COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP682-CR **Cir. Ct. No. 2013CF3214**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW RAY TAYLOR,

DEFENDANT-APPELLANT.

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

Before Kessler, Brash and Dugan, JJ.

¶1 BRASH, J. Matthew Ray Taylor appeals from his judgment of conviction, entered upon a jury's verdict, for first-degree reckless homicide while using a dangerous weapon, first-degree reckless injury while using a dangerous

weapon, and being a felon in possession of a firearm. These charges stemmed from a drug deal that resulted in two men being shot, one fatally.

¶2 Taylor subsequently filed a postconviction motion seeking a new trial, or alternatively, an evidentiary hearing, claiming there was new evidence in the form of three witnesses who had previously remained silent out of concern for their safety. Taylor also sought a new trial on grounds of ineffective assistance of counsel based on his trial counsel's failure to call any witnesses at trial, as well as failing to object to the witnesses' out-of-court identification of Taylor. Alternatively, he requested a ***Machner***[1] hearing on this issue.

¶3 The trial court rejected both arguments without a hearing. We affirm.

BACKGROUND

¶4 In the early morning hours of July 11, 2013, Milwaukee police officers responded to the report of a shooting at the intersection of North 15th Street and West Keefe Avenue in Milwaukee. They found two males lying in the middle of the street. Both men had been shot; one had a chest wound and was unconscious, the other had been shot in the hip. Efforts to revive the man shot in the chest, later identified as Gabriel Contreras, were unsuccessful.

¶5 Police later interviewed the other man who had been shot, Anthony Bachman, while he was being treated at the hospital for his gunshot wound. Bachman stated that he and Contreras, who were from Walworth County, had

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

traveled to Milwaukee to buy drugs with the help of a woman, Yujwana McClendon, who was a friend of Contreras. They picked McClendon up in their vehicle, which Bachman was driving, and proceeded to drive around looking to make a drug transaction.

¶6 They eventually met up with two men in the area of 15th Street and Atkinson, one of whom was wearing a black hooded sweatshirt with writing across the front of it. The man in the black hoodie, who appeared to be the primary negotiator, asked Contreras what kind of drugs they were trying to buy; Contreras said they were looking for Percocet, and the man in the black hoodie indicated that he had that drug to sell. However, an argument ensued over payment. Bachman stated that the man in the black hoodie then pulled out a gun and began shooting into their car. Contreras reached for his revolver, but Bachman was unsure of whether Contreras had a chance to fire it before he was hit. Bachman had a rifle that he raised as the two men ran away, but did not remember firing it.

¶7 McClendon was in the backseat of the car during this incident. She told police that she saw the man in the black hoodie pull out a gun and start shooting into the car. She stated that the black hoodie had red writing on it. McClendon also testified that she saw Bachman fire the rifle after the shooting started.

¶8 One of the police officers responding to the shooting was flagged down by a woman who told him there was someone inside her house, located at 3254 North 15th Street, who had been shot. The police found that the wounded man inside of that residence was Taylor, and that he had been shot in the back of the left leg. In a search conducted at that residence, police found a black hooded

sweatshirt with the word "Grumpy" written across it on the floor in the basement of the residence, with fresh blood on it. The blood was determined to belong to Taylor and no one else.

¶9 Police followed a blood trail that led from that residence, through an alleyway, and ended in the vicinity where the shooting of Contreras and Bachman had occurred. Located in the alleyway along the blood trail were some garbage containers from which police retrieved a handgun.

¶10 The police were able to retrieve a fingerprint from the gun which was identified as belonging to Terry Singleton. The police also retrieved a baseball hat from the shooting scene, which was found to have Singleton's DNA on it. Police interviewed Singleton on September 11, 2013, after he was arrested on an unrelated matter. He initially denied knowing anything about the shooting. However, Singleton later told police that he had been on the front porch of a house just down the street from the residence where Taylor was found after the shooting. He heard gunshots, and then saw Taylor lying in the grass with a gunshot wound to the leg. He also saw a gun lying in the grass near Taylor. Singleton said he helped Taylor walk down the alleyway toward the residence, throwing the gun in an open garbage can. After helping Taylor into the residence, Singleton stated that he left because he was on probation and knew he could not have police contact. Singleton was not charged with any crime related to this incident.

