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

**March 9, 2010**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2008AP3180-CR** **Cir. Ct. No. 2005CF4145**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CLIFFORD DEWAYNE WALKER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM M. BRASH, III, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Clifford Dewayne Walker appeals from a judgment of conviction for first-degree reckless homicide by use of a dangerous weapon, attempted armed robbery with threat of force, and possession of a firearm by a felon, contrary to WIS. STAT. §§ 940.02(1), 939.63, 943.32(2), 939.32 and

941.29(2) (2005-06).[1] He also appeals from an order denying his motion for postconviction relief. Walker argues he is entitled to a new trial on several bases: (1) the State violated his discovery rights under ***Brady v. Maryland***, 373 U.S. 83 (1963); (2) there is newly discovered evidence; (3) his trial counsel was ineffective; and (4) the real controversy was not fully tried and it is probable that justice miscarried. We reject these arguments and affirm.

## BACKGROUND

¶2 Walker was charged with several crimes related to the shooting death of Antoine Nichols, which occurred in a car near a gas station. The case proceeded to a court trial.[2]

¶3 The State's theory at trial was that Walker got into the back seat of a car at a gas station to buy marijuana from the driver, Nichols, and a man named Brandon Johnson, who was sitting in the front passenger seat. The State asserted that Walker tried to rob the two men, a scuffle ensued and Nichols was fatally shot.[3] In contrast, Walker's defense was that he got into the car to buy marijuana, Nichols and Johnson tried to rob him and Nichols was shot while Walker attempted to disarm him.

¶4 The State presented numerous witnesses at the trial, including Johnson and Jameell McKee, a man who observed Walker at the gas station.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] For background purposes, we summarize some of the testimony offered at trial. We do not attempt to summarize all of the testimony or discuss all of the potentially relevant evidence.

[3] Nichols suffered gunshot wounds to his upper arm and chest.

McKee testified that Walker asked him if he had any marijuana and McKee told him no. McKee said Walker then walked past him and went to a pay phone, picked up the receiver "and just started talking on the phone" without having dialed any numbers, which McKee thought was strange. McKee then proceeded to the gas station store to buy snacks.

¶5 McKee said that before he entered the gas station store, Nichols and Johnson drove up. McKee said he was "good friends" with Johnson and knew Nichols by reputation. McKee said that when he left the gas station store, he saw Walker still talking on the phone and asking people at the gas station whether they had marijuana. McKee said that as he stood talking to a friend, he saw Walker walk toward Nichols's car. McKee testified that he saw Walker pass up the opportunity to get into the passenger-side rear door in favor of getting in behind the driver, which McKee thought was "odd." He said Walker also "turned to the side instead of ... getting directly [seated] in the car," which led McKee to believe that Walker had something, perhaps a gun, in his waistband.

¶6 McKee said he saw the car leave the gas station and within a minute, he heard gunshots. McKee said he was at a distance of approximately five houses away and he could see flashes in the car. He said he saw the men exit through the car's back door and that they were "tussling." McKee said it appeared the men were "trying to grab for a gun." McKee testified that eventually, he saw Nichols lying on the ground where the tussle had occurred. McKee said that he saw Johnson run away and that he watched as Walker, who had a gun, "went through [Nichols's] pockets" and then ran away.

¶7 Johnson, who was in the car during the shooting, also testified. He said that he and Nichols were at the gas station at about half past midnight when

Walker approached Nichols to see if Nichols would sell him some marijuana. Johnson said Walker got in the back seat and Nichols drove away from the gas station.

¶8 Johnson said that Nichols pulled the car over, accepted money from Walker and gave Walker the marijuana. Then Walker said something like "break yourself," which Johnson understood to mean that Walker was attempting to rob Johnson and Nichols. Johnson said there was a scuffle and Walker grabbed Nichols from behind, "trying to choke him." Johnson said he and Nichols both fought with Walker, sometimes by leaning into the back seat or going into the back seat.

