements to police and testimony would

entitle him to receive a $10,000 reward offered by Cort's family for the arrest and conviction of those responsible for Cort's death, and that defense counsel attempted to use this impeachment to their advantage at trial. For example, Taylor's counsel argued to the jury that Saffold had a strong interest in providing testimony that would support guilty verdicts: "He's beating a drug charge and going to get $10,000." The State argues, in part, that the marginal additional value to the defendants at trial of evidence of the $770 security deposit payment, beyond the value of the reward-money-related impeachment, would likely have been small and cumulative impeachment. *See* ***State v. Lenarchick***, 74 Wis. 2d 425, 448, 247 N.W.2d 80 (1976) (circuit court has discretion to exclude potential impeachment testimony as cumulative).

¶30 In response, Taylor argues that the $770 was money-in-hand to Saffold, not a mere chance for $10,000. This is a difference, but it is not clear that it supports Taylor's ***Brady*** argument. Unlike the already paid $770, the potential reward money was offered only in the event of conviction, which provided an obvious motivation for Saffold to twist or make up facts. In addition, of course, $10,000 is 13 times greater than $770.

¶31 Taylor argues that the security deposit issue must be considered in light of the late-disclosed video evidence addressed above, because the impeachment effect would have been cumulative. However, we have already explained why we conclude that Taylor has failed to make a materiality case regarding the late-disclosed video evidence.

¶32 Taylor emphasizes that the evidence against Taylor relied heavily on Saffold's testimony, and also that the jury sent out a note after initial deliberations to alert the court that it was "at an impasse regarding Hopgood and Taylor."

However, these facts do not add weight to Taylor's argument that the $770 payment amounted to significant, noncumulative impeachment material.

3. Assertions Referencing Detective

¶33 Taylor briefly asserts that the State violated ***Brady*** in failing to disclose in advance of trial "the details" of "allegations of professional misconduct and dishonesty" by one of the lead detectives on the Cort homicide case, Rodolfo Gomez, because "the Gomez misconduct evidence would have helped impeach the State's most important witness and would have shown the bias of the investigator." We reject this argument as wholly undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (courts may not act as advocates; inadequately briefed arguments may be ignored). Taylor effectively invites us to construct arguments for him, which we cannot do. It may be that Taylor expects this court to study his post-conviction motion and decide which appellate arguments he wants to abandon and which he wants to renew on appeal, but that is not our role. *See* WIS. STAT. § 809.19(1)(e) (requiring entire arguments to be presented on appeal).

¶34 Before moving on, we observe that in Hopgood's separate appeal, Hopgood presented us with *developed* arguments referencing Gomez, which may closely resemble in many or all respects whatever argument or arguments Taylor now envisions. *See* ***Hopgood***, No. 2014AP2742-CR, ¶¶50-76. We rejected Hopgood's developed arguments, in part because Gomez was not called by any party as a witness at trial and therefore he was not available to be impeached. *See* ***id.*** Gomez could hardly be considered, in Taylor's words, "the State's most important witness."

¶35 Taylor contends that his three ***Brady*** arguments should be considered for their cumulative effect, because if Taylor had had timely access to the "three batches of non-disclosed evidence" he would have easily prevented the State from proving him guilty. However, we have explained why we conclude that none of Taylor's ***Brady*** arguments are persuasive.

II. DENIALS OF MISTRIAL MOTIONS

¶36 Taylor makes a brief argument that the circuit court erred in failing to grant two defense motions to declare a mistrial involving statements by the prosecutor at trial. This argument is only thinly developed, but we reject it for a different reason. When Hopgood raised identical arguments—involving alleged vouching by the prosecutor for the truth of Saffold's testimony, and references to evidence not introduced at trial—we rejected them, and Taylor presents us with no basis to apply a different analysis here. *See* ***Hopgood***, No. 2014AP2742-CR, ¶¶78-89. Taylor emphasizes what he submits was the closeness of the case against him, when contrasted with the evidence against Hopgood and Riley, but this would not affect our analysis of the issues as explained in ***Hopgood***.

