STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2017AP798-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHNALEE A. KAWALEC,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN THE WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE JOHN R. RACE AND KRISTINE E. DRETTWAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Because a reasonable attorney could think that a joint-ownership defense was not available to Johnalee Kawalec, did she fail to prove that her trial counsel performed deficiently by not introducing more evidence of her joint ownership and not objecting to jury instructions on the subject?

The circuit court concluded that Kawalec's trial counsel performed deficiently because he did not know the law well and because his actions at issue resulted from inattention. This Court should conclude that counsel's performance was not deficient because it had an objectively reasonable basis.

2. Alternatively, because the jury still learned that Kawalec jointly owned the victim's bank account from which she stole money, did Kawalec fail to prove that her trial counsel's alleged mistakes prejudiced the defense?

The circuit court ruled that Kawalec failed to prove prejudice. This Court should agree with that ruling.

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.

INTRODUCTION

Kawalec was convicted of theft by bailee, and she seeks a new trial. As she went through a divorce, she tried to keep an expensive new house that she could not afford. Her

ex-husband's uncle, H.K.—with whom she had a close relationship—gave her $130,000 to help her keep the house. Kawalec let H.K. move in with her because he was ill. Kawalec was H.K.'s power of attorney, and he later converted his bank account into a joint account with her. Kawalec spent almost all of the money in the account and kicked H.K. out of her house. A jury convicted her of theft by bailee.

Kawalec raises several claims of ineffective assistance of trial counsel. She recognizes that all of her claims relate to whether she was a joint owner of her and H.K.'s joint bank account. (Kawalec Br. 10.) Kawalec's view of the law on joint ownership is two-fold. First, Kawalec argues that she cannot be guilty of theft for taking money from a bank account that she jointly owned. Second, she argues that she jointly owned H.K.'s bank account because H.K. had donative intent when he made Kawalec a joint account holder. The jury heard testimony from one of H.K.'s bankers that Kawalec and H.K. equally owned their joint bank account. Yet H.K. claims that her trial counsel was ineffective because he did not (1) introduce evidence about H.K.'s alleged donative intent when creating the joint account, or (2) object to jury instructions that failed to state that Kawalec's co-ownership hinged on whether H.K. had donative intent.

Kawalec is not entitled to relief because she has failed to prove either prong of an ineffective-assistance claim. Under the first prong, her trial counsel's conduct at issue was not deficient because a reasonably competent attorney could think that co-ownership is not a defense to a criminal charge of theft. In other words, a reasonably competent attorney could reject the first aspect of Kawalec's two-fold view of co-ownership. Thus, Kawalec's trial counsel had a reasonable basis for not seeking evidence or jury instructions

on whether H.K. had intended to make Kawalec a co-owner of their joint bank account.

Under the second prong, Kawalec has failed to prove prejudice even if she had a viable co-ownership defense. Because a banker testified that Kawalec and H.K. *were* co-owners of their joint bank account, trial counsel did not prejudice the defense by failing to get evidence and jury instructions on whether H.K. had *intended* to make Kawalec a co-owner. Even if the banker's testimony was inaccurate because Kawalec's co-ownership hinged on H.K.'s intent, this inaccuracy only helped Kawalec's defense. It was better for her defense for the jury to hear the banker's unequivocal testimony that Kawalec *did* jointly own H.K.'s bank account, rather than hearing that she co-owned the account *if H.K. had donative intent*.

STATEMENT OF THE CASE

H.K., a retired farmer and carpenter, gave almost 15 acres of his farmland to his nephew Ray Kawalec and Ray's then-wife, Johnalee Kawalec, so they could build a house on it. (R. 140:47–48; 144:103–04, 119.) Ray promised H.K. that he could live with Ray and Kawalec for the rest of his life. (R. 140:47–48.) H.K. gave them another 40 acres of his farmland so they could start a farm. (R. 140:48–49.) Ray and Kawalec built a house on the land from H.K. (R. 144:104–05.)

H.K. had a "very strong" relationship with Ray. (R. 144:103.) He had "a father-daughter relationship" with Kawalec. (R. 145:37.) He referred to Ray as his son and Kawalec as his daughter. (R. 140:61.) Kawalec and Ray were H.K.'s powers of attorney. (R. 141:6; 145:30, 35.)

H.K. fell ill and spent four months in a hospital and nursing home. (R. 144:112–13; 145:35–36.) Ray and Kawalec began divorce proceedings around that time. (R. 144:8–9,

13.) Ray moved out of the house while H.K. was in the hospital. (R. 145:37.) Doctors told H.K. that he could not live alone after being released from the hospital. (R. 140:73.)

