COURT OF APPEALS DECISION DATED AND FILED

May 27, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2008AP2017-CR **Cir. Ct. No. 2007CF3976**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. FLYNN,

DEFENDANT-APPELLANT.

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

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

¶1 KESSLER, J. Robert L. Flynn, proceeding *pro se*, appeals from a judgment of conviction for being a felon in possession of a weapon as a habitual

criminal, contrary to WIS. STAT. §§ 941.29(2)(a) and 939.62 (2007-08).[1] He also appeals from the order denying his *pro se* postconviction motion for relief. In his postconviction motion, Flynn claimed that his trial counsel was ineffective for a variety of reasons. Because Flynn did not present facts at the ***Machner***[2] hearing that established ineffective assistance of counsel, we reject his arguments. Further, we reject his challenge to the sufficiency of the evidence. Therefore, we affirm the judgment and the order.

BACKGROUND

¶2 The home of Flynn's brother-in-law, David Sterling,[3] was burglarized while the Sterling family was away. On August 15, 2007, while the police were investigating the burglary, David told Detective Shannon Lewandowski that Flynn had a gun and was a convicted felon. Lewandowski went to Flynn's home, interviewed Flynn and recovered a lock box containing a gun. The lock box was found in the trunk of a Chevy Impala that was titled to Flynn and his wife, Maribeth. Maribeth had voluntarily given the car keys to the police in response to their request to look in the trunk.

¶3 According to the criminal complaint, David also told Lewandowski about an incident with Flynn that had recently occurred at the hardware store that David owned. The complaint alleged that David said Flynn came to the store with

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

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

[3] David Sterling's wife is the sister of Maribeth Flynn, who is Flynn's wife. This case involves numerous individuals with the same last name. Thus, we will refer to David Sterling as David; Brian Sterling as Brian; and Maribeth Flynn as Maribeth.

a gun that he tried to sell to David. David said he declined and that Flynn proceeded to ask other employees about buying the gun, but the gun was not sold. David said Flynn purchased a tan-colored lock box from the store and left with the gun and the lock box.

¶4 Flynn, who was on parole at the time the gun was recovered from the vehicle, was charged with one count of possession of a firearm by a convicted felon, as a habitual offender. The Information charged that Flynn, "[b]etween 7-1-07 & August 1, 2007 at 3955 S. Howell Avenue to August 15, 2007, at 178 West Tripoli Avenue, City of Milwaukee … did possess a firearm…." The Howell Avenue address is David's hardware store. The Tripoli Avenue address is Flynn's home.

¶5 The trial court held a two-day jury trial. Flynn's theory of defense was that the two witnesses who told police that they had seen him with a gun, David and his adult nephew, Brian, were not credible. It was stipulated that Flynn had previously been convicted of a felony.

¶6 At trial, three witnesses testified: David, Brian and Lewandowski. Brian, who works at the hardware store, was expected to testify that he saw Flynn with a black handgun at the hardware store in July. However, he instead testified

that he had never seen Flynn in the hardware store with a gun, but that he saw Flynn with a black handgun at Flynn's home.[4]

¶7 David testified that on July 25, 2007, Flynn came to the hardware store to buy a lock box. David said that Flynn entered the store carrying the gun in a black plastic case and that Maribeth was with him. David testified that Flynn showed David the gun and told David he had purchased it three days earlier. David said that he showed Flynn some lock boxes and that Flynn picked one. David testified that Maribeth paid for the lock box with a twenty-dollar bill. David said that during the transaction, Flynn held the gun in his hand and at one point had David hold the gun. David said that Flynn left the store with the gun in the lock box.

¶8 During cross-examination, Flynn's attorney established that many details of David's testimony were inconsistent with statements he had given to Lewandowski. The inconsistencies focused on when David first mentioned various details, differences as to dates when David said various events occurred, whether Flynn had the gun in his pocket or in the plastic case when he came into the store, differences as to where in the store Flynn was when he almost dropped the gun and whether Flynn solicited David and other store employees to buy the gun.

