STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP548-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DAVID EARL HARRIS, JR.,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING A POSTCONVICTION MOTION FOR A NEW TRIAL AND AN ORDER VACATING THE DEFENDANT'S JUDGMENT OF CONVICTION AND SENTENCE, BOTH ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED

Did trial counsel for David Earl Harris, Jr. provide effective representation by not objecting to the jury seeing an exhibit that was central to Harris' defense?

The circuit court granted Harris' postconviction motion for a new trial because it concluded that Harris' trial counsel provided ineffective assistance by not objecting to the jury seeing a particular portion of a temporary restraining order exhibit. (54, A-App. 101-04.)

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE

In July 2013, the State charged Harris with one count of false imprisonment in violation of Wis. Stat. § 940.30, one count of second-degree sexual assault in violation of Wis. Stat. § 940.225(2)(a), one count of strangulation and suffocation in violation of Wis. Stat. § 940.235(1), and one count of third-degree sexual assault in violation of § 940.225(3)—all as a repeater. (2:1-2.) Harris' estranged girlfriend, D.L.S., was the victim of all four counts. (2:2-3.)

Harris had a four-day jury trial in October 2013. (63; 64; 65; 66; 67; 68; 69.) D.L.S. testified at trial that Harris arrived at her house around 2:00 or 3:00 a.m. on Sunday, June 2, 2013, called her cell phone about fifteen times, knocked loudly on her door, and yelled her name several times. (64:99-101.) D.L.S. went outside to tell Harris that she had been sleeping because she had to work in the morning. (64:103-04.) Harris told D.L.S. to get into his car, and when she refused, he grabbed her by her hair, threw her into the car, and sped off. (64:104-06.) Harris threatened to kill D.L.S. and to throw her off of a bridge. (64:107.) While driving the car, Harris punched D.L.S. in the head, including her face (64:108, 109, 112-13), and he wrapped his hand in her hair and pulled it (65:4-5).

D.L.S. testified that Harris eventually parked the car in a parking lot near an apartment building. (65:5.) He told her to pull down her pants, and she complied. (65:7-8.) Harris then inserted his fingers into D.L.S.'s vagina and accused her of cheating on him. (65:8-9.)[1]

Harris then got out of the car, grabbed D.L.S., and threw her into the trunk of the car. (65:11-12.)[2] Harris closed the trunk and then let D.L.S. out of the trunk a little while

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[1] This intercourse formed the basis for the count of second-degree sexual assault. (2:1.)

[2] At trial, the State argued that Harris falsely imprisoned D.L.S. by forcing her into a car and by forcing her into the car's trunk. (68:26-27; 64:14; *see also* 2:2.)

later. (65:12-13.) He grabbed D.L.S.'s arms and put her back into the passenger seat. (65:13-14.) Harris then got on top of D.L.S., placed his hands on her neck, and squeezed hard. (65:14-15.) D.L.S. "could barely breathe" and thought that she "was going to die." (65:15.) When D.L.S. tried to stop Harris, he bit her finger. (65:16.) Harris continued choking her until she completely passed out. (65:17.)

After D.L.S. regained consciousness, Harris took her to his mother's house because he was afraid that D.L.S. would call the police on him if he let her go. (65:19, 21.) After D.L.S. had been at Harris' mother's house for a couple days, Harris asked her to have sex with him and she complied even though she did not want to.[3] (65:29-30.) On Friday, June 7, 2013, D.L.S. left Harris' mother's house for the first time since Harris brought her there on June 2. (65:34.)

The jury also heard from Chaniece Jeffery, who testified that she had known Harris for six years, they were in a relationship together, and they had a four-year-old child together. (67:98-99.) Jeffery testified that she had learned that Harris had another woman, D.L.S., in his life. (67:99.) Jeffery and D.L.S. both testified that Jeffery called D.L.S. on the phone around July 13, 2013, and talked about Harris. (66:8; 67:99.)

D.L.S. testified that she filed a petition for a temporary restraining order (TRO) against Harris in late

[3] This intercourse formed the basis for the count of third-degree sexual assault. (2:3.)