¶11 Taylor was arrested after being taken to the hospital for treatment for his gunshot wound, and subsequently charged with first-degree reckless homicide and first-degree reckless injury, both while using a dangerous weapon. Additionally, an information was later filed adding the charge of being in possession of a firearm after being adjudicated delinquent for an act that is deemed

to be a felony if committed by an adult. *See* WIS. STAT. § 941.29(2)(b) (2013-14).[2]

¶12 A jury trial was held in December 2013. The defense did not call any witnesses, and Taylor did not testify. The jury found Taylor guilty on all three charges. He was sentenced to a total of thirty years of initial confinement to be followed by a total of twenty-five years of extended supervision.

¶13 Taylor subsequently filed a postconviction motion for relief based on newly-discovered evidence and ineffective assistance of counsel. The trial court denied Taylor's motion, and this appeal follows.

DISCUSSION

¶14 In his postconviction motion as well as this appeal, Taylor seeks a new trial or, in the alternative, an evidentiary hearing on the newly-discovered evidence. With regard to his ineffective assistance claims, he also seeks a new trial or, in the alternative, a ***Machner*** hearing.

A. Newly Discovered Evidence

¶15 Taylor first argues that newly-discovered evidence warrants postconviction relief. The newly-discovered evidence refers to affidavits submitted by two individuals approximately two years after Taylor's trial.[3] Taylor

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] These affidavits were filed under seal due to concern for the safety of the individuals from whom the testimony was elicited.

asserts that these affidavits support his assertion that Singleton was the shooter in this incident.

¶16 "In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a 'manifest injustice.'" ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted). To establish this, there are four factors that must first be proven, by clear and convincing evidence: "'(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Love***, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (citation omitted). If these factors are proven, the trial court must then determine "'whether a reasonable probability exists that a different result would be reached in a trial.'" ***Id.***, ¶44 (citation omitted). "A reasonable probability of a different outcome exists if 'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***Id.*** (quoting ***State v. McCallum***, 208 Wis. 2d 463, 474, 561 N.W.2d 707 (1997); brackets in ***Love***). However, the reasonable probability determination "does not have to be established by clear and convincing evidence, as it contains its own burden of proof." ***Love***, 284 Wis. 2d 111, ¶44. We review the trial court's decision to grant or deny a motion for a new trial based on newly-discovered evidence under the erroneous exercise of discretion standard. *See* ***Plude***, 310 Wis. 2d 28, ¶31.

¶17 The first affidavit, dated September 23, 2015, is from an individual who claims to have been at the residence where Taylor was found after he was shot. The affiant asserts that when Taylor arrived that night, he was accompanied by another individual, who stated that "he had just shot someone." The affiant

reported to the police the presence of a second individual with Taylor on the night of the shooting, but did not identify him at the time. In the affidavit, the second individual is now identified as Singleton.

¶18 The trial court found that this affidavit was insufficient to satisfy the newly-discovered evidence standard. We agree. In the first place, the presence of another individual at the 15th Street residence who arrived with Taylor after the shooting is evidence that was known to Taylor prior to his trial. This court has previously established that there is a distinction between testimony that can be deemed to be newly-discovered evidence, and testimony that was simply not available at the time of trial. ***State v. Jackson***, 188 Wis. 2d 187, 201, 525 N.W.2d 739 (Ct. App. 1994). In ***Jackson***, we held that "newly available testimony from a co-defendant is not newly discovered evidence necessitating a new trial for the defendant where, (1) the defendant was aware of that possible testimony before or at trial, and (2) the co-defendant previously declined to testify for fear of self-incrimination." ***Id.*** The same premise applies here, in that Taylor was aware of the possible testimony of the witness from the residence before trial, but that witness had previously declined to testify out of fear of retaliation by Singleton. Therefore, the affidavit does not meet the requirement of the first factor for establishing newly-discovered evidence: discovery after conviction. *See* ***Love***, 284 Wis. 2d 111, ¶43.

