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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

For the reasons set forth in the State's brief-in-chief and this reply brief, the State respectfully asks this Court to reverse the circuit court's orders granting David Earl Harris, Jr. a new trial and vacating his judgment of conviction and sentence.

ARGUMENT

Harris' trial counsel provided effective assistance.

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

In its brief-in-chief, the State cited *State v. Marcum*, 166 Wis. 2d 908, 926, 480 N.W.2d 545 (Ct. App. 1992), and *State v. Prineas*, 2009 WI App 28, ¶ 36, 316 Wis. 2d 414, 766 N.W.2d 206, for the general proposition that acquittals belie the notion that an attorney's errors were prejudicial. (State Br. 12.) Harris argues that *Marcum* and *Prineas* are distinguishable because they did not involve a temporary restraining order (TRO) exhibit. (Harris Br. 8.)

Harris' rationale for distinguishing those cases is not convincing. For example, the defendant in *Marcum* argued that his trial counsel was ineffective for not objecting to two medical professionals' testimony about the victim's credibility. *Marcum*, 166 Wis. 2d at 925. Harris advances a similar claim that his counsel was ineffective for not objecting to a TRO exhibit that improperly bolstered the

victim's credibility. (Harris Br. 4-10.) Both witness testimony and exhibits constitute evidence. *State v. Heft*, 178 Wis. 2d 823, 828, 505 N.W.2d 437 (Ct. App. 1993), *aff'd*, 185 Wis. 2d 288, 517 N.W.2d 494 (1994). That *Marcum* involved allegedly objectionable *testimony* and Harris' case involves an allegedly objectionable *exhibit* provides no basis for distinguishing *Marcum*. Harris' acquittals on two of four charges belie any notion that his attorney's performance was prejudicial.

The State similarly argued that Harris' acquittal on the strangulation count shows that he did not suffer prejudice when his counsel had no objection to the jury's viewing the TRO exhibit during deliberations. (State Br. 12-14.) The State reasoned that the jury acquitted Harris of strangulation although D.L.S. alleged in the TRO petition that he strangled her. (*Id.*) The State relied on *State v. Perkins*, 2000 WI App 137, 237 Wis. 2d 313, 614 N.W.2d 25, *rev'd on other grounds*, 2001 WI 46, 243 Wis. 2d 141, 626 N.W.2d 762. (State Br. 13-14.)

In *Perkins*, the court of appeals concluded that Perkins suffered no prejudice when his counsel failed to stipulate to his felon status and thereby allowed the State to introduce evidence showing the nature of his felony convictions. *Perkins*, 237 Wis. 2d 313, ¶¶ 23-25. Harris argues that *Perkins* is distinguishable because the jury in that case had to learn of Perkins' felon status because it was an element of a charged offense, but here "the TRO evidence and exhibit

should never have even been part of the trial." (Harris Br. 8-9.)

That basis for distinguishing *Perkins* is not convincing. When the court of appeals determined that Perkins suffered no prejudice, it did *not* rely on the fact that the jury had to learn of his felon status. *Perkins*, 237 Wis. 2d 313, ¶¶ 23-25. Rather, it reasoned 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.* ¶ 25. The jury's acquittals on the firearms charges showed that its knowledge of Perkins' prior convictions did not improperly influence the guilty verdict on a different charge. *Id.*

That reasoning applies equally here. If the jury was inclined to draw improper inferences from the TRO exhibit, it would be at least as likely to find Harris guilty of strangulation as to find him guilty of false imprisonment and second-degree sexual assault. The TRO petition alleged all three of those crimes. (20:Exh. 2 at 5; *see also* 2:1-2.) That the jury acquitted Harris of strangulation shows that the TRO exhibit did not improperly influence the jury's guilty verdicts.