III. LIMITATIONS ON CROSS EXAMINATION OF SAFFOLD

¶37 Taylor argues that the circuit court violated his constitutional right to confrontation through rulings that limited cross examination of Saffold in two respects, both related to a pending cocaine case against Saffold: prohibiting counsel from referring to the pending case against Saffold as a "felony" case, and "disallowing non-open-ended questions about the subjective fears/hopes at the core of Saffold's bias" involving the pending case. We reject these related arguments for the following reasons.

¶38 This court has summarized the pertinent legal standards:

> A criminal defendant's due process right includes "the right to a fair opportunity to defend against the State's accusations." "The right to present evidence is rooted in the Confrontation and Compulsory Process Clauses of the United States and Wisconsin Constitutions." The trial court may not "deny the defendant a fair trial or the right to present a defense by a mechanistic application of rules of evidence."
>
> However, the rights to confront witnesses and to defend are not absolute and may bow to accommodate other legitimate interests in the criminal trial process. Evidence of little importance, whether merely cumulative or of little probative value, will almost never outweigh the State interest in efficient judicial process. Whether a defendant's right to present a defense has been improperly denied by the trial court is a question of constitutional fact which we decide de novo.

State v. Rockette, 2006 WI App 103, ¶¶32-33, 294 Wis. 2d 611, 718 N.W.2d 269 (quoted sources omitted).

¶39 As we have already discussed, the defendants presented significant impeachment evidence on Saffold, including his hope for the $10,000 reward in the event of convictions. Separately, Saffold testified at trial that he told police about seeing Taylor, Hopgood, and Riley participate in Cort's murder only after he was arrested, 20 months after the murder, and taken into custody based on cocaine found in his vehicle. Saffold testified that he was "hoping for a little consideration on my [cocaine] case, that it wouldn't make it to the D.A.'s desk." Moreover, the jury learned that Saffold was aware that if he were convicted on the cocaine charge, then he would lose the possibility of expungement of a recent 5-gram marijuana conviction. Separately, the jury learned that Saffold had nine prior criminal convictions and juvenile adjudications. Taylor does not dispute that

defense attorneys made extensive efforts to impeach Saffold based on these topics and urged the jury to evaluate Saffold's testimony in light of them.

¶40 Against that factual background, Taylor's first confrontation challenge is that the circuit court should not have "disallowed any mention of the 'felony' status" of the cocaine charge against Saffold. For reasons we now explain, we reject this "felony status" argument.

¶41 In ruling on objections at trial, the court observed that Taylor would have understood that, at least "in most cases," Saffold would have known that, in the Milwaukee County circuit courts at that time, "he's not going to prison on two grams of cocaine," and that his exposure was not significantly enhanced by potential loss of the chance for expungement of the recent 5-gram marijuana conviction, for which he received "three days time served." In an attempt to prove the allegedly serious nature of the cocaine case, Taylor's attorney proposed to call "three witnesses from the Wauwatosa Police Department to [testify] in detail [as to] what occurred that night, what was taken, how [Saffold] was pulled over." The court responded that it was not going to allow this proposed, detailed testimony regarding "two grams of cocaine [that] Mr. Saffold may have had in his car…. It's a waste of judicial resources, it's a waste of time, it's cumulative, [and] it's not relevant." Taylor fails to support his assertion that the court "arbitrarily" "disallow[ed] relevant evidence" on this topic.

¶42 Taylor's second, related confrontation argument is that the circuit court prohibited "non-open-ended questions about the subjective fears/hopes at the core of Saffold's bias." We reject this argument on three grounds.