¶19 Furthermore, the information in the affidavit does not establish a reasonable probability of a different outcome based on the other evidence heard by the jury. ***Id.***, ¶44. For example, both Bachman and McClendon identified the shooter as wearing a black hoodie with writing on it, and such a hoodie was found at the residence with Taylor's blood on it. Moreover, the jury heard the evidence relating to the police questioning of Singleton relative this incident, where he

admitted to being at the scene and throwing the gun in the trash can. Based on that statement, the jury could have found reasonable doubt as to Taylor's role in the shooting, but did not.

¶20 The second affidavit, dated December 22, 2015, is from an individual who was incarcerated with both Taylor and Singleton at different times. He was first incarcerated at Lincoln Hills in September, October, and November of 2013 with Singleton. The affiant states that Singleton told him he had "gotten away with" a shooting, that the victim had been killed, and that someone else was being prosecuted for the crime. The affiant states that in mid-November, 2013, he was transferred to Columbia Correctional Institution, where he met Taylor. After speaking with Taylor, the affiant claims he realized a connection between the crime for which Taylor was convicted and the crime that Singleton described.

¶21 The trial court rejected this affidavit as well, stating that it was "rank hearsay," and that its contents were "complete and utter speculation," containing "no specifics whatsoever delineating what the particular circumstances of the crime were." It therefore was rejected by the trial court *in toto*. We agree with the trial court that the affidavit was not admissible based on the hearsay rule, *see* WIS. STAT. § 908.02, nor was it admissible under the general rules of evidence due to its speculative nature, *see* WIS. STAT. § 904.01. Therefore, it could not be used in attempting to meet the newly-discovered evidence standard.

¶22 Taylor contends that even if this court finds that this evidence does not meet the standard for granting a new trial, it nevertheless meets the lower threshold for granting an evidentiary hearing. When determining whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested, we consider "whether the motion on its face

alleges sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This is a question of law that we review *de novo*. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. If the motion raises sufficient material facts, the trial court must hold an evidentiary hearing. ***Allen***, 274 Wis. 2d 568, ¶9. 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 [trial] court has the discretion to grant or deny a hearing." ***Id.***

¶23 The trial court found that the defendant's claims did not establish a viable claim for relief and, accordingly, denied the motion for an evidentiary hearing as well as a new trial. We agree. Neither affidavit meets the standard for newly-discovered evidence; in fact, one of the affidavits is not even admissible under the general rules of evidence. Therefore, we affirm the trial court's rejection of Taylor's claim of newly-discovered evidence, and its denial of a new trial or an evidentiary hearing based on that claim.

B. Ineffective Assistance of Counsel

¶24 Taylor next argues that he was denied the effective assistance of counsel for several reasons. First, he points out that his trial counsel never called any witnesses; trial counsel did not call Singleton to testify even though he was linked by physical evidence to the scene, nor did counsel call any other witnesses to testify that Taylor was not wearing a black hoodie that night. Taylor further argues that trial counsel was deficient for failing to raise objections relating to the reliability of the out-of-court witness identifications of Taylor.

¶25 To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's performance was deficient and that the deficiency prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficiency, a defendant must show that counsel's actions or omissions were "professionally unreasonable." ***Id.*** at 691. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). A court may start its review by examining either of the two ***Strickland*** prongs and, if a defendant fails to satisfy one component of the analysis, the court need not consider the other. *See* ***Strickland***, 466 U.S. at 697.

¶26 A defendant who alleges ineffective assistance of counsel must seek to preserve counsel's testimony at a postconviction hearing. ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). However, a defendant is not automatically entitled to a hearing upon filing a postconviction motion. A trial court must grant a hearing only if the postconviction motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***Allen***, 274 Wis. 2d 568, ¶9.