[4] This unexpected testimony led to a discussion outside the jury's presence. Trial counsel moved for a mistrial. The trial court denied the motion, concluding that evidence that Flynn had a gun at his home was not a surprise and that the inconsistency in Brian's testimony actually benefited Flynn's defense. The court offered to instruct the jury to disregard Brian's statement about seeing the gun at Flynn's home, if Flynn's attorney wanted that instruction. She declined. The court also asked whether there may be a unanimity problem with the Information and verdict form. Trial counsel did not offer any comments during the unanimity discussion and did not object to the Information.

¶9 David also testified that on July 31, 2007, Flynn asked David to hold onto the lock box for Flynn. David said that he never opened the box and was not told the gun was in it, but also said he was "smart enough to know" that the gun was in it. David testified that he returned the lock box to Flynn on August 10, 2007, after Flynn "asked for the gun." Specifically, David said that Flynn came to the hardware store about an hour before closing and waited for David to close up. Then, David drove to his home with Brian, retrieved the lock box and handed it to Brian to give to Flynn, who was outside on his motorcycle. David admitted on cross-examination that he did not share information about holding the gun for Flynn with Lewandowski when he spoke with her on August 15, 2007.

¶10 Lewandowski testified that she interviewed David in the early morning hours of August 15, 2007, after he reported that his house had been burglarized. She said David told her that Flynn had a gun. Lewandowski said she then went to Flynn's home, at about 4 a.m. Lewandowski said that Flynn and Maribeth were there and that she eventually received permission to search Flynn's home and the two vehicles in the driveway. She found in the trunk of the Chevy Impala, the car that Maribeth usually drove, a lock box with a nine millimeter gun inside. Lewandowski said that the gun was tested for fingerprints, but none were recovered.

¶11 Lewandowski also testified concerning interviews she conducted with Brian and David. She said Brian told her that he had seen Flynn in the hardware store with a gun. She said David told her that Flynn had come to the hardware store and tried to sell the gun to David and others. Lewandowski was also cross-examined concerning a number of other inconsistencies between the statements she said Brian and David had given her and their testimony at trial.

¶12 The jury was instructed as to the elements of the offense. There were no objections to the jury instructions. The jury found Flynn guilty and he was convicted. Prior to sentencing, Flynn's privately retained counsel filed a motion to withdraw based on Flynn's desire to represent himself.[5] The trial court granted the motion. From that point on, including at sentencing one month later, Flynn represented himself.

¶13 The trial court imposed a sentence of six and one-half years, comprised of thirty months of initial confinement and forty-eight months of extended supervision, concurrent to Flynn's previously imposed sentence in the Wisconsin State Prison System.[6] Flynn filed a motion for postconviction relief, alleging that he was denied the effective assistance of trial counsel for numerous reasons that we discuss later in this opinion. In response, the State asked the trial court to schedule a ***Machner*** hearing so that the issues could be thoroughly explored. The trial court agreed and scheduled a ***Machner*** hearing.

¶14 At the ***Machner*** hearing, Flynn's trial counsel testified. After more than two hours of Flynn questioning his trial counsel (the State having asked no questions) and the trial court repeatedly admonishing Flynn that this was not an opportunity to retry his case, the trial court denied Flynn's motion. The court stated:

> I've given you every opportunity to bring out things that you think [trial counsel] did wrong, and you persist in trying to retry the case. I have not heard anything. I've not

[5] Prior to trial, Flynn had on several occasions contacted the trial court to complain about his trial counsel. However, he elected to proceed to trial with trial counsel representing him.

[6] At the time of sentencing, it was anticipated that Flynn's parole in the previous case would be revoked.

> seen anything in this record to support even the hint of an inference that [trial counsel] did anything wrong….
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> In fact, what she did was more than competent in this case in my view….
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> ….
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> … I base my decision on the evidence here this afternoon. I also base my decision on all of the materials that you filed with the exception of the CD that I did not listen to. But based on everything else that was filed, there's nothing in this record to support a claim that [trial counsel] did anything wrong and acted in any way short of the standard required of her. And all you're doing is trying to use this motion as a way to retry the case. We are done. Motion denied.

This appeal follows.