¶43 First, this "non-open-ended questions" argument is undeveloped in multiple respects. *See* ***Pettit***, 171 Wis. 2d at 646-47. A first step in developing an

appellant's argument is to accurately characterize the challenged circuit court ruling. Taylor fails to accurately account for the substance of the extensive back-and-forth among defense counsel, the prosecutor, and the circuit court regarding the scope of cross examination of Saffold that would be allowed regarding the pending cocaine case. To cite only one example, Taylor flatly asserts that the circuit court held defense counsel to a strict script, in that the court "only allowed counsel to ask: 'So, you got stopped with cocaine in your car?' 'Yeah.' 'What did you expect when you came forward?'" However, the transcript reflects that, in the course of the extensive back and forth, the court merely suggested the *types* of permissible questions, and these two questions were not dictated as a strict script. In addition, Taylor's "non-open-ended question" argument is, for the most part, merely conclusory, reciting legal standards but failing to tie those standards to the facts of this case, which is closely related to our second point.

¶44 Second, as best we can discern, a developed version of Taylor's "non-open-ended questions" argument would have no merit. Taylor appears to argue from the incorrect premise that he was entitled to unlimited cross examination so long as it might serve to impeach Saffold's testimony to any degree ("*Full* exposure of Saffold's subjective fears and expectations … *all* evidence exposing the bias ....) (emphasis in original), without regard to any reasonable consideration the circuit court might give to the "other legitimate interests in the criminal trial process" of the sort referred to in the legal standards quoted above. *See* ***Rockette***, 294 Wis. 2d 611, ¶33. And, applying the correct standard, the jury was well aware of Saffold's "fears and hopes," to use Taylor's phrase, about avoiding potential consequences from the cocaine case and potentially receiving reward money, in addition to other potentially significant impeaching information referenced above. Taylor fails to explain why the circuit

court could not reasonably have concluded that a different framing of cross examination questions, or some additional cross examination questions, would have created needless delay and confusion and would not have meaningfully assisted the jury in evaluating Saffold's testimony.

¶45 Third, in the same vein, Taylor fails to persuade us that any error by the circuit court in this connection would not have been harmless. Saffold was a critical witness for the State against Taylor, but to repeat he was heavily impeached at the trial.

IV. JOINDER

¶46 Taylor argues that the circuit court violated his due process rights by not ordering a separate trial for him, but he forfeited this issue by failing to raise it in the circuit court. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612 (failure to timely raise an argument in the circuit court generally forfeits argument on appeal). After the State provides a forfeiture argument supported by appropriate citations to the record and authority, Taylor does not contest the point in his reply brief, conceding the point. *See* ***United Coop.***, 304 Wis. 2d 750, ¶39.[7]

[7] In an inconsistent approach, Taylor initially purports to "reserve" a claim of ineffective assistance of trial counsel on the joinder topic, then later appears to advance an ineffective assistance argument. In any case, a claim of ineffective assistance must first be raised in a post-conviction motion, not in this court. *See* ***State v. Balliette***, 2011 WI 79, ¶¶29-31, 336 Wis. 2d 358, 805 N.W.2d 334. As to whether Taylor may raise this particular ineffective assistance argument following remand, the circuit court may exercise its discretion in making that decision, a topic we address *infra*, n.8.

V. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

¶47 Taylor renews on appeal a series of ineffective assistance of trial counsel arguments that the circuit court rejected without a ***Machner*** evidentiary hearing. Taylor argues that he was entitled to a hearing to allow him to demonstrate that his trial counsel was ineffective in: (1) failing to call Kelli Walton as a witness at trial, because her testimony would have directly impeached Saffold's testimony that Taylor drove a white BMW as the getaway car with shooter Riley; (2) failing to present evidence that, contrary to his trial testimony, Saffold knew before the day of Cort's murder that Taylor had been shot in 2008; (3) failing to present evidence that Saffold held a "grudge" against Taylor; (4) failing to present evidence that "Taylor had no grudge against Cort or his twin brother, and no reason for a grudge"; (5) failing to present evidence that any one of three alternative suspects (other than Hopgood, Riley, or Taylor) killed Cort, because this evidence was admissible and would have raised doubt about Taylor's guilt; (6) failing to challenge the authenticity of a bullet that the State offered as evidence at trial as the one used to kill Cort.[8] We now summarize the applicable