July. (65:40.) The TRO petition was dated July 16, 2013. (20:Exh. 2 at 5, A-App. 109.) D.L.S. stated in the TRO petition that Harris forced her into a car, punched her multiple times, choked her until she passed out, felt inside of her vagina, put her into the car's trunk, and took her to his mother's house where she stayed for five days. (20:Exh. 2 at 5, A-App. 109.)

A court commissioner issued the requested TRO. (20:Exh. 2 at 1-2, A-App. 105-106.) The commissioner found, in relevant part, that "[t]here are reasonable grounds to believe that the respondent has engaged in, or based on the prior conduct of the petitioner and the respondent, may engage in domestic abuse of the petitioner[,]" and "[t]he petitioner is in imminent danger of physical harm." (20:Exh. 2 at 2, A-App. 106.)

At Harris' trial, the circuit court received the TRO and TRO petition into evidence as an exhibit. (65:41-42; *see also* 20:Exh. 2, A-App. 105-14.) The exhibit was a ten-page document consisting of a two-page TRO, a four-page TRO petition, and four pages of information for a person against whom a TRO petition has been filed. (20:Exh. 2, A-App. 105-14.)

D.L.S. and a police officer both testified that the police learned about Harris' abuse of D.L.S. because someone called the police when Harris showed up at D.L.S.'s place of work and the police then read the TRO petition. (66:8, 124.) That police officer interviewed D.L.S. on July 19 because the

TRO petition made allegations of sexual abuse and kidnapping. (66:124-25; *see also* 65:119-20; 67:8.)

Defense counsel's closing argument relied on the TRO exhibit. Counsel argued:

> July 13, the gig is up. [Harris is] busted by his two women. And [D.L.S.] goes down and files a restraining order against him and puts a bunch words down on a piece of paper. And the police say, oh, oh, we got word of this. We've now reviewed it.
>
> Ladies and gentlemen, use your common sense. Would you expect that when the police get involved that [D.L.S.] would have said, oh, I lied? I lied when I wrote that legal document. Just kidding. Forget about it. No. She is now stuck. Which is why we're here.

(68:42-43.)

While the jury was deliberating, it requested to see several things, including the TRO exhibit. (69:3-4.) Off the record, the parties agreed that the jury could see that exhibit. (69:3.) The circuit court allowed the jury to see the entire TRO exhibit. (69:6; 54:2, A-App. 102.)

The jury found Harris guilty of false imprisonment and second-degree sexual assault, but it acquitted him of strangulation and third-degree sexual assault. (69:9; 31.)

Harris filed a postconviction motion requesting a *Machner*[4] evidentiary hearing to determine whether his trial counsel provided ineffective assistance by not objecting when the circuit court allowed the jury to view the TRO exhibit during deliberation. (38:8-12.) Harris further requested a

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

new trial on the grounds that the prosecutor's allegedly improper cross-examination and closing argument prevented the real controversy from being fully tried. (38:12-16.)

The circuit court denied Harris' request for a new trial and concluded that the real controversy was fully tried. (48:1-8, A-App. 115-22.) The court, however, granted a *Machner* hearing. (48:8-10, A-App. 122-24.)

The circuit court held a *Machner* hearing on December 18, 2015. (73, A-App. 125-49.) At the hearing, Harris' trial counsel testified that Harris' defense at trial was "[t]hat he didn't do it." (73:6, A-App. 130.) Counsel further testified that she did not seek to exclude the TRO exhibit from being introduced into evidence "because it was part of the strategy that we had in the matter." (73:7, A-App. 131.) Counsel explained the strategy as:

> [D.L.S.] had gone down a month after this supposed allegation or this supposed incident, she had gone down and filed a restraining order only after she . . . learned of the other woman in [Harris'] life. So the strategy at that time was that she, in order to get even with him, went down and filed a restraining order and made the allegations up. So it was part and parcel to what the defense was. Because she never went to the police department. Instead, upon review of the restraining orders in the court system, the police department was made aware of the allegation and started investigating it. So it was part and parcel to his defense that this was all retaliation for him having another woman in his life.