DISCUSSION

¶15 On appeal, Flynn raises six issues, four of which concern the ineffective assistance of counsel and one of which is a challenge to the sufficiency of the evidence. We address those issues in turn, but we decline to address Flynn's allegation of prosecutorial misconduct, which is raised for the first time on appeal.[7] *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997)

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[7] Flynn asserts that he raised his allegations concerning the prosecution in a "reply brief" he filed with the trial court prior to the ***Machner*** hearing. However, when Flynn mentioned at the beginning of the ***Machner*** hearing that he had filed a reply brief, the trial court responded: "A reply brief to what?" and noted that the State had not filed a brief because it had conceded Flynn's right to a ***Machner*** hearing. The trial court implicitly declined to consider new issues raised in the reply brief. On appeal, Flynn argues that the trial court should have considered the prosecution issue, suggesting that he "ask[ed] to supplement his brief in chief with his reply brief and attached exhibits." However, we do not see where in the record Flynn ever asked to amend or supplement his original postconviction motion, or even drew the trial court's attention to the fact that an entirely new issue had been raised in the reply brief. We discern no erroneous exercise of discretion on the part of the trial court for declining to consider issues raised for the first time in a reply brief, as we too "do not consider arguments raised for the first time in a reply brief." *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661.

("As a general rule, this court will not address issues for the first time on appeal."). We will also not address additional allegations of ineffective assistance that Flynn raised at the trial court but did not argue on appeal. *See* ***State v. Ledger***, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993) (noting that issues not briefed or argued are deemed abandoned).

I. Legal standards: ineffective assistance of counsel.

¶16 To prove ineffective assistance of counsel, a defendant must show both deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because the defendant must show both, reviewing courts need not consider one prong if the defendant has failed to establish the other. ***Id.*** at 697.

¶17 To prove deficient performance, the defendant must point to specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "'Effective representation is not to be equated, as some accused believe, with a not-guilty verdict. But the representation must be equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his [or her] services.'" ***State v. Felton***, 110 Wis. 2d 485, 500-01, 329 N.W.2d 161 (1983) (citation omitted).

¶18 To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were sufficiently serious to deprive him or her of a fair proceeding and a reliable outcome. ***Id.***, 466 U.S. at 694 ("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.").

¶19 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. ***Id.*** at 324-25. However, the ultimate question of ineffective assistance is one of law, subject to independent review. ***Id.*** at 325.

II. Analysis: ineffective assistance of counsel.

¶20 Flynn argues that his trial counsel provided ineffective assistance in numerous ways, which he divides into four main categories. We address each alleged error in turn.

A. Lack of a unanimity or duplicity challenge.

¶21 Flynn argues his trial counsel erred by not challenging the Information, which Flynn alleges was duplicitous and led to a non-unanimous verdict.[8] In a related argument, Flynn asserts his trial counsel should have asked

[8] Flynn also argues the merits of the unanimity issue, asserting that the verdict was unconstitutional because the Information referenced two different dates and locations. Because Flynn never objected to the Information, verdict form or jury instructions, we conclude that he waived his objection. Thus, we will consider the issue within the context of ineffective assistance of counsel. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994) (Where a defendant waives a duplicity challenge, it is appropriate to consider the issue within the context of an ineffective assistance of counsel claim.); ***State v. Marcum***, 166 Wis. 2d 908, 916, 480 N.W.2d 545 (Ct. App. 1992) (where defendant challenged his conviction on unanimity grounds, court stated that although it would not review unobjected-to instructions or verdict forms "in the context of whether the trial court erred," it would consider the instructions and verdict forms as part of its ineffective-assistance-of-counsel analysis).

for a jury unanimity instruction regarding the actual date the firearm was possessed.[9]

¶22 "'Duplicity is the joining in a single count of two or more separate offenses.'" ***State v. Miller***, 2002 WI App 197, ¶22, 257 Wis. 2d 124, 650 N.W.2d 850 (quoting ***State v. Lomagro***, 113 Wis. 2d 582, 586, 335 N.W.2d 583 (1983)). The prohibition against duplicity serves numerous purposes:

> (1) to provide the defendant with sufficient notice of the charge, (2) to protect the defendant against double jeopardy, (3) to avoid prejudice and confusion arising from evidentiary rulings during trial, (4) to assure that the defendant is appropriately sentenced for the crime charged, and (5) to guarantee jury unanimity.