[8] In addition, Taylor makes passing references to several other topics as *potential* ineffective assistance of trial counsel arguments, which he failed to raise in his post-conviction motion, namely, that trial counsel: failed to properly address "prosecutorial vouching and improper statements"; improperly admitted that Taylor drove the getaway car for Riley; and failed to properly request a potential lesser included jury instruction on "aiding and abetting a felon." We will not address these topics. *See* ***Balliette***, 336 Wis. 2d 358, ¶¶29-31; ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

We note that, assuming that "prosecutorial vouching and improper statements" is the same topic as one that we reference *supra* at ¶36, we have resolved that issue on the merits. As to the other two topics, we do not intend to direct the circuit court to address either topic if Taylor raises either following remand, nor do we intend to foreclose the court from addressing these topics. That is, the court may exercise its discretion in deciding whether and in what ways to address these topics as arguments for the first time on remand, in light of the fact that the proceeding on remand remains part of Taylor's pursuit of post-conviction relief (first appeal as of right) under WIS. STAT. RULE 809.30 and considering the interests of judicial economy in striving to avoid potential later claims of ineffective assistance of post-conviction counsel.

legal standards, then explain why we conclude that Taylor is entitled to an evidentiary hearing on one, but only one, of these six topics: the failure to call Walton as a witness.

¶48 Our supreme court has summarized the ineffective assistance standards in pertinent part as follows:

> Whether a defendant received ineffective assistance of trial counsel is a two-part inquiry under ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant must show both (1) that counsel performed deficiently; and (2) that the deficient performance prejudiced the defendant.
>
> When reviewing whether counsel performed deficiently, the ***Strickland*** standard requires that the defendant show that his counsel's representation fell below an objective standard of reasonableness considering all the circumstances. A court is highly deferential to the reasonableness of counsel's performance….
>
> Even if counsel's performance was deficient, a defendant must also show prejudice by demonstrating that there is a reasonable probability that the errors "had an adverse effect on the defense." The proper test for prejudice in the context of ineffective assistance of counsel is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."…
>
> Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact. This court will uphold the circuit court's findings of fact, including the circumstances of the case and the counsel's conduct and strategy, unless they are clearly erroneous. Whether counsel's performance satisfies the standard for ineffective assistance of counsel is a question of law which we determine independently of the circuit court and court of appeals, benefiting from their analysis.

State v. Jenkins, 2014 WI 59, ¶¶35-38, 355 Wis. 2d 180, 848 N.W.2d 786 (footnotes and citations omitted).

¶49 Our supreme court has summarized the pertinent standards for entitlement to a post-conviction hearing as follows:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted). Non-conclusory allegations should present the "who, what, where, when, why, and how" with sufficient particularity for the circuit court to meaningfully assess the claim. ***Id.***, ¶23. At the same time, a circuit court may not deny a motion for a hearing based on the proposition that its allegations "seem to be questionable in their believability," because "credibility" "is best resolved by live testimony." ***Id.***, ¶12 n.6 (citation omitted).

A. Failure To Call Walton As Witness

¶50 Taylor argues that his trial counsel was ineffective in failing to call Kelli Walton as a witness at trial, because Walton's testimony would have directly contradicted Saffold's trial testimony that Taylor drove a white BMW getaway car with alleged shooter Riley, and that Taylor is entitled to a ***Machner*** hearing on this topic. We conclude that Taylor is entitled to an evidentiary hearing on this topic, because Taylor presented the circuit court with "sufficient material facts" to merit a hearing, and not the sort of "merely conclusory," "bare-bones," mere

opinion, or immaterial allegations that fall short. *See* ***Allen***, 274 Wis. 2d 568, ¶¶16-24. Aspects of this case resemble aspects of ***Jenkins***, in which the defendant demonstrated a reasonable probability of a different result when "contradictory eyewitness testimony supporting the defendant" was not offered, when the prosecution "rested almost completely on the testimony of one eyewitness … [t]he defense offered no contradictory eyewitness testimony… [and n]o physical evidence directly tied the defendant to the shooting." *See* ***Jenkins***, 355 Wis. 2d 180, ¶¶51-53.