(73:8, A-App. 132.)

Counsel further explained that this strategy included the idea that D.L.S., "as a result of filing this [TRO petition], was stuck with her allegations and could not retract them. So the concept of it being a lie and now she's stuck with a lie,

which is exactly what I argued in closing argument." (73:10-11, A-App. 134-35.) Counsel stated that "there was no way" to defend Harris "other than allowing . . . the facts and circumstances as to [D.L.S.'s] filing [the TRO petition] into evidence. It had to come in." (73:19, A-App. 143.)

However, counsel testified that it was not part of her deliberate trial strategy to have the jury view the portion of the TRO exhibit that contained the court commissioner's findings. (73:20-21, A-App. 144-45.) She stated that, "in hindsight," she should have asked the circuit court to allow the jury to see only the portion of the TRO exhibit that contained D.L.S.'s handwritten statement. (73:13-14, A-App. 137-38.) Counsel stated that, had she noticed that the commissioner's findings were part of the TRO exhibit, she would have objected to the jury viewing that portion. (73:16, A-App. 140.)

Counsel agreed with the prosecutor, though, that allowing the jury to view the commissioner's findings was "not necessarily harmful to the defense case if the jury views it that the court commissioner locks [D.L.S.] in and now she can't deviate and explanation as to why she goes through with the trial." (73:17, A-App. 141.) Harris' trial counsel further testified that, had she objected to the jury seeing the commissioner's findings and the circuit court overruled her objection, she "still could have argued, hey, [D.L.S. is] still stuck with this and it's irrelevant whether or not a court commissioner made a finding or not." (73:21, A-App. 145.)

With respect to the TRO exhibit's possible impact on the verdicts, trial counsel noted that the jury acquitted Harris on two of the four charges and that the commissioner's findings constituted a "small" and "pre-printed" portion of the TRO exhibit. (73:19, A-App. 143.) She thought that she "elicited testimony throughout the course that [a TRO petition] was just some document that somebody can go down and file, to not make it a very significant legal filing by somebody, so that the jury wouldn't put too much weight in it." (73:18, A-App. 142.)

At the end of the *Machner* hearing, the circuit court deferred making a decision until after both parties submitted proposed findings of fact and conclusions of law. (73:23, A-App. 147.)

On January 26, 2016, the circuit court adopted postconviction counsel's proposed findings of fact and conclusions of law, determined that trial counsel was ineffective for not objecting to the jury viewing the "judicial portion of the restraining order," and ordered a new trial. (54:3, A-App. 103.) The court later issued an order vacating Harris' judgment of conviction and sentence. (55.) The State appeals from those two orders. (56.)

ARGUMENT

I. Harris' trial counsel provided effective assistance.

A. Controlling legal principles.

A defendant who asserts a claim of ineffective assistance of trial counsel must demonstrate: (1) trial counsel rendered deficient performance and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (quoted source and quotation marks omitted).

To prove prejudice, "the defendant must show that [counsel's deficient performance] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. "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.

Strickland's prejudice standard "does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 693, 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* (citing *Strickland*, 466 U.S. at 693).

"The defendant has the burden of proof on both components" of the *Strickland* test, that is, deficient performance and prejudice. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citing *Strickland*, 466 U.S. at 688). If a defendant fails to prove one prong of the *Strickland* test, a court need not consider the other prong. *Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which [the Supreme Court] expect[s] will often be so, that course should be followed." *Id.*

"A claim of ineffective assistance of counsel is a mixed question of fact and law." *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695 (citations omitted). A reviewing court "will uphold the circuit court's findings of fact unless they are clearly erroneous." *Id.* (citation omitted). "However, the ultimate determination of whether counsel's assistance was ineffective is a question of law, which [an appellate court] review[s] de novo." *Id.* (citation omitted).

B. Harris' trial counsel did not prejudice the defense by having no objection to the jury seeing the entire temporary restraining order exhibit.