¶27 Whether the allegations necessitate a hearing presents another question of law for our independent review. *See* ***id.*** If the defendant is not entitled to a hearing—either because the defendant does not make sufficient allegations that, if true, entitle him or her to relief, or the allegations are merely conclusory, or the record conclusively shows that the defendant is not entitled to relief—the trial

court then has the discretion to deny a postconviction motion without a hearing. ***Id.*** We review a trial court's discretionary decisions with deference. *See* ***id.***

1. Failure to Call Witnesses

¶28 Taylor argues that his trial counsel was ineffective for calling no witnesses during the trial. Specifically, Taylor asserts that there were a number of witnesses who were at the residence on 15th Street where he took refuge after being shot who would have testified that he was not wearing a black hooded sweatshirt. Taylor contends that the black hoodie found in the basement of the 15th Street residence with his blood on it has no evidentiary value, other than proving that he was shot. He suggests that someone in the house may have used the sweatshirt to treat his wound.

¶29 Putting aside the question of why someone would treat Taylor's wound with the sweatshirt and then hide it in the basement, this argument ignores the fact that Bachman and McClendon both identified the shooter as wearing a black hoodie, with Bachman testifying that the hoodie "looks exactly like what [the shooter] was wearing." Additionally, two of the witnesses that Taylor contends should have been called at trial told police that they had seen Taylor wearing that black hoodie in the past.

¶30 Given the nature of the testimony that would have likely been elicited from these witnesses, and the fact that it may have inculpated Taylor instead of exculpating him, the trial court found that Taylor's trial counsel was not deficient for not calling any of these witnesses. We agree.

¶31 Taylor further argues that his trial counsel's failure to call Singleton, who was linked to the crime scene through physical evidence, was "inexplicable." Singleton was listed as a witness for the State, but was not called on to testify.

¶32 In contemplating what Singleton's testimony would have been if called, it likely would have been similar to his statement to police: that he was close to the scene at the time of the shooting; saw Taylor in the road, shot in the leg, with a gun next to him; and then assisted Taylor to the residence on 15th Street, throwing the gun in a dumpster along the way. It is extremely unlikely that Singleton would have confessed to committing the shooting himself.

¶33 Furthermore, in the unlikely event of Singleton confessing on the stand, it still would not have disproved Taylor's involvement in the crime, since both Bachman and McClendon testified that *two* men had approached their vehicle for the drug transaction. Additionally, neither Bachman nor McClendon identified Singleton in a live lineup.

¶34 For these reasons, the trial court found that even if Taylor's trial counsel was deficient for not calling Singleton, Taylor still failed to prove he was prejudiced by this deficiency because there is not a reasonable probability that Singleton's testimony would have altered the outcome of the trial. *See* ***Strickland***, 466 U.S. at 694. We agree with this finding as well, and therefore affirm the trial court's finding that Taylor's trial counsel was not ineffective for failing to call these witnesses.

2. *Failure to Object to Out-of-Court Identifications*

¶35 Taylor next argues that his trial counsel was ineffective for failing to object to the out-of-court identification of Taylor made by Bachman and

McClendon on the grounds that the identifications were impermissibly suggestive. Taylor advances three reasons for this claim: (1) the witnesses were substantially stressed while looking at the photo array; (2) the photo arrays did not follow the proper procedures established by the Milwaukee Police Department; and (3) the witnesses were pressured by police officers to identify Taylor.

¶36 The test for determining whether an out-of-court identification was properly admitted has two prongs: (1) the court must first determine if the identification procedure was impermissibly suggestive; and (2) the court must then decide whether "under the totality of the circumstances the out-of-court identification was reliable, despite the suggestiveness of the procedures." ***Powell v. State***, 86 Wis. 2d 51, 65, 271 N.W.2d 610 (1978). The defendant has the burden of proving the first prong; if that requirement is met, the burden then shifts to the State to prove that the identification was nevertheless reliable. ***Id.*** at 66.