Harris argues that "[t]he fact that Harris was convicted of two crimes proves that Harris suffered prejudice." (Harris Br. 6.) If Harris were right, then every defendant who gets convicted would be able to automatically

establish prejudice and the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), would be rendered meaningless. Harris cannot simply rely on his convictions to prove prejudice. *Cf. State v. Elm*, 201 Wis. 2d 452, 463-64, 549 N.W.2d 471 (Ct. App. 1996) (rejecting Elm's argument that his lawyer must have performed deficiently because the jury convicted him although there was conflicting evidence).

Harris also argues that the TRO exhibit must have prejudiced his defense because the jury rendered verdicts shortly after receiving the exhibit and because the exhibit "was basically the last thing the jury looked at before rendering their verdicts[.]" (Harris Br. 6, 7.) However, Harris does not cite to the record or any legal authority to support those assertions. The record does not reveal how long the jury deliberated between receiving the TRO exhibit and rendering a verdict. (69:8.) The circuit court found as fact that "[i]t is unknown what weight the jury placed on the commissioner's findings [in the TRO exhibit] in its decision to find the defendant guilty of false imprisonment and second degree sexual assault." (54:3.) Harris has not shown that this finding is clearly erroneous.

Harris similarly argues, without citing any legal authority, that the jury instructions did not cure any possible prejudice from the TRO exhibit because the circuit court did not instruct the jury *after* it received the TRO exhibit. (Harris Br. 7.) However, "[a] reviewing court may not assume that the jury did not follow its instructions."

Burch v. Am. Family Mut. Ins. Co., 198 Wis. 2d 465, 477 n.6, 543 N.W.2d 277 (1996) (citation omitted). Here, the circuit court instructed the jury several times that the jury was the sole judge of credibility. (67:106, 108, 110.) Those instructions helped to mitigate any potential prejudice. *See State v. Pharm*, 2000 WI App 167, ¶ 31, 238 Wis. 2d 97, 617 N.W.2d 163 (concluding that the same instruction helped to dilute any prejudicial effect from a witness's testimony that allegedly constituted an improper comment on Pharm's truthfulness).

Harris further argues that whether there was sufficient evidence of his guilt is irrelevant in a prejudice analysis under *Strickland*. (Harris Br. 6.) Contrary to his suggestion, the State has not argued otherwise. Instead, the State argued that because plenty of admissible evidence bolstered D.L.S.'s testimony, Harris did not suffer prejudice when the jury received a TRO exhibit that allegedly improperly bolstered D.L.S.'s testimony. (State Br. 15-17.)

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

Harris argues that his trial counsel performed deficiently because her lack of an objection to the jury's viewing the commissioner's findings in the TRO exhibit resulted from her oversight rather than deliberate strategy. (Harris Br. 9.) However, "[t]he 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).

Harris similarly argues that his trial counsel performed deficiently because she stated at the *Machner*[1] hearing that she should have objected to the jury's viewing the commissioner's findings in the TRO exhibit. (Harris Br. 9.) However, an attorney's "subjective testimony" is not "dispositive of an ineffective assistance claim. Such testimony is simply evidence to be considered along with other evidence in the record that a court will examine in assessing counsel's overall performance." *State v. Kimbrough*, 2001 WI App 138, ¶ 35, 246 Wis. 2d 648, 630 N.W.2d 752.

The State argued that Harris' trial counsel could have reasonably concluded that the commissioner's findings in the TRO exhibit could have helped Harris' defense. (State Br. 22-23.) Harris argues that this argument is "speculative at best[.]" (Harris Br. 10.) However, Harris' argument that the jury relied on the commissioner's findings to find him guilty of two charges is also speculative at best. The record does not explain why the jury wanted to view the TRO exhibit or to what extent, if any, the jury used it. (69; 54:3.) Harris' trial counsel reasonably could have decided not to object to the jury's viewing the commissioner's findings because those

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

findings could have either hurt or helped Harris' defense. (State Br. 23.)