Id. However, prosecutors have discretion whether to charge one continuous offense, a single offense or a series of single offenses. ***State v. Glenn***, 199 Wis. 2d 575, 584, 545 N.W.2d 230 (1996); *see also* ***Lomagro***, 113 Wis. 2d at 598 (holding that various acts of sexual penetration that occurred over a period of about two hours could be considered one continuous occurrence and the verdict did not violate unanimity principles).

¶23 Trial counsel could have attempted to challenge the wording of the Information, or she could have asked the State to specify a location or date for the possession and then asked the trial court to instruct the jury consistent with the identified date and place. However, trial counsel made a strategic decision not to raise the unanimity issue, as she explained at the ***Machner*** hearing:

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[9] To the extent Flynn is suggesting the trial court did not give WIS JI—CRIMINAL 515 concerning unanimity, he is mistaken. In addition to giving this instruction, the jury was polled on its return and the record reflects the court's finding that all jurors agreed the verdict returned was their verdict.

> I opted to really accept it the way it was versus somehow raising a stink and getting two counts of felon in possession charged against [Flynn].
>
> So I decided to leave it that way versus having the district attorney's office charge [Flynn] with felon in possession for the time frame between July 1 and August 1 of '07 and then a second count of felon in possession regarding the August 15th [possession].
>
> So I decided not to challenge that because technically [the State] could have done that.

The trial court accepted this testimony as truthful; this finding is not clearly erroneous.

¶24 The court concluded that trial counsel's actions were reasonable, telling Flynn:

> I don't find any basis for a claim that [trial counsel] was ineffective for not challenging the information. We talked about it in the trial.
>
> I, in fact, am the one that raised the unanimity issue. And [trial counsel] made a strategic decision about limiting the State [to], in effect, one count. She explained that. I think that's something within the trial counsel's discretion.
>
> So I don't find anything ineffective about her decision nor on the request or lack of a request with respect to the unanimity instruction.

We agree that trial counsel's performance was not deficient. Whether a challenge to the Information or verdict form would have been successful is uncertain.[10] Moreover, challenging the Information, jury instructions or verdict form would likely have led to the State separating the single possession charge into two

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[10] Although the Information could have been more artfully drafted, we do not decide whether the Information or verdict violated principles of duplicity and unanimity; this is the issue that trial counsel could have raised, but elected not to for significant strategic reasons.

separate charges, which trial counsel understandably wanted to avoid.[11] "We will not second guess trial counsel's selection of trial tactics or strategies in the face of alternatives that he or she has considered. Rather, we 'judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" ***State v. Nielsen***, 2001 WI App 192, ¶44, 247 Wis. 2d 466, 634 N.W.2d 325 (citations omitted). We conclude that trial counsel's strategy was reasonable and that her performance was not deficient. Therefore, Flynn's ineffective assistance claim fails.

B. Counsel's agreement not to mention the burglary.

¶25 Flynn argues his trial counsel performed deficiently when she reached an agreement with the State that prevented the jury from hearing about the burglary of David's home because this prevented the jury from hearing that David had a motive to lie and allowed the State to argue that there was no evidence that David had a motive to lie. Like the trial court, we reject this argument because we conclude that trial counsel had a strategic reason for making the agreement. *See **id.***

¶26 At the ***Machner*** hearing, trial counsel testified about the reasons that she made an agreement with the State not to introduce the burglary allegations in the trial:

> [I]n essence it was a strategic decision not to bring in other potential bad acts. Because it was clear to me based upon the review of the reports and the information that I received

[11] Given testimony from David that the gun looked different than the gun that was recovered from Flynn's car, the State may have been even more inclined to increase the charges if trial counsel had challenged the Information. The State could have charged that Flynn possessed one gun at the store and a different gun that he stored in the lock box in the car trunk.