¶37 There are several procedures and circumstances that give rise to the possibility of a photo array being found to be impermissibly suggestive. For instance:

> Some aspect of the photographs themselves might serve to emphasize unduly the photo of the suspect. The manner in which the photos are presented, grouped, displayed or otherwise exhibited to the eyewitness might be highly suggestive. Finally, the words or actions of the law enforcement official overseeing the viewing might lead or sway an uncertain viewer, thereby compromising the reliability of the resulting identification.

Id. at 63.

¶38 Both Bachman and McClendon were shown the photo arrays using what is referred to as the "double blind method." For this method, police officers assemble a photo of the targeted suspect together with five other "filler"

photographs, utilizing a computer to choose photos from a database of people who are the same race and gender, are close in age, and have similar facial features and hairstyles. The six photos are then placed in manila folders, with one photo in each folder. Additionally, two empty folders are included in the array.

¶39 The six folders with photos are then shuffled so that the officer conducting the interview is not aware of which folder contains the photo of the suspect. Officers generally try to ensure that the suspect's photo is not in the first folder; the two empty folders are placed at the end. The witnesses are then given a standardized form with instructions on viewing the photos. The form includes a list of the folder numbers to indicate whether or not the person in that particular folder was involved in the crime being investigated.

¶40 Taylor's first argument, that the witnesses were stressed when they made the identifications, refers to the fact that Bachman and McClendon were shown the photo arrays while both were undergoing medical treatment. Specifically, when Bachman was shown the photo array the day after the shooting, he was still in the hospital recovering from his gunshot wound. McClendon, who was shown the photo array in the evening of the same day of the shooting, had also been transported to the hospital after the incident to receive medication related to a seizure disorder.

¶41 Taylor's argument fails in that any confusion on the part of the witnesses at the time the interviews were conducted would go to the credibility of the witness identification, as opposed to indicating the use of impermissibly suggestive procedures by the police. Taylor contends that the medicated and sleep-deprived state that the witnesses were in at the time they viewed the photo arrays "rendered them unduly susceptible to police suggestion." However, Taylor

provides no legal support for this premise; furthermore, the record indicates that both witnesses were coherent and understood the procedure as explained by the officers.

¶42 Taylor next argues that the standard operating procedure established by the Milwaukee Police Department for photo arrays was not followed in this case. In particular, Taylor asserts that the detectives that conducted the photo arrays were directly involved in the investigation of the shooting, which is contrary to Milwaukee Police Department Standard Operating Procedures (MPD SOP) § 240.10. That section describes photo arrays as being conducted by an administrator.

¶43 However, as the State points out, MPD SOP § 240.10 does not explicitly state that an investigating officer may *not* conduct a photo array. Nevertheless, that section does distinguish between an investigating officer and an administering officer. Taylor contends that this division of duties "ensures neutrality because an administrator who knows nothing about the investigation logically cannot be suggestive." The procedures also state that the officers should not give witnesses feedback or make comments regarding their selections. *See* MPD SOP § 240.10.B.7. Taylor argues that the officers conducting the photo arrays did both, his third claim of impermissible suggestiveness.

¶44 Specifically, Taylor asserts that during the photo array administered to Bachman, the officers told Bachman that he had identified the suspect before he began the second photo array of another suspect, as well as making other comments linking the suspect with the shooting. With regard to McClendon, Taylor alleges that the officers pressured her into making an identification of which she was unsure.

¶45 In contrast, the State contends that when taken in context, the comments made to the witnesses by the officers were not impermissibly suggestive. By adopting the State's brief for its decision on this issue, the trial court agreed.

¶46 After listening to the recordings made of the photo arrays presented to the witnesses, this court find that while the guidelines set forth in the MPD SOP were not followed to the letter, the conduct of the officers did not render the photo array impermissibly suggestive. For example, McClendon was unsure about making a definitive identification the first time she viewed the array. However, McClendon then made a request to see the array a second time, which is permitted as long as the witness is the requestor under MPD SOP § 240.10.B.8. Upon viewing the array the second time, she was more certain of her identification, which was the photo of Taylor.