¶9 Johnson said that Walker had a gun and during the struggle he "started shooting," and Nichols got shot. Eventually, all three men exited through one of the rear car doors as they struggled with one another. Johnson said that he could not see well in the dark and that he was not sure how Nichols got out of the car, given that he had already been shot. Johnson said he knocked the gun out of Walker's hands, but Walker picked it back up and then proceeded to go through Nichols's pockets, taking money.

¶10 Johnson said after Walker went through Nichols's pockets, he turned to Johnson, pointed the gun at him and said, "[W]hat you got[?]" Johnson said he told Walker he did not have any money and then ran home, called 911 to report the incident and drove back to the scene in his car. When he arrived, he saw paramedics trying to resuscitate Nichols. He also spoke with police officers about what had occurred.

¶11 The defense presented two witnesses: Walker and a woman who heard the gunshots and observed the men. Walker testified that he did not have a

gun with him the night of the shooting and that he never pulled the trigger of any weapon that night. Walker said that he was left-handed and that on the night of the shooting, his left hand was wrapped in gauze because he had previously injured it and had stitches.

¶12 Walker admitted that he was trying to buy marijuana, which he said was for his ex-girlfriend. He said that while he was at the gas station, he saw a man he later came to know as McKee. Walker said he asked McKee if he had any marijuana to sell. Walker testified that McKee said no and then went to Nichols's car, spoke with Nichols and subsequently directed Walker's attention to Nichols. Walker said he spoke with Nichols, who was seated in the driver's seat, about purchasing marijuana. Walker said Nichols directed him to get into the back seat and Walker did so.

¶13 Walker said the car pulled away from the gas station and Walker got his money ready to make the purchase. Walker said he noticed they were driving away from where he needed to catch a bus. Walker testified that he said, "'Hold up. Where [are] you all going?'" There was no response and Walker then told Nichols and Johnson to stop the car. Walker testified that after the car stopped,[4] Nichols "half turned, and with a gun in his hand, in between the two [front] seats had a gun in his hand pointed at me and told me to break myself." Walker testified that he said, "What?" and then grabbed Nichols's hand and the gun. Walker said a struggle ensued, with both Nichols and Johnson fighting from the front seat.

[4] It is undisputed that the car was not put into park and while the events unfolded, the car slowly moved down the street and eventually hit a parked vehicle.

¶14 Walker said that Nichols had the gun in his hands and that the gun was fired. Walker said after the first gunshot, all three men kept fighting. Walker said he heard two or three more gunshots and he knew he was not hit, because his "purpose in grabbing [Nichols's] hand was to make sure the barrel of that gun was never pointed in my direction." Walker denied that he ever held the gun "independently" in his hand at any time while the men were in the vehicle. He testified that the shots were fired with Nichols holding the gun, while Walker was trying to "twist the gun around out of [Nichols's] hand."

¶15 Walker said he and Nichols ended up outside the vehicle, and that he did not see where Johnson went. Walker said he did not have the gun, did not pick up Nichols's gun, did not tell Johnson to give him money and did not go through Nichols's pockets. Walker said he ran home. He said he did not call the police because he knew that he was on extended supervision from prison and he did not care about helping Nichols because "[t]hey just tried to rob me and then tried to kill me when I wouldn't give up my money." Walker said he left town a couple of days later and went to Appleton, where he was eventually arrested.

¶16 At the time of his arrest in Appleton, Walker was carrying a gun that was the same type of gun that fired the shot that killed Nichols.[5] Walker said that one of the officers arresting him "got very excited, started jumping up and down ... [saying] 'Oh, is this a .38? Is this a .38'?" Walker said he told the officer, "I didn't shoot anybody with this gun."

[5] It was subsequently determined that this was not the gun that killed Nichols. There is no evidence in the record that the gun that killed Nichols was ever recovered.