¶51 The following is pertinent trial testimony by Saffold. On the day of the shooting, Saffold saw Taylor drive a white BMW to Saffold's apartment building. Immediately after the shooting, Riley walked across the street from the liquor store lot to the parking lot area of the apartment building where Saffold lived. Riley removed the dark hoodie and placed it in the BMW. Riley gave the gun back to Hopgood. Taylor drove away in the BMW, with Riley in the passenger seat.

¶52 As Taylor points out, the State argued to jurors, in part, that they should rely on this testimony to conclude that Taylor played a "major role" in the felony murder "because he takes Laquan Riley in a white BMW, and they drive away and get away."

¶53 With that background, in connection with his post-conviction motion Taylor submitted an affidavit from Walton in which she averred the following information, including the averments that she shared the following information

with Taylor's attorney before trial and would have testified to this information at trial if called, but that the attorney did not call her to testify.[9]

¶54 Walton is a cousin of Taylor and a friend of Cort's. During the pertinent time period, Walton and Taylor occasionally "switch[ed]" cars—Walton would borrow Taylor's white BMW and Taylor would borrow Walton's Chrysler sedan (no color specified in Walton's affidavit), because Walton enjoyed "driving around with friends" in the BMW. Walton called Taylor on the morning of Cort's shooting to see if the two could switch cars that day, and Taylor agreed. At about 10:00 a.m., they switched cars at Walton's mother's house. "During the day I drove around in George's car, spent time at my baby's father's [first name given] house, and spent time hanging around the neighborhood around 25th and Chambers in Milwaukee, then returned to my mother's house." "I still had George's BMW around 9 p.m., when my semi-step-sister [name given] called me and told me that Vincent Cort had been shot and was at St. Joseph's Hospital."[10] At about 10:30 p.m., Taylor "returned the Chrysler to me at my mother's house," and Taylor left in the BMW.

¶55 Taylor contends that, had Walton been called to testify to this account, and the jury believed Walton, this would have cast serious doubt on Saffold's testimony in general, and in particular on testimony about Taylor's involvement, since the testimony about him driving a white BMW getaway car

[9] More precisely, Taylor initially submitted an investigator's report of an interview with Walton, and after the circuit court rejected this on hearsay grounds, Taylor submitted the Walton affidavit and moved for reconsideration. The court reconsidered the issue based on the affidavit, and the State does not now argue that delayed submission of the affidavit should matter to our review of the issues.

[10] The shooting occurred at approximately 7:00 p.m.

was vivid and significant evidence against Taylor. *See* ***Jenkins***, 355 Wis. 2d 180, ¶¶41, 45 ("Failure to call a potential witness may constitute deficient performance," although "failure to call a witness may have been a reasonable trial strategy.").

¶56 In a thoughtful decision, the circuit court determined that an evidentiary hearing is not necessary, because Taylor cannot show prejudice from the failure of trial counsel to call Walton as a witness. In the court's view, Saffold was thoroughly impeached at trial as it was, and there is not a reasonable probability that the jury "would have rejected Saffold's *entire* testimony based on his recollection of what car Taylor was driving that day." (Emphasis in original.)

¶57 The State's argument on appeal on this issue tracks the core reasoning of the circuit court, to which the State adds the allegation that Walton has a felony conviction, which the State could use to undermine her credibility.

¶58 We begin by noting points not contested by the State, all of which we conclude weigh substantially in favor of Taylor's entitlement to a ***Machner*** hearing, then explain why we reject the State's lack-of-prejudice argument based on the record as it now stands.