In its order granting Harris a new trial, the circuit court found as fact that "[i]t is unknown what weight the jury placed on the commissioner's findings in its decision to find the defendant guilty of false imprisonment and second degree sexual assault." (54:3, A-App. 103.) The circuit court reiterated that finding when it concluded as a matter of law that Harris suffered prejudice.

> The defendant was prejudiced by counsel's failure to object to the entire restraining order document going to the jury during deliberations. Because it is unknown what weight the jury placed on the commissioner's findings in the restraining order, the court's confidence in the outcome of the trial is seriously undermined and concludes that the only appropriate remedy is to order a new trial.

(54:3, A-App. 103 (numbering omitted).)

The circuit court applied an incorrect legal standard when it concluded that Harris suffered prejudice. Under *Strickland*, "[t]he defendant must affirmatively prove prejudice; mere speculation is insufficient." *State v. Adams*, 221 Wis. 2d 1, 13, 584 N.W.2d 695 (Ct. App. 1998) (citation omitted).

Thus, Harris must prove that he suffered prejudice. *See id.* Because the circuit court found as fact that it is unknown whether the TRO exhibit affected the jury's guilty verdicts, the circuit court erred by speculating that Harris suffered prejudice. *See id.* Accordingly, before Harris can

prove prejudice, he must prove that this factual finding was clearly erroneous. *See Carter*, 324 Wis. 2d 640, ¶ 19 (noting that an appellate court upholds a circuit court's factual findings unless clearly erroneous). The record shows that Harris did not suffer prejudice for several reasons.

1. Harris' two acquittals, especially on the strangulation charge, show that he did not suffer any prejudice.

The jury acquitted Harris on two out of four charges. (69:9.) This fact alone indicates that he did not suffer prejudice under *Strickland*. *See State v. Marcum*, 166 Wis. 2d 908, 926, 480 N.W.2d 545 (Ct. App. 1992) (holding that Marcum's acquittal on four of six counts "shows" that he did not suffer *Strickland* prejudice when his attorney failed to object to improper testimony); *see also State v. Prineas*, 2009 WI App 28, ¶ 36, 316 Wis. 2d 414, 766 N.W.2d 206 (concluding that Prineas suffered no *Strickland* prejudice and reiterating "that Prineas was acquitted on four of six charges against him"); *cf. State v. Snider*, 2003 WI App 172, ¶ 29 n.10, 266 Wis. 2d 830, 668 N.W.2d 784 (noting that, although the court was not reaching the prejudice prong under *Strickland*, counsel's efforts "were at least partially successful strategies in that the jury acquitted Snider on two of the three counts it was asked to decide").

Perhaps more importantly, the jury acquitted Harris on the count of strangulation and suffocation (69:9), even though D.L.S. alleged in her TRO petition that Harris choked her until she passed out (20:Exh. 2 at 5, A-App. 109).

The fact that the jury acquitted him on this charge shows that he suffered no prejudice when the court allowed the jury to see the entire TRO exhibit. *See, e.g.*, *State v. Perkins*, 2000 WI App 137, ¶ 25, 237 Wis. 2d 313, 614 N.W.2d 25, *rev'd on other grounds*, 2001 WI 46, ¶ 2 n.2, 243 Wis. 2d 141, 626 N.W.2d 762.

In *Perkins*, the defendant was charged with threatening a judge, intoxicated use of a firearm, and possessing a firearm as a convicted felon. *Id.* ¶ 5. The jury found Perkins guilty of threatening a judge and acquitted him on the other two counts. *Id.* Perkins moved for a new trial on the grounds "that his trial counsel was ineffective in failing to stipulate that he had prior felony convictions for purposes of the felon in possession of firearm charge, thereby permitting the State to introduce certified copies of judgments convicting him of armed robbery and attempted robbery." *Id.* ¶ 23.