¶17 The second defense witness was a woman who lived near the location where Nichols was shot. She testified that she heard shots, looked out her front door and saw a car in front of her house that was "just rolling forward." The car stopped a few doors down from the woman's house and she could see the driver's side of the vehicle. She said she saw the car door swing open and "a man was slumped forward, was pushed out onto the ground, and then two people piled out after him." She said the slumped man "never moved." She said she went to call 911 and later continued to observe the two men by the car. She testified that she saw one of the men bend over the man who was lying on the ground.

¶18 After the conclusion of testimony, the parties submitted written closing arguments that summarized the testimony. At the same time, Walker personally wrote a series of letters to the trial court in which he presented a number of arguments concerning the facts and directed the trial court's attention to a report written by Daphne Moutry-Allen, an investigator for the medical examiner's office, which stated that officers told her that when Johnson was questioned at the scene, he did not initially say that drugs were involved and instead told officers that Walker was borrowing a cell phone.

¶19 In response to receiving Walker's letters, the trial court held a hearing where it asked the parties whether they believed it should consider the information in Walker's letters. Trial counsel told the trial court that he had made strategic decisions about what to argue in closing and that he did not want the trial court to consider anything Walker submitted. The trial court agreed, but told the parties that if they wanted to revisit closing arguments or supplement them, the parties could agree to do so. No subsequent documents were filed with the trial court.

¶20 In an oral decision, the trial court found Walker guilty of the charged crimes. The trial court reviewed the evidence and made a specific finding that Walker's testimony was incredible. The trial court stated that it:

> finds [Walker's] testimony to be incredible both with regards to how these issues unfolded, the injuries that were ultimately received by Mr. Nichols, the fact that [Walker] indicated that he had never touched the gun at any point in time which seems ... inconsistent with what occurred, and looking at everything, not just the individual injuries of Mr. Nichols, but also the hole on the roof of the car, the other damage to the car and how everything unfolded with regards to these matters, I find Mr. Walker's testimony to be incredible.

The trial court then continued:

> Again it's not to say that the other witnesses ... didn't have other points where they were also inconsistent or [had testimony that] differed from the testimony of other witnesses, but I did find that the State, after considering all the factors the court has to take a look at with regards to these matters, has met their burden of proof with regards to each and every [charge].

¶21 Walker was found guilty and sentenced as follows: thirty years of initial confinement and ten years of extended supervision for the first-degree reckless homicide; three years of initial confinement and three years of extended supervision for being a felon in possession of a firearm, concurrent to the first-degree reckless homicide; and five years of initial confinement and five years of extended supervision for the attempted armed robbery by use of force, consecutive to the other counts and to any other sentence.

¶22 Walker secured postconviction counsel and filed a postconviction motion seeking a new trial, alleging several bases for relief, including ineffective

assistance of trial counsel. The State requested a hearing on the motion so that trial counsel could provide testimony. A ***Machner***[6] hearing was conducted, which included testimony from trial counsel and several others. Ultimately, the trial court denied Walker's postconviction motion in an oral decision, for reasons discussed below. This appeal follows.

## DISCUSSION

¶23 Walker argues that he is entitled to a new trial on several bases: (1) the State allegedly withheld ***Brady*** evidence; (2) the alleged ***Brady*** evidence constitutes newly discovered evidence; (3) his trial counsel was ineffective; and (4) the real controversy was not fully tried and it is probable that justice miscarried. We consider each argument in turn.

### I. Alleged withholding of *Brady* evidence by the State.

¶24 Walker asserts that the State committed a ***Brady*** violation and that he is therefore entitled to a new trial. ***Brady*** held that "under the Due Process Clause of the Fourteenth Amendment, a defendant has a constitutional right to evidence favorable to the accused and that a defendant's due process right is violated when favorable evidence is suppressed by the State either willfully or inadvertently, and when prejudice has ensued." ***State v. Harris***, 2008 WI 15, ¶61, 307 Wis. 2d 555, 745 N.W.2d 397. ***Harris*** explained:

> Prejudice means that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." In other words, "strictly

[6] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

> speaking, 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.*** (citations and footnotes omitted).