¶47 With regard to the photo array presented to Bachman, he identified Taylor's photo almost immediately. Additionally, the officers noted a physiological reaction in Bachman when he viewed that photo: an increase in his rate of breathing, and the way in which he gripped the photo. Bachman stated that this photo looked like the shooter, and the officers commented to clarify that he was talking about the person who shot him and Contreras.

¶48 After Bachman had completed the first photo array, the officers commented on his physical reaction to seeing the photo that he had identified. However, this was *after* Bachman had finished viewing the photo array and completed the requisite form. Therefore, the officers' comments did not affect Bachman's identification of Taylor, because that identification had already been made.

¶49 Although we agree with the State that neither identification involved impermissible suggestiveness by the officers administering the photo arrays, we address the State's contention that even assuming some impermissible suggestiveness in this case, the identifications were nevertheless reliable under the totality of the circumstances. *See* ***Powell***, 86 Wis. 2d at 66. Whether an identification is reliable under the totality of the circumstances is determined using a five-part test:

> (1) the opportunity of the witness to view the defendant at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the defendant; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

State v. Dubose, 2005 WI 126, ¶24, 285 Wis. 2d 143, 699 N.W.2d 582.

¶50 We find that the State has met its burden of demonstrating the reliability of the identifications based on the totality of the circumstances. In the first place, both witnesses were in the vehicle during the drug transaction negotiations, which took several minutes prior to the shots being fired, with a clear view of the man who was the shooter. Additionally, both witnesses gave similar accounts of the manner in which the negotiations, and ultimately the shooting, occurred, indicating they were attentive during this time.

¶51 Furthermore, although the witnesses' prior descriptions of Taylor were not completely accurate, they both described in detail the black hoodie with writing on it that was found at the 15th Street residence with Taylor's blood on it. Moreover, the inconsistencies in the prior descriptions, which involved the height and weight of the suspect, were inconsequential because the photo arrays show only faces, and thus these inconsistencies are not problematic in determining

reliability. To that end, both witnesses were quite certain of their identifications of the shooter when they viewed the photo arrays, which, for both witnesses, were shortly after the incident: the same day of the shooting in the case of McClendon, and the day after the shooting for Bachman.

¶52 Thus, there is sufficient evidence that all five factors required for a showing of reliability have been met. As a result, Taylor's argument that his trial counsel was deficient for failing to object to the introductions of the identifications fails on the simple premise that the objection would not have succeeded during the trial.

¶53 Taylor further argues that his trial counsel was deficient during the cross-examination of McClendon with regard to the photo array. Taylor claims that trial counsel inculpated Taylor in her line of questioning relating to the identification; however, in reviewing the transcript, we disagree with Taylor's interpretation of the testimony. During the State's direct examination of McClendon regarding the photo array, the State asked McClendon whether she remembered making an identification, and McClendon replied "[t]hey said I made an identification ... I don't remember but they said I picked the right one out." Trial counsel's follow-up questions on cross-examination appear to focus on McClendon's lack of memory regarding some of the details of her interview with police. We fail to see how this line of questioning prejudiced Taylor in any way; in fact, it is a strategy designed to undermine the credibility of the witness.

¶54 Therefore, we affirm the trial court's finding that trial counsel was not ineffective for not objecting to the out-of-court identifications. Accordingly, we affirm the trial court's denial of a new trial, and further, we affirm the trial court's denial of a ***Machner*** hearing, because the record conclusively

demonstrates that Taylor is not entitled to such relief. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

¶55 In sum, we affirm the trial court's denial of Taylor's postconviction motion, based on its finding that the affidavits submitted did not constitute newly-discovered evidence, its finding that Taylor's trial counsel was not ineffective, and its conclusion that Taylor had not presented a viable claim for relief for purposes of obtaining either a new trial or a ***Machner*** hearing.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.