This Court rejected that argument because Perkins suffered no prejudice under *Strickland*. *Id.* ¶ 25. This Court "conclude[d] that if the jurors were inclined to draw improper inferences from the two prior convictions, they would be at least as likely, if not more likely, to conclude that a former armed robber would commit the firearms offenses with which Perkins was charged." *Id.* This Court further "conclude[d] that the acquittals on the two firearms offenses show that the jury was not improperly influenced by

knowledge that Perkins had previously been convicted of an armed robbery and an attempted robbery." *Id.*

Here, similarly, Harris' acquittal on the charge of strangulation and suffocation shows that the judicial portion of the TRO exhibit did not improperly influence the jury. In the TRO petition, D.L.S. described conduct that formed the basis of three of the four counts against Harris: false imprisonment, second-degree sexual assault, and strangulation and suffocation. (20:Exh. 2 at 5, A-App. 109; *see also* 2:1-2.) As explained more below, witness testimony at trial corroborated D.L.S.'s allegation that Harris strangled her. Specifically, her nephew testified that he saw bruises on her neck "where a person would squeeze" to choke someone. (66:59.) D.L.S.'s mother testified that she saw "a little bruise" on D.L.S.'s neck. (66:36.) Other evidence of strangulation included photographs that D.L.S. took of herself and that depicted red marks on her neck. (65:52-57.) D.L.S. testified that another photograph showed makeup covering the marks on her neck. (65:54-55, 57.)

Accordingly, if the jury was inclined to draw improper inferences from the judicial portion of the TRO exhibit, it would be at least as likely, if not more likely, to find Harris guilty of strangulation than to find him guilty of false imprisonment and second-degree sexual assault. That the jury acquitted Harris of strangulation shows that this portion of the TRO exhibit did not prejudice his defense. *See Perkins*, 237 Wis. 2d 313, ¶ 25.

2. Harris suffered no prejudice because plenty of evidence bolstered D.L.S.'s credibility by corroborating details of her testimony.

Evidence that corroborated much of D.L.S.'s testimony further shows that the court commissioner's findings in the TRO did not prejudice Harris' defense. *See State v. Smith*, 170 Wis. 2d 701, 715, 490 N.W.2d 40 (Ct. App. 1992) (concluding that, because several witnesses corroborated Smith's accomplice's testimony, Smith's trial counsel was not ineffective for failing to request the standard cautionary instruction regarding accomplice testimony).

For example, D.L.S. testified that Harris called her cell phone about fifteen times around 2:00 or 3:00 a.m. on Sunday, June 2, 2013. (64:99-100.) D.L.S.'s cell phone records showed that Harris called her cell phone fifteen or sixteen times between 1:51 a.m. and 2:13 a.m. on June 2. (67:51; *see also* 65:44.)

The boyfriend of D.L.S.'s niece testified that in the middle of the night on June 2, he noticed that D.L.S. was not at home but her keys and cell phone were there. (64:26-28, 35.) Similarly, D.L.S. testified that she called her niece from Harris' mother's house and asked her niece to leave D.L.S.'s keys and cell phone in D.L.S.'s car parked at her home, so that Harris could retrieve them for her. (65:30-31.) D.L.S.'s niece, who lived with D.L.S., corroborated that testimony. (64:61-62.)

D.L.S. testified that Harris retrieved her cell phone three or four days after he brought her to his mother's home on June 2. (65:34-35.) D.L.S.'s niece corroborated that testimony as well. (64:61-64.) An intelligence analyst with the Milwaukee County District Attorney's Office provided testimony indicating that D.L.S.'s cell phone did not move between June 2 and June 4, and it then moved to the Harris residence. (67:71-73.)

Other corroboration involved D.L.S. missing work due to Harris. D.L.S. testified that, shortly after Harris brought her to his mother's house, D.L.S. called her employer and said that she could not go into work the next day because she would "be in the emergency room." (65:25.) An attendance record from D.L.S.'s employer corroborated that testimony. (65:61-62; 20:Exh. 26, 46.) The attendance record also showed that D.L.S. called from Harris' mother's home phone. (20:Exh. 46; *see also* 65:63.) D.L.S. also testified that she used paid time off on the day that she left Harris' mother's house and for several days afterward, due to her "appearance." (65:60.) Her employer's records confirmed that she took off of work those days. (65:59-60.)