¶25 The alleged ***Brady*** violation in this case does not stem from the withholding of police reports. Rather, Walker argues the alleged violation occurred when the detective who interviewed Johnson did not include in his written report a reference to the fact that when he first started talking with Johnson at the scene, Johnson did not mention a drug transaction and instead said that Walker had approached the car to borrow a cell phone. Walker asserts that the detective, Tom Casper, thus "withheld evidence from his report" and that this was a "failure to turn over ***Brady*** material [which] denied Walker his right to due process."[7]

¶26 We begin our analysis of Walker's argument by disagreeing with his suggestion that the State conceded that there was a ***Brady*** violation in its response brief to Walker's postconviction motion. We do not read the State's brief as conceding a ***Brady*** violation. Rather, the State asserted that it had turned over all written reports. It did not dispute the fact that there was no written police report that discussed Johnson's initial story, but it also did not concede that failure to include that information constituted a ***Brady*** violation.

¶27 Next, we consider whether the defense was actually deprived of evidence that was "favorable to the accused." *See* ***Harris***, 307 Wis. 2d 555, ¶61.

[7] Walker's postconviction motion also mentioned Christopher Blaszak, another detective whose report did not mention Johnson's story about the cell phone, but on appeal Walker does not offer any argument with respect to Blaszak's report and, therefore, we do not discuss it.

The defense had a copy of the medical examiner's investigator's report explaining that officers told the investigator that Walker had changed his story. Thus, Walker was not deprived of the evidence concerning Johnson's initial story.

¶28 Even assuming for purposes of this appeal that Casper should have included the information in his report, Walker has failed to prove that the incompleteness of Casper's report was prejudicial. Trial counsel testified at the ***Machner*** hearing that he was given a copy of the medical examiner's investigator's report and that he reviewed it prior to trial.[8] Trial counsel said he was aware that officers reported they had been told a different story by Johnson when they first spoke with him. Trial counsel said he made a conscious decision not to raise that issue at the trial. In light of that fact, we cannot conclude that if a more complete report by Casper had "been disclosed to the defense, the result of the proceeding would have been different." *See* ***Harris***, 307 Wis. 2d 555, ¶61. For this reason, Walker is not entitled to relief on this ground and we affirm the trial court's order rejecting Walker's ***Brady*** argument.

**II. Newly discovered evidence.**

¶29 Walker argues that Johnson's initial statement that Walker approached the car to borrow a cell phone is newly discovered evidence that entitles him to a new trial. The decision to grant or deny a motion for a new trial based on newly discovered evidence is committed to the trial court's discretion. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. ***Plude*** held:

[8] Whether trial counsel should have used that information to impeach Johnson is not relevant to the ***Brady*** issue. We consider trial counsel's alleged ineffectiveness later in this opinion.

> When moving for a new trial based on the allegation of newly-discovered evidence, a defendant must prove: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative."

***Id.***, ¶32 (citation omitted). As noted above, the fact Johnson initially told officers that Walker wanted to borrow a cell phone was not discovered after conviction. This information was in the medical examiner's investigator's report and was known to trial counsel. Walker has failed to satisfy the principle factor identified in ***Plude*** and, therefore, his request for a new trial based on newly discovered evidence fails.

**III. Alleged ineffective assistance of counsel.**

¶30 Walker seeks a new trial on grounds that his trial counsel provided ineffective assistance in four ways: (1) ineffectively cross-examining Johnson; (2) failing to file a discovery demand; (3) allowing a detective to vouch for Johnson's credibility; and (4) failing to alert the trial court that it had relied on facts not in evidence to reach its decision on Walker's guilt.