¶59 Walton's affidavit is reasonably detailed and plausible, and appears internally consistent. That is, it provides a clear version of plausible events and the record does not "refute" the allegations, unless Saffold's testimony is fully credited. *See* ***Allen***, 274 Wis. 2d 568, ¶30.

¶60 The State acknowledges that Walton's account is inconsistent with Saffold's testimony that Taylor drove a white BMW as the getaway car; both accounts could literally be accurate, but only if Taylor had access to two white

BMWs, a scenario that the State does not argue was suggested by any evidence. And, without a ***Machner*** hearing record, the State can point to no suggestion in the record that trial counsel had a basis to question Walton's account or her credibility when he decided not to call her as a witness.

¶61 The State may intend to suggest that Walton's averments count for little because of bias evident on the face of her affidavit. It is reasonable to suspect that Walton may be partial toward Taylor because the two are alleged cousins who, by Walton's own account, routinely borrowed each other's vehicles, and because Walton, at a minimum, troubled herself to sign an affidavit that could help him. However, the State does not attempt to develop an argument that Walton's affidavit merits little or no weight on its face due to obvious bias.

¶62 Walton avers that she came forward "soon after George was charged," and that she provided trial counsel with the account reflected in her affidavit. Thus, this case is distinguishable from those ineffective assistance claims in which defendants fail to allege that trial counsel had reason to know of or discover potentially exculpatory information in time to make use of it at trial.

¶63 The State does not offer a clear rebuttal to Taylor's argument that Saffold's detailed testimony about his more-than-fleeting observations of the white BMW constituted significant evidence in the case against Taylor, and therefore Walton's contradictory testimony, if believed, could be significant to a determination of Taylor's guilt. The circuit court, at least in one reference, suggested that the question reduces to the following simple issue: "[w]hich car was George Taylor driving" when Saffold testified to seeing him drive the getaway car after the shooting. In a narrow sense, this is an accurate characterization. However, we think that this characterization fails to take into

account the potential significance of Walton's averments in light of all evidence against Taylor in particular, which came primarily from Saffold and was not extensive. To repeat, Saffold unambiguously and specifically put Taylor behind the wheel of a white BMW at a critical moment in the narrative, and Walton unambiguously and specifically says that she had Taylor's white BMW at that time. Therefore, if Walton were to testify credibly and consistently with her affidavit, jurors would appear to have a new, serious question about the reliability of Saffold's testimony regarding a significant percentage of Saffold's incriminating testimony against Taylor.

¶64 The question in this appeal, is not, as the circuit court put it at one point, whether the jury "would have rejected Saffold's *entire* testimony," but whether there is a reasonable probability that it would have rejected Saffold's relatively limited testimony incriminating *Taylor in particular*. Again, the State does not seriously dispute that the State's case against Taylor came down almost entirely to Saffold's testimony, and Saffold's specific testimony about Taylor's conduct was not an extensive part of Saffold's overall testimony.

¶65 This leads to the State's argument, and the core rationale of the circuit court, namely, that Taylor has not shown sufficient prejudice that arose from the failure to call Walton as a witness, and more specifically that the extensive impeachment of Saffold that occurred at the trial would render Walton's potential testimony merely cumulative impeachment. This argument starts from the correct premise, noted in a separate discussion section above, that impeachment material that is merely cumulative can, depending on all circumstances, reasonably be deemed to carry little weight. *See* ***Lenarchick***, 74 Wis. 2d at 448.

¶66 However, we conclude that the State's argument is significantly undermined by the fact that Walton's potential testimony could potentially discredit Saffold's testimony in a different way than the impeachment material, summarized *supra* in ¶39, could have discredited Saffold's testimony. Explaining further, there is a meaningful distinction between, on the one hand, efforts to discredit Saffold's testimony through impeachment of his character for truthfulness (prior convictions) or his bias and interest (motivations to obtain reward money and to avoid convictions or more harsh sentences), and on the other hand, efforts to discredit his testimony through directly contradictory testimony on a material point in Saffold's testimony. Walton's potential testimony would be different in kind and not related to the facts used to impeach Saffold's character or bias, but instead would potentially discredit him as a reliable eyewitness to at least one key event. Thus, Walton's testimony would not merely place Saffold's character in a bad light, but instead be a new and potentially important reason to conclude that Saffold was unreliable in testifying about Taylor. Indeed, because Walton's potential testimony would be different in kind from the impeachment topics, it could be seen as *multiplying* the effect of the impeachment topics.