Evidence also corroborated D.L.S.'s actions immediately after she left Harris' mother's house after staying there for several days. D.L.S. testified that she went to a bank and withdrew "[a]bout $200" and then went to a mall to buy makeup to cover the bruises on her face. (65:35-37.) The jury saw the makeup that D.L.S. purchased and the

receipt for it. (65:68-70.) The jury also saw a receipt for a $300 withdrawal from D.L.S.'s bank account. (65:66-67.) D.L.S. further testified that after buying makeup, she went to see her sister at a Sam's Club. (65:37.) D.L.S. testified that she wore sunglasses and a head scarf while meeting her sister (65:37), and that the scarf covered her "tangled" hair and the sunglasses covered her "bruises and [her] black eyes" (65:33). Likewise, D.L.S.'s sister testified that she met D.L.S. at a Sam's Club and barely recognized her because wearing a head scarf and sunglasses were not "how [D.L.S.] would normally dress." (66:45.) An intelligence analyst provided testimony that corroborated D.L.S.'s movement from Harris' mother's house to the mall and then to Sam's Club. (67:73-74.)

Witnesses also corroborated that D.L.S. looked like she had been physically assaulted. As explained above, D.L.S.'s nephew and mother testified that they saw bruising on D.L.S.'s neck. (66:36, 59.) D.L.S.'s niece testified that D.L.S.'s face was "bruised up," one of her eyes was "red" and "swollen," and her finger "had bite marks." (64:64-65.) D.L.S.'s niece's boyfriend testified that D.L.S.'s eyes were bloodshot days after Harris assaulted her. (64:31, 80.) A medical doctor testified that strangulation can cause redness of the eyes called "scleral hemorrhage." (66:73-74.) The doctor viewed a photograph of D.L.S., said that it depicted "sclerotic hemorrhaging," and said that strangulation was one possible explanation for it. (66:77, 79; *see also* 65:52.)

3. Harris suffered no prejudice because the court commissioner's findings in the temporary restraining order consisted of a few lines of boilerplate in a ten-page exhibit, nobody mentioned the findings during Harris' trial, and the circuit court instructed the jurors that they were the judges of credibility.

In contrast to the substantial amount of evidence that corroborated D.L.S.'s testimony, the court commissioner's findings in the TRO consisted of a few lines of boilerplate in a ten-page exhibit. The inconspicuous findings did not discuss any of D.L.S.'s specific allegations or even refer to the parties by name. Rather, in ordinary typeface, the non-modifiable findings read that "[t]here are reasonable grounds to believe that the respondent has engaged in, or based on the prior conduct of the petitioner and the respondent, may engage in domestic abuse of the petitioner[,]" and "[t]he petitioner is in imminent danger of physical harm." (20:Exh. 2 at 2, A-App. 106.)

Further, the court commissioner's findings did not purport to be definitive. They merely stated that a court commissioner issued a *temporary* restraining order and set a date for a hearing on an injunction. (20:Exh. 2 at 2, A-App. 106.) The jury found D.L.S.'s narrative of abuse credible because plenty of evidence corroborated it, not because of a few lines of boilerplate on a standardized form.

Indeed, no witness or attorney during the trial mentioned the court commissioner's findings in the TRO. During closing argument, defense counsel and the prosecutor alluded to the TRO petition briefly and only in regard to whether the fact that D.L.S. never directly reported Harris' crimes to the police helped or hurt her credibility. (68:16, 42-43, 50-51.) The absence of any reference to the commissioner's findings throughout the trial further shows that the findings did not prejudice Harris. *Cf. State v. Romero*, 147 Wis. 2d 264, 279, 432 N.W.2d 899 (1988) (granting a new trial in the interest of justice because impermissible expert opinion testimony that the victim was telling the truth, "and the prosecutor's use of it, pervaded the entire trial").