> during the course of my representation of [Flynn] that [Flynn was] supposedly the prime suspect in the burglary of the David Sterling home.
>
> Certainly that gives a motive for Mr. Sterling to have either pointed the finger at [Flynn] in regards to the gun or lied about you regarding the gun.
>
> But it was my strategic decision not to bring in other bad acts that would have complicated the issue. It also would have created a mini trial within a trial; and, therefore, I did not bring it in.

Trial counsel further explained that introducing evidence of the burglary would have allowed the State to talk about a pair of wet slippers that were recovered from Flynn's house the morning the police were investigating the burglary. Trial counsel stated that the slipper evidence

> would have opened the door to an accusation that [Flynn] knew that the police were coming over when [Flynn] found out that the burglary had been reported or the burglary had occurred and then [Flynn] went and hid the loot from the burglary, and that's why the slippers were wet.
>
> It would have opened up an entire can of worms [and] I was not going to be a part of … having it come into this trial.

¶27 The trial court accepted this testimony as truthful and that finding is not clearly erroneous. Although the court did not specifically comment on trial counsel's decision not to mention the burglary, the court concluded at the end of the hearing that trial counsel had "adequately explained why she made the decisions she made at the various points in the trial" and that "there's nothing in this record to support a claim that [trial counsel] did anything wrong and acted in any way short of the standard required of her."

¶28 We conclude, like the trial court, that trial counsel's actions were not deficient. She explained the basis for her strategic decision to make sure that the

burglary was not mentioned and this decision was reasonable. *See* ***Nielsen***, 247 Wis. 2d 466, ¶44. Flynn's allegation of ineffective assistance fails.

C. Counsel's alleged failures to use discovery material to impeach the witnesses, conduct a "significant investigation" and interview additional witnesses.

¶29 Flynn contends that trial counsel did not properly impeach the State's witnesses, investigate the case or call other witnesses to testify at trial. First, he identifies eight inconsistencies in David's testimony at various hearings and asserts that trial counsel should have impeached David or, in cases where counsel asked questions, that she should have asked them in a more effective way. At the ***Machner*** hearing Flynn asked his trial counsel about several of the inconsistencies. Trial counsel explained that she did not remember all of the details because she had not reviewed the trial transcripts, but she explained that she *did* try to impeach David. She stated:

> [David] was very inconsistent. I attempted to cover all inconsistencies between his preliminary hearing transcript, his testimony at trial, and also his statements to law enforcement.
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> ….
>
> I attempted to confront [David] with every inconsistenc[y] that I could come up with at the time of cross-examination based on upon my review of the police reports, the preliminary hearing transcript, and the testimony that he gave at trial.

¶30 The record supports trial counsel's assertion that she attempted to cross-examine David with his inconsistent testimony. At the very start of the cross-examination, she asked David questions about what he told Lewandowski. For instance, she asked David whether he had told Lewandowski that Flynn entered the store with the gun in his pocket, rather than in a plastic case. David

denied telling the detective the gun was in Flynn's pocket, and said his testimony had been consistent. By highlighting this inconsistency, counsel gave the jury information on which to base its credibility assessments of David and Lewandowski.

¶31 Trial counsel asked David detailed questions about what occurred at the hardware store. She challenged David's testimony that he held the lock box for Flynn for several days and got David to admit that he had not shared that information with Lewandowski when he was interviewed on August 15, 2007. She confronted David about his identification of the gun. In terms of sheer length, trial counsel's cross-examination of David was roughly equal to the State's direct examination; the total examination consumed about forty-eight pages of the transcript.

¶32 These examples of impeachment support trial counsel's statements, which the trial court accepted as true, that counsel attempted to cross-examine David with every inconsistency. We acknowledge that trial counsel did not ask every question that Flynn believes she should have asked. However, we are unconvinced that any single inconsistency that he discusses was more vital than the inconsistencies trial counsel chose to highlight. Trial counsel attempted to discredit David in a multitude of ways. Which questions to ask, and how to ask them, were decisions within trial counsel's discretion. *See* ***Felton***, 110 Wis. 2d at 502 (selection of trial tactics is "the equivalent of the exercise of discretion" and should not be second-guessed "in the face of alternatives that have been weighed by trial counsel"). We reject Flynn's argument that trial counsel's impeachment of David was deficient. *See* ***id.*** (strategic or tactical decision "based upon rationality founded on the facts and the law" will not be held to constitute ineffective assistance).