¶67 Some facts here are arguably less compelling than those in ***Jenkins***, discussed above. For example, as the circuit court noted in its decision here, Taylor offered an innocent bystander defense at trial, not a defense that he was not in the area when and where Saffold testified that Taylor participated in the planning of the armed robbery and Riley's getaway. Consistent with this, as noted above, Taylor concedes at least for the purpose of this appeal that he was video recorded in close temporal and geographic proximity to the homicide, which no doubt forecloses various potential defenses.

¶68 At the same time, however, we are to make a fact-intensive inquiry and we conclude, for all of the reasons that we have discussed, that the rationale of ***Jenkins*** applies here. That is, based on the record as it now stands, Walton's potential testimony "would expose vulnerabilities at the center of the State's case," *see* ***Jenkins***, 355 Wis. 2d 180, ¶53, and this is sufficient to undermine our confidence in the outcome if Walton were to testify credibly at a new trial—assuming that Taylor carries his burden on both prongs of the ineffective assistance test at a ***Machner*** hearing held to evaluate counsel's effectiveness on this issue.

¶69 This leaves only the State's reference to Walton's alleged conviction as potential impeachment of her. However, it is difficult to see how we can credit the State's apparent argument that a jury would likely have significantly discounted Walton's testimony at a new trial based on one conviction, when it is undisputed that the jury did not significantly discount Saffold's testimony despite learning of his nine convictions.

B. Saffold's Knowledge Of The 2008 Shooting Of Taylor

¶70 In a largely conclusory argument, Taylor suggests that his trial counsel was ineffective in failing to present evidence that Saffold was aware, before the day of Cort's murder, that Taylor had been shot in 2008, because this evidence would have contradicted Saffold on a key point. Assuming without deciding that this was a key point at trial, we reject the argument because Taylor provides no basis for us to conclude that he alerted the circuit court in his post-conviction motion to evidence that trial counsel had access to proof that Saffold had this knowledge. Indeed, even on appeal Taylor fails to point to evidence showing that Saffold had this knowledge.

C. Saffold's "Grudge" Against Taylor

¶71 Taylor argues that his trial counsel was ineffective in failing to present evidence that Saffold held a "grudge" against Taylor, because this would have provided a basis to conclude that Saffold was motivated to give false testimony against Taylor. However, Taylor fails to provide a citation to the record to support his contention that he "informed counsel that he had clashed with Saffold prior to the crime." In addition, when the State argues, in part, that "Taylor does not specify what he told his trial counsel" on this topic, Taylor has no reply, thus conceding the point.

D. Lack Of Taylor "Grudge" Against Cort Or Cort's Brother

¶72 Taylor argues that his trial counsel was ineffective in failing to present evidence that "Taylor had no grudge against Cort or his twin brother, and no reason for a grudge," because this evidence would have undermined the State's argument at trial that Taylor set in motion the armed robbery of Cort based on a grudge against Cort. However, we agree with the State that this argument is based on speculation, and that Taylor fails to point to evidence that would likely have undermined the State's theory about a Taylor grudge against Cort. The evidence that Taylor argues his counsel should have developed at trial involves averments in a search warrant affidavit to the effect that Cort's brother helped police identify the person who shot Taylor in 2008 and that the brother later told Taylor that he had cooperated with police in this matter. Taylor fails to develop an argument that his counsel's representation in this area fell below an objective standard of reasonableness.