¶31 To establish an ineffective assistance of counsel claim, a defendant must show both that trial counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697. We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will not reverse the trial court's factual findings unless they are clearly erroneous. ***Id.*** However, we

review the two-pronged determination of trial counsel's performance independently as a question of law. ***Id.*** at 128.

¶32 With respect to trial counsel's performance, there is a strong presumption that counsel rendered adequate assistance. ***Strickland***, 466 U.S. at 690. Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** at 689. We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.'" ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted). "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***Id.*** at 464-65.

¶33 With respect to the prejudice prong, the defendant must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687. In other words: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. "The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). "[I]n determining whether a defendant has been prejudiced as a result of counsel's deficient performance, [a court] may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfied the standard

for a new trial under ***Strickland***." ***Thiel***, 264 Wis. 2d 571, ¶60. With these standards in mind, we examine Walker's ineffective assistance claims.

**A. Cross-examination of Johnson.**

¶34 Walker argues that because credibility "was of utmost importance," trial counsel performed ineffectively when, without good reason, he did not attempt to impeach Johnson with the fact that he initially told the officers Walker had approached the car to borrow a cell phone. At the ***Machner*** hearing, postconviction counsel asked trial counsel about his cross-examination of Johnson. Trial counsel testified that he had recognized Johnson's credibility was important and said, "That's why the cross-examination went the way it did." Trial counsel testified that he "made a determination as to what I thought was significant, and that's how I tried the case." He said that he "would never have asked" Johnson about the change in his story because he does not ask questions to which he does not know the answer, and that instead, he asked "pointed questions about the changes that I saw between his testimony and what he told the detectives." Trial counsel acknowledged that he could have tried to impeach Johnson about the change in his story, but explained the reason behind his strategic decision not to do so:

> There's a lot of impeachable questions in a trial. I make the decision on how I'm going to impeach, when I'm going to impeach, and with what I'm going to impeach.
>
> ....
>
> ... [T]hat was the decision I made. I felt it was the right decision. I still feel that was the right decision.
>
> I'm not going to give Mr. Johnson a chance to talk about whatever might come into his head, including, ["W]ell, I changed my story because I was a little bit afraid, and then when the detectives talked to me, I wasn't quite as afraid.["]

> Or he could have come up with, which probably was in there to a certain extent, [that "]I didn't really want the detectives knowing that I was dealing drugs so I kind of fudged that, and then I realized that my friend's dead so I really should come clean,["] which would have strengthened his testimony.

¶35 The trial court implicitly accepted trial counsel's testimony as credible, noting several times that trial counsel had made strategic decisions when deciding whether to ask Johnson about his statements to police about Walker wanting to borrow a cell phone. For instance, the trial court noted that postconviction counsel "came to [the issue] ... with a different perspective than [trial counsel] did, because [trial counsel] put a different value and viewed that issue differently, and I think that the testimony will bear that out." The trial court further noted that, based on trial counsel's testimony, the trial court did not think that trial counsel "saw that as a pivotal issue or a central issue." We read the trial court's comments as finding that trial counsel made strategic decisions concerning this area of inquiry and concluding that trial counsel's strategic decisions were reasonable. We agree with the trial court.

¶36 As noted, "[a] strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***Elm***, 201 Wis. 2d at 464-65. It is a reasonable trial strategy to focus on what counsel believes are the strongest areas of impeachment and forego lesser areas of inquiry. It is also reasonable to avoid giving a witness the opportunity to offer explanations that improve his credibility. Trial counsel's strategic decision satisfies the standard noted in ***Elm*** and, therefore, Walker has failed to show that his trial counsel was deficient.

¶37 Moreover, we agree with the trial court's assessment that Walker has failed to show he was prejudiced by trial counsel's alleged error. The trial court

concluded that while the potential impeachment evidence may have affected Johnson's credibility, "looking at everything that was adduced during the course of the trial[, it] would be of a minimal nature. Thus, it would not materially affect the outcome of the trial." Johnson was impeached in numerous ways, and we agree with the trial court that the fact Johnson initially did not admit to being involved in a drug transaction would not have so affected his credibility that it can be said that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***Strickland***, 466 U.S. at 694. For these reasons, we conclude that Walker has failed to prove ineffective assistance of counsel.