Kawalec, a teacher, could not afford the new house on her own. (R. 145:16–17, 38.) Her property's appraised value was $675,000, and she still owed more than $350,000 on her mortgage. (R. 39:3; 144:9.) Kawalec offered to let H.K. live with her in her new house. (R. 140:50.) They both thought that H.K. had only four to six weeks to live. (R. 140:55; 145:29–30.)

As part of their divorce, Ray and Kawalec agreed that she would pay him $138,000 to buy out his share of their new house. (R. 144:115–16.) H.K. gave $130,000 to Kawalec to help her make that payment. (R. 140:45; 145:38.) H.K. wanted the property to stay in the family. (R. 145:38, 41.) H.K. moved in with Kawalec in 2010. (R. 145:35–36.)

In April 2010, H.K. converted his U.S. Bank account into a joint account with Kawalec. (R. 144:55, 57.) H.K. thought that Kawalec changed afterward. (R. 140:72, 82.) Kawalec told him not to call her his daughter anymore. (R. 140:63, 82–83.) That comment made H.K. cry. (R. 140:75–76.)

Kawalec's mother moved in with her and H.K. in spring 2011. (R. 146:7.) Kawalec had a fight with her mother in August or September 2011. (R. 146:7–8.) Kawalec told her mother to move out if she did not like living there. (R. 146:8.) H.K. told Kawalec not to talk to her mother that way. (R. 146:9–10.) Kawalec then kicked her mother and H.K. out of her house. (R. 140:53; 146:10.) H.K. removed Kawalec as his power of attorney. (R. 141:9.)

H.K. went to the bank and was expecting to have "a lot of money" left, about $75,000 to $100,000. (R. 140:60.) He learned that he "was broke." (R. 140:61.) By Kawalec's own

estimate, their joint bank account had a little over $5,000 left. (R. 146:14.)

In February 2012, the State charged Kawalec with one count of theft by bailee for embezzling H.K.'s money while she was his power of attorney. (R. 2:1–2.) A month later, the State filed an information that separated the one count in the complaint into five counts of theft by bailee. (R. 9.) In November 2012, the State filed an amended information charging Kawalec with only two counts of theft by bailee. (R. 31.)[1]

Kawalec had a four-day jury trial in November 2012. (R. 139–147.) H.K.'s attorney testified that H.K.'s power-of-attorney document prohibited Kawalec from using H.K.'s money for her own benefit unless she had written consent from all of H.K.'s heirs. (R. 141:13–14; *see also* R. 34:2.)

H.K.'s investment adviser from U.S. Bank, Marlo Carpio, also testified about the power of attorney. He explained that as H.K.'s power of attorney, Kawalec could do things with H.K.'s bank account without his signature, such as sign checks. (R. 144:54–55.) Being power of attorney did not give Kawalec ownership rights. (R. 144:56.) Being a joint account holder did, though. (R. 144:53–54.) Carpio testified that the bank account listed H.K. as Joint Owner First and Kawalec as Joint Owner Other. (R. 144:53–54.) Those account designations meant that H.K. and Kawalec "both own it equally and that they're both entitled to everything in the account." (R. 144:54.) They had equal ownership of the account. (R. 144:54.) Carpio did not know what H.K.'s intentions were when setting up the joint account because Carpio did not help H.K. set up the account. (R. 144:58.)

[1] The State did not charge Kawalec for using H.K.'s $130,000 gift to pay for Ray's interest in their house. (R. 146:47.)

Kawalec testified in her defense. She admitted that she had used money from her and H.K.'s joint bank account, but she claimed that she had his permission to do so. (R. 145:49–94; 146:5.) She testified that she never used H.K.'s money without his consent, except for two lunches for which she paid him back. (R. 146:15.) Kawalec claimed that H.K. had given her permission to use money from the joint account to pay for ski lessons for her son, $5,000 in college expenses for her daughter, and continuing education for Kawalec herself. (R. 145:72–73, 80–83.)

During a jury-instruction conference, the circuit court asked the parties whether Kawalec was a bailee. (R. 146:21.) The State argued that Kawalec's position as H.K.'s power of attorney made her a bailee. (R. 146:21.) It said that the jury had to decide whether she was a bailee. (R. 146:24.) Kawalec argued that she was not a bailee because she was a joint owner of H.K.'s bank account. (R. 146:25–26.) She argued that this conclusion was a matter of law and was not a question for the jury to decide. (R. 146:26.) The State crafted a proposed jury instruction on bailment and joint ownership. (R. 146:26.) Kawalec maintained that "bailee and ownership are mutually exclusive." (R. 146:27.) The circuit court told Kawalec that she could argue to the jury she was not a bailee because she co-owned H.K.'s bank account. (R. 146:27–28.) Kawalec reserved her right to renew the issue after verdicts. (R. 146:27–28.)