E. Alternative Suspect Evidence

¶73 Taylor passingly asserts that his trial counsel should have presented "rebuttal evidence of viable alternat[ive] suspects identified early in the investigation." Taylor's approach on this topic is much like Taylor's purported ***Brady*** argument involving Detective Gomez, addressed above. Taylor makes no attempt to present a developed legal argument. Moreover, when Hopgood presented us with *developed* arguments referencing alternative suspects, which appear to closely resemble in many or all respects whatever argument or arguments Taylor now envisions, we rejected these arguments. *See* ***Hopgood***, No. 2014AP2742-CR, ¶¶12-29. Taylor provides us with no reason to think that the analysis in ***Hopgood*** would not resolve against him any arguments that he intends to make on this topic.

F. Authenticity Of Bullet

¶74 It is the same with Taylor's brief assertion that his trial counsel "was ineffective for not presenting expert opinion testimony regarding the alleged killing bullet" (*i.e.*, the bullet that the State offered as evidence at trial as the one used to kill Cort). Again, Taylor makes no attempt to present a developed legal argument. Moreover, we rejected Hopgood's *developed* arguments referencing the bullet, which appear to closely resemble in many or all respects whatever argument or arguments Taylor now envisions. *See* ***id.***, ¶¶56-66. Taylor provides us with no reason to think that the analysis in ***Hopgood*** would not resolve against him any arguments that he intends to make on this topic.

VI. INTEREST OF JUSTICE

¶75 Repeating various points that we have addressed above, Taylor contends that the real controversy of Taylor's alleged guilt was not fully tried and that justice miscarried for multiple reasons, and therefore we should order a new trial under authority of WIS. STAT. § 752.35. We are to exercise this power on a highly selective basis. *See* ***State v. Avery***, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60; ***State v. Hicks***, 202 Wis. 2d 150, 159-160, 549 N.W.2d 435 (1996). For reasons that should be clear by this point, we conclude that Taylor has not demonstrated that this is an exceptional case requiring our discretionary grant of a new trial.

VII. SENTENCING CHALLENGE

¶76 Taylor effectively concedes that he has no sentencing argument by failing even to attempt to rebut the State's detailed, persuasive responses to the only two points he raises on this topic. Taylor argues that the sentencing court relied on the following two pieces of information that Taylor submits are inaccurate: (1) that Taylor, in the words of the sentencing court, "gave Riley, the shooter, a sweatshirt or hoodie to use to conceal his identity as he ran across the street armed with a weapon, eventually shooting the victim"; (2) that Taylor and Riley, in the course of post-arrest and pre-trial correspondence, planned a subsequent armed killing and referred to a "whip," purportedly meaning a gun, when in fact a "whip" is a car. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1 (defendant may challenge sentence by showing that sentencing court erred by actually relying on inaccurate information).

¶77 On the hoodie topic, Taylor offers no reply after the State quotes extensively from transcript passages that on their face reveal a sound basis for the

court to have relied on Saffold's testimony that Taylor gave Riley a dark hoodie in preparation for the armed robbery. *See supra* n.5. Similarly, on the meaning of "whip" topic, Taylor has no reply to the State's argument that there is no suggestion in the record that the court relied on the notion that "whip" meant gun rather than car. *See* ***id.***, ¶¶26-27 (only after defendant has shown both that information was inaccurate and that the court actually relied on the inaccurate information in the sentencing does the burden shift to the State to prove harmless error).

CONCLUSION

¶78 For these reasons, we reject all of Taylor's arguments, including his arguments for an evidentiary hearing on each topic that he raised in the post-conviction motion and renews on appeal, with the single exception of his argument that he is entitled to a ***Machner*** hearing on his claim that his trial counsel provided ineffective assistance in failing to call Walton as a witness at trial. Accordingly we affirm the judgment but reverse in part the orders denying post-conviction relief and remand for further proceedings consistent with this opinion.

By the Court.—Judgment affirmed; orders reversed in part; and cause remanded for further proceedings.

Not recommended for publication in the official reports.