**B. Failing to file discovery demand.**

¶38 Walker faults trial counsel for not filing a discovery demand and instead relying on an informal arrangement with the State whereby trial counsel had access to the State's files. He argues that "[t]he prejudice from not filing a discovery demand is abundantly evident because Walker never received any reports from [Detectives] Blaszak and/or Casper explicating or elaborating on the change in Johnson's story that is noted in [Mouty-]Allen's report."

¶39 There is no evidence in the record that either Blaszak or Casper ever wrote a report mentioning the change in Johnson's story. At the ***Machner*** hearing, Casper said no such reports exist.

¶40 The trial court denied Walker's motion and we affirm. Walker has not proven the prejudice prong of the ***Strickland*** test because he has not shown how filing a discovery demand would have produced any reports that were not already provided to trial counsel.

### C. Failing to object to Detective Chavez's testimony.

¶41 Walker argues that trial counsel should have objected to the testimony of Detective David Chavez, who testified as follows when the State asked him questions about his on-the-scene interview of Johnson:

> Q: [H]ow did [Johnson] appear to you? What was his demeanor when you saw him that night?
>
> A: He was upset.
>
> Q: And was he in custody at this time?
>
> A: Not at this time, no.
>
> Q: Was he ever in custody?
>
> A: No.
>
> Q: ... [W]hen you first arrived on [the] scene and you saw [Johnson] ... were you informed that he had been involved in this incident?
>
> A: Yes.
>
> Q: Was he a potential suspect at that point?
>
> A: Not at that point. We found out that he was the caller and a witness that was inside the automobile at the time.
>
> Q: And why was that significant that he was the caller?
>
> A: Not only was he the caller, but he actually arrived back on the scene. That made us believe that this was, you know, his friend who was shot and killed and that he wanted to help.
>
> Q: And what's that based on, your experience or your training?
>
> A: Both.
>
> ....
>
> A: ... This individual, Mr. Johnson, wanted to help. And he was very concerned about his friend.

¶42 In his opening appellate brief, Walker presented a three-paragraph argument that his constitutional right to effective counsel was violated when trial counsel did not object to Chavez's testimony on grounds that Chavez was allowed to improperly offer an opinion that Johnson was telling the truth, contrary to ***State v. Jensen***, 147 Wis. 2d 240, 432 N.W.2d 913 (1988), and ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). In response, the State provided a detailed analysis of numerous cases in support of its argument that Chavez's testimony was not objectionable, which Walker then refuted in his reply brief.

¶43 Under ***Strickland***, we "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *See* ***id.***, 466 U.S. at 697 ("The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). In this case, the prejudice prong is dispositive.

¶44 The following is Walker's entire argument on prejudice:

> Here, Trial Counsel's failure to know the rules of evidence clearly prejudiced Walker because it allowed the finder-of-fact to hear inadmissible testimony on an important issue—credibility. Because Trial Counsel allowed this bolstering of Johnson's credibility, and also, failed to attack Johnson's credibility, Walker was deprived of competent counsel and prejudiced.

While erroneously admitted evidence that affects credibility may *potentially* prejudice a defendant such that reversal is required, a reversal is not automatic. Here, Walker's argument fails to prove "that there is a reasonable probability"—defined as "a probability sufficient to undermine confidence in the outcome"—"that, but for counsel's unprofessional errors, the result of the proceeding would

have been different." *See* ***id.*** at 694. As we have stated before, "[a] showing of prejudice requires more than speculation.... The defendant must affirmatively prove prejudice." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). Walker has not even attempted to do so. Therefore, his claim fails. *See* ***id.***; *see also* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court will not address issues on appeal that are inadequately briefed).