¶33 Flynn also complains that trial counsel should have investigated more thoroughly and then presented testimony from a hardware store employee named Jake, Flynn's eye doctor and Flynn's wife. However, the only evidence of what these witnesses would have said is offered by Flynn in his brief. There are no affidavits or other materials to support Flynn's assertion that their testimony would have helped his case and Flynn did not call those people as witnesses at the ***Machner*** hearing. What they would have said, whether they would have been credible and how their testimony would have contradicted other evidence in the case is purely speculative. We conclude that Flynn has failed to show that he was prejudiced by his trial counsel's alleged error in not contacting or calling those individuals as witnesses. *See* ***State v. Erickson***, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999) ("It is not enough for a defendant to merely show that the error 'had some conceivable effect on the outcome' of the trial.... Rather, the defendant must demonstrate … there is a reasonable probability … that the result of his trial would have been different.") (citation omitted).

D. Cross-examination of Lewandowski.

¶34 Flynn asserts that his trial counsel should have cross-examined Lewandowski about her testimony concerning the lack of fingerprints on the gun.[12] Specifically, Flynn contends that his trial counsel should have challenged Lewandowski's testimony that it is very difficult to find fingerprints on a gun. Flynn suggests that allowing Lewandowski to give testimony about the likelihood of finding prints was prejudicial and misleading. However, Flynn also argues that

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[12] Flynn has not directed us to any ***Machner*** hearing testimony from trial counsel concerning this issue and we have not identified any.

his trial counsel should have called two technicians to testify that they too had not found any fingerprints. We fail to understand how the result of the proceeding would have been different if Lewandowski had been asked questions concerning her opinion or if the two technicians had testified, especially where the technicians' testimony would have corroborated Lewandowski's testimony that there were no fingerprints found on the gun. We reject Flynn's argument because we are unconvinced that Flynn has proven he was prejudiced by any alleged trial counsel error. *See* ***id.***

III. Sufficiency of the evidence.

¶35 Flynn challenges the sufficiency of the evidence for his conviction. When reviewing the sufficiency of evidence, an appellate court may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). "'The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding.'" ***Id.*** at 504 (citation omitted).

¶36 To convict Flynn of being a felon in possession of a weapon, the State was required to prove that he: (1) is a felon; and (2) possessed a firearm. At trial, Flynn stipulated to the fact he was a felon. His argument on appeal is that there was insufficient evidence that he possessed a firearm. We disagree.

¶37 The jury heard David's testimony that Flynn possessed a gun in the hardware store. The jury heard evidence that in the weeks following the hardware

store visit, Flynn possessed a lock box which David said he believed contained a gun. The jury heard that subsequently, while David was at Flynn's house, Flynn asked David to hold onto the lock box for Flynn, then retrieved a key from behind a picture in Flynn's kitchen and gave David the key to the lock box along with the lock box. David testified that ten days later, Flynn came to the hardware store and asked David to return the lock box. Finally, it was undisputed that a gun was found in a lock box that was in the trunk of the car Flynn and his wife owned and had parked in their driveway.[13] Applying the appropriate standard of review, which requires that we defer to the jury's credibility determinations, we conclude that there was sufficient evidence to convict Flynn of possessing a firearm. *See* ***id.***

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

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[13] Flynn asserts that the "mere fact" the firearm was found in his wife's car's trunk was insufficient evidence that he possessed the firearm. However, he ignores the testimony—which the jury was free to accept—that Flynn and his wife jointly owned the car and that Flynn bought a lock box to store a gun in and was seen with the lock box on subsequent occasions. From this testimony the jury could reasonably infer that Flynn had access to the car and that he intended to exercise control over the firearm. *See* WIS JI—CRIMINAL 920 ("An item is … in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item."). Further, the fact that Flynn's wife may have had access to the lock box because it was in the trunk of the car she drove does not mean Flynn could not also have had control over the lock box in the trunk. *See* ***id.*** ("Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.").