C. Harris may not argue that his trial counsel was ineffective for not filing an other-acts motion in limine.

Harris argues that his trial counsel was ineffective for not filing a motion in limine to exclude the TRO exhibit throughout trial on the grounds that it was inadmissible other-acts evidence. (Harris Br. 3-5.) Harris forfeited this other-acts claim because he did not raise it at the *Machner* hearing. (73.) *See, e.g.*, *State v. Thompson*, 222 Wis. 2d 179, 190 n.7, 585 N.W.2d 905 (Ct. App. 1998); *Elm*, 201 Wis. 2d at 463.

In any event, the TRO exhibit did not contain other-acts evidence. Other-acts evidence necessarily refers to actions other than the charged conduct. *See State v. Fishnick*, 127 Wis. 2d 247, 253-54, 261-62, 378 N.W.2d 272 (1985). But, as Harris recognizes, the allegations in the TRO exhibit were "the same allegations that were the subject of the criminal trial" (Harris Br. 8.) and hence were not other-acts evidence. Harris' trial counsel did not provide ineffective assistance by failing to make a meritless other-acts objection to the TRO exhibit. *See State v. Ziebart*, 2003 WI App 258, ¶ 14, 268 Wis. 2d 468, 673 N.W.2d 369 (noting that counsel cannot be ineffective for failing to make a losing argument).

D. The New Jersey case on which Harris relies is distinguishable.

Harris invokes *State v. Vallejo*, 965 A.2d 1181 (N.J. 2009), to support his claim that his trial counsel was ineffective for not objecting to the jury's viewing the TRO exhibit during deliberations. (Harris Br. 5, 9.) *Vallejo* is not controlling authority, nor does it provide persuasive support.

Vallejo was charged with several domestic violence-related crimes stemming from a single episode. *Vallejo*, 965 A.2d at 1182. At a pre-trial hearing, the court ruled that the prosecutor was barred at trial from referring to a prior domestic violence incident between Vallejo and the victim. *Id.* at 1184. Nevertheless, at trial, the prosecutor elicited testimony from various witnesses about Vallejo's prior acts of domestic violence against the victim. *Id.* at 1184-85. The prosecutor also elicited testimony that the victim obtained a final restraining order against Vallejo due to the conduct for which he was on trial. *Id.* at 1184. Defense counsel did not object and the trial court did not intervene in response to any of that testimony. *Id.* at 1184-85. The trial court gave an ambiguous curative instruction at the end of trial. *Id.* at 1182, 1189-90.

The New Jersey Supreme Court concluded that the other-acts testimony together with the testimony about the final restraining order violated Vallejo's right to a fair trial. *Id.* at 1182. The supreme court explained that "[t]his brief trial was poisoned by the recurring admission of evidence of other crimes and wrongdoings by defendant, and by

reference to the domestic violence restraining order against him. The trial judge's curative instruction was too little, too late." *Id.* The supreme court considered Vallejo's fair-trial claim on its merits and not through the lens of an ineffective-assistance claim. *Id.* at 1188 n.2.

Vallejo is a far cry from Harris' case. Unlike in *Vallejo*, the circuit court here did not rule that the TRO exhibit or references to it were inadmissible and, importantly, the State did not introduce other-acts evidence against Harris. Apparently borrowing language from *Vallejo* without considering how it applies to the facts of his case, Harris asserts that his "trial was poisoned by the recurring admission of evidence of other acts and wrongdoings by Harris including reference to a domestic violence restraining order against him." (Harris Br. 5.) However, Harris does not identify what alleged other-acts evidence he is referring to.

Further, unlike the defendant in *Vallejo*, Harris is raising a claim of ineffective assistance of counsel. Harris' claim fails because he has not shown that the TRO exhibit prejudiced his defense and that his counsel performed deficiently by not objecting to the jury's viewing it. (State Br. 11-23.) Here, unlike in *Vallejo*, the TRO was central to Harris' defense. As the State has explained, Harris' counsel pursued the strongest available defense, which depended on the TRO exhibit. (State Br. 21-23.)

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 17th day of August 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 2123 words.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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Dated this 17th day of August, 2016.

_____
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