After the close of evidence, the circuit court instructed the jurors on their role. The court told the jurors that they were "the sole judges of the facts." (67:106.) The court also instructed the jurors that they were "the sole judges of the credibility; that is, the believability of the witnesses and of the weight to be given to their testimony." (67:108.) The court reiterated that point when it instructed the jurors that they were "the judges of the credibility of the witnesses and the weight of the evidence." (67:110.) The court also instructed the jury at length about the State's burden of proof and the elements of the offenses. (68:4-12.) These instructions helped to eliminate any possible prejudice from the court commissioner's findings. *See State v. Pharm*, 2000

WI App 167, ¶ 31, 238 Wis. 2d 97, 617 N.W.2d 163 (concluding that "the prejudicial effect, if any, of [an expert's] testimony was diluted because the trial court explicitly instructed the jury that it (the jury) was the sole judge of a witness's credibility").

In sum, Harris' claim of ineffective assistance fails because he cannot show a "substantial" likelihood that his trial would have had a different result if his counsel objected to the jury seeing the court commissioner's findings in the TRO. *See Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693).

C. Alternatively, Harris' trial counsel did not perform deficiently by having no objection to the jury seeing the entire temporary restraining order exhibit.

As explained above, Harris' trial counsel testified at the *Machner* hearing that the TRO exhibit was central to their defense that D.L.S. fabricated her accusations against Harris. (73:7-11, A-App. 131-35.) Trial counsel also testified, however, that allowing the jury to see the court commissioner's findings in the TRO exhibit was not part of her trial strategy. (73:20-21, A-App. 144-45.) She testified that she would have objected to the jury seeing that portion of the TRO if she had noticed it. (73:17, 21; A-App. 141, 145.) She testified that, "in hindsight," she should have asked for the jury to see only D.L.S.'s handwritten portion of the TRO petition. (73:13-14, A-App. 137-38.)

However, an aspect of an attorney's performance is not deficient simply because it was not part of the attorney's strategy. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (citing *Strickland*, 466 U.S. at 688). A court will hold that defense counsel's challenged act or omission was reasonable, even if it resulted from oversight, if the act or omission would have been reasonable under all the circumstances had counsel made it for strategic reasons. *See State v. Kimbrough*, 2001 WI App 138, ¶¶ 31-32, 246 Wis. 2d 648, 630 N.W.2d 752.

An attorney's subjective testimony is not dispositive of whether he or she performed deficiently, but rather it is "simply evidence to be considered along with other evidence[.]" *Id.* ¶ 35. In determining whether trial counsel performed deficiently, a court "may consider reasons trial counsel overlooked or disavowed." *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719 (citing *Kimbrough*, 246 Wis. 2d 648, ¶¶ 24, 31). A court must avoid using hindsight to assess an attorney's performance. *Strickland*, 466 U.S. at 689.

Here, Harris' trial counsel reasonably handled the jury's request to see the TRO exhibit. Harris' defense at trial was that D.L.S. fabricated allegations against him in a TRO petition to retaliate against him for having another woman in his life. (68:42-43; 73:8, A-App. 132.) According to Harris'

defense, D.L.S. felt like the TRO petition obligated her to continue telling the false allegations contained therein. (68:42-43; 73:10-11, A-App. 134-35.)

This defense was the strongest one available to Harris. D.L.S. continued seeing Harris after the abuse occurred and she did not directly report it to the police. (65:40-41, 73; 66:5-6.) D.L.S. filed the TRO petition a mere three days after she talked to Harris' other romantic partner over the phone. (66:8; 67:99-100; 20:Exh. 2 at 5, A-App. 109.) D.L.S. stopped seeing Harris after she filed the TRO petition. (65:41.) At the very least, given those facts, Harris' trial counsel did not perform deficiently by pursuing the defense that she did, which relied on the TRO exhibit. *See Snider*, 266 Wis. 2d 830, ¶ 22 (citation omitted) ("Defense counsel may select a particular defense from available alternative defenses[.]").