**D. Failing to correct the trial court's findings of fact.**

¶45 Walker's final ineffective assistance argument relates to the trial court's statement, made during its oral decision finding Walker guilty, that it found Walker's testimony to be incredible in part because Walker "indicated that he had never touched the gun at any point in time which seems ... inconsistent with what occurred." In his appellate brief, Walker identifies numerous times during his trial testimony where he testified that he had touched the gun, such as during the struggle with Johnson and Nichols. Walker does not discuss the comments concerning this issue that the trial court offered at the postconviction hearing.[9] Rather, Walker simply presents a three-sentence argument asserting that his trial counsel's failure to object during the trial court's oral decision constituted ineffective assistance of counsel, stating:

[9] At the hearing on Walker's postconviction motion, the trial court explained that as the trier of fact, it knew that Walker had admitted touching the gun. It said that its finding in its oral decision was intended to address the fact that Walker denied he had ever held the gun independently, as opposed to touching it during the struggle with Nichols and Johnson. The trial court stated that if trial counsel had asked for clarification during the trial court's oral decision finding Walker guilty, the trial court would have clarified its statement, "because clearly, we're talking about the fact that he is denying possessing that firearm, either when he got in the car or during the course of these proceedings or afterwards, and that his only contact with that gun was ... in defense of his own position."

> Walker was prejudiced because Trial Counsel was ineffective for failing to alert the Court that it had relied upon facts not in evidence to reach its decision.
>
> The Trial Court erroneously believed that Walker had claimed to have not touched the gun that killed Nichols. The Trial Court's belief is not supported by the record, and Trial Counsel's failure to alert the Court that this belief was predicated on facts not in evidence[] clearly prejudiced Walker.

(Emphasis omitted.) Walker has not adequately briefed this issue. He offers no explanation of how the alleged error by the trial court after the evidence was complete was sufficiently prejudicial to justify a new trial, especially in light of the trial court's comments at the postconviction hearing explaining that it was referring to Walker's denial that he ever possessed the firearm and not suggesting Walker denied touching the gun during the struggle. We decline to address this undeveloped argument. *See* ***Pettit***, 171 Wis. 2d at 646-47; *see also* ***Wirts***, 176 Wis. 2d at 187.

**IV. Discretionary reversal.**

¶46 Walker seeks a new trial pursuant to WIS. STAT. § 752.35, the statute that allows this court to order a discretionary reversal "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." *See* ***id.*** "[U]nder the first category, when the real controversy has not been fully tried, an appellate court may exercise its power of discretionary reversal without finding the probability of a different result on retrial." ***Vollmer v. Luety***, 156 Wis. 2d 1, 16, 456 N.W.2d 797 (1990). "Under the second category, however, an appellate court must first find a substantial probability of a different result on retrial before exercising its discretionary reversal power." ***Id.*** As Walker acknowledges, reversal under § 752.35 occurs

"only in exceptional cases." *See* ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶47 Walker argues that a discretionary reversal is justified here under both categories because trial counsel was ineffective, the State withheld ***Brady*** evidence that is also newly discovered and the trial court relied on facts not in evidence to assess Walker's credibility. We conclude that these arguments, which we have already rejected, do not support a discretionary reversal.

¶48 Walker's final claim is that justice probably miscarried because the trial court's credibility determination rested in part on an erroneous finding that Walker claimed he never touched the gun. At the postconviction hearing, the trial court clarified its previous statement concerning Walker's contact with the gun. We conclude that the trial court's previous misstatement does not justify discretionary reversal. The trial court found Walker's testimony incredible for numerous reasons. Its correction of a single misstatement in its credibility assessment does not lead us to conclude that here is "a substantial probability of a different result on retrial" that would justify the exercise of our discretionary power. *See* ***Vollmer***, 156 Wis. 2d at 16.

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

Not recommended for publication in the official reports.