Further, Harris' trial counsel did not perform deficiently by having no objection to the jury seeing the judicial portion of the TRO exhibit. The police began investigating D.L.S.'s allegations against Harris because someone at her place of employment called the police and said that Harris was there in violation of a TRO. (66:8, 124; 67:103-104.) A police officer then interviewed D.L.S. about the allegations that she made in the TRO petition. (66:124-125.)

Given those facts, the judicial portion of the TRO exhibit could have helped Harris' defense at trial. It would have been a reasonable extension of Harris' defense to argue that the court commissioner's issuance of the TRO made D.L.S. *more* obligated to stay consistent with the allegations that she made in the TRO petition. In other words, if D.L.S. felt compelled to continue telling the alleged lies of abuse after she wrote them in a TRO petition, then she would have felt *more* compelled to continue telling those lies after a court commissioner relied on them when issuing a TRO. Harris' trial counsel appeared to agree with that point at the *Machner* hearing. (73:17, A-App. 141.)

Because the court commissioner's findings could have helped Harris' defense, it would have been reasonable for his trial counsel to have no objection to the jury seeing those findings. *See State v. Weber*, 174 Wis. 2d 98, 115-116, 496 N.W.2d 762 (Ct. App. 1993) (concluding that counsel did not perform deficiently by allowing the jury to hear evidence that could hurt and help Weber's defense). Accordingly, trial counsel's lack of such an objection was not deficient performance. *See Kimbrough*, 246 Wis. 2d 648, ¶¶ 31-32 (explaining that an attorney's oversight is not deficient performance if it would have been reasonable had it been deliberate).

The circuit court's order granting a new trial does not compel a different conclusion. In that order, the circuit court made some determinations, labeled as findings of fact,

regarding Harris' trial counsel's lack of an objection to the jury seeing the commissioner's findings. Specifically, the circuit court found that: "[t]he jury viewing of the judicial portion of the TRO could not be considered beneficial to the defense"; "[a]llowing the jury to see a document during deliberations which contained what jurors may have perceived as a judicial endorsement of the victim's allegations was a poor trial strategy"; and "[c]ounsel's stated strategic reason for allowing the TRO to go back to the jury, i.e. to challenge the victim's credibility, was undermined by the court's [*sic*] commissioner's validation of the allegations in the TRO." (54:3, A-App. 103.)

However, those determinations are legal conclusions, not findings of fact. Findings of fact are "'the underlying findings of what happened[.]'" *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoted source omitted). "Findings of fact include the circumstances of the case and the counsel's conduct and strategy." *Carter*, 324 Wis. 2d 640, ¶ 19 (quoted source and quotation marks omitted). They also include assessments of credibility and demeanor. *Id.*; *Thiel*, 264 Wis. 2d 571, ¶ 19. By contrast, whether counsel's performance was deficient or prejudicial is a legal determination subject to de novo review. *Thiel*, 264 Wis. 2d 571, ¶¶ 22-24; *Johnson*, 153 Wis. 2d at 127-28.

Accordingly, the circuit court made legal conclusions about deficient performance—and perhaps about prejudice as well—when it determined that Harris' trial counsel's

challenged conduct was not "beneficial," "was a poor trial strategy," and "undermined" the defense. *See State v. Tulley*, 2001 WI App 236, ¶ 19, 248 Wis. 2d 505, 635 N.W.2d 807 (treating the circuit court's conclusion that counsel had made a strategic decision as a finding of fact, but treating the wisdom of that strategic decision as a question of law). This Court owes no deference to those legal conclusions, even though the circuit court labeled them as findings of fact. *See Janesville Cmty. Day Care Ctr., Inc. v. Spoden*, 126 Wis. 2d 231, 236, 376 N.W.2d 78 (Ct. App. 1985) (citation omitted) ("We owe no deference to a legal conclusion the trial court has denominated a fact.").

In sum, Harris' claim of ineffective assistance fails because he cannot establish both deficient performance and prejudice.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the circuit court's orders granting Harris a new trial and vacating his judgment of conviction and sentence.

Dated this 20th day of June, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5756 words.

_____
Scott E. Rosenow
Assistant Attorney General

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I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 20th day of June, 2016.

_____
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