The circuit court instructed the jury that Kawalec "had possession of money . . . belonging to another because of her status as a bailee. A person who acts as a power of attorney is a bailee." (R. 146:85.) It also instructed on joint ownership, saying that the jury had "heard testimony from [H.K.] that the funds in the US Bank account were the property of [H.K.]" (R. 146:87.) It then said that the jury had also heard that "the bank recognized Johnalee Kawalec as a joint owner of that account." (R. 146:88.) It told the jury "to

determine what effect, if any" Kawalec's status as a joint owner had on this case. (R. 146:88.)

During closing argument, Kawalec argued that she was not a bailee because she jointly owned H.K.'s bank account. (R. 146:70, 75.) Her main theory of defense was that joint ownership did not matter because she had H.K.'s permission for each expenditure at issue. (*See* R. 146:71–73, 76–79; 155:7–8.)

The jury found Kawalec guilty of count two in the amended information and found that she had stolen more than $2,500 and less than $5,000. (R. 77; 147:23–24.) It acquitted her of count one in the amended information. (R. 76; 147:23.) Kawalec moved the court for judgment notwithstanding the verdict on count two. (R. 147:28.) The court ordered briefing on Kawalec's motion. (R. 147:29; *see also* R. 80; 81.)

The court heard arguments on the motion at the start of the sentencing hearing in January 2013. (R. 149:4–25.) Kawalec argued that she could not be guilty of stealing money from H.K.'s bank account that she jointly owned. (R. 149:4–16.) She claimed that "a person can't steal from [him or herself] and I think that's what the defendant is being charged with here is having stolen money from herself." (R. 149:14.) The State argued that Kawalec "can steal from property in which she shares a co-ownership and she did." (R. 149:22.) The court denied Kawalec's motion, concluding that the evidence was sufficient to support her conviction. (R. 149:24–25.) The court then withheld sentence, placed Kawalec on probation for two years, and ordered restitution. (R. 149:59–61.)[2]

[2] The Honorable John R. Race presided over the trial and sentencing hearing.

In November 2016, Kawalec filed a postconviction motion for a new trial. (R. 112; 113.) She argued that her trial counsel provided ineffective assistance by not (1) presenting testimony from H.K.'s bankers about his intent when setting up his joint account with Kawalec, or (2) objecting to the jury instructions on ownership. (R. 113:10–13.) The circuit court held a *Machner*[3] hearing on the motion in January 2017. (R. 156.)

Anthony Moorefield, H.K.'s personal banker at U.S. Bank, testified at the *Machner* hearing. He said that when H.K. set up a joint account with Kawalec, Moorefield explained to H.K. that making Kawalec a joint owner was like giving his money to her. (R. 156:8.) Moorefield further testified that H.K. understood that Kawalec would become a joint owner of his account if he made it into a joint account with her. (R. 156:9.) Moorefield testified that making Kawalec a joint owner did not really add any convenience because she was already H.K.'s power of attorney. (R. 156:12.) Moorefield did not testify whether he had made that point to H.K.

Carpio, H.K.'s investment adviser from U.S. Bank, also testified at the *Machner* hearing. He said that when H.K. signed documentation making Kawalec a joint owner of his account, Carpio explained to H.K. that he was essentially giving his money to Kawalec. (R. 156:32.) H.K. said that it did not matter because Kawalec would get the money anyway. (R. 156:32.) Carpio had told H.K. that "if he added her [to his account] then basically she's entitled to half that right away or joint ownership right away." (R. 156:32.)

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

Kawalec's trial attorney, Michael Masnica, testified at the *Machner* hearing as well. He testified that he was wrong when he argued that Kawalec was not a bailee as a matter of law because she co-owned H.K.'s bank account. (R. 156:53.) Instead, he now thought that Kawalec's co-ownership hinged on whether H.K. had intended to make Kawalec a co-owner when he set up the joint account. (R. 156:53–54.) Attorney Masnica said that he did not have a strategic reason for not calling Moorefield to testify at trial but instead was unaware of Moorefield. (R. 156:58.) He also said that he did not recall why he had not objected to the jury instructions on ownership and that he had missed any issue with them. (R. 156:63–67.)

The circuit court denied the postconviction motion in March 2017.[4] (R. 155:10–11; *see also* R. 126.) The court first determined that Attorney Masnica had performed deficiently. (R. 155:4–8.) Even though Attorney Masnica pursued a "reasonable" defense that Kawalec had H.K.'s permission for each expenditure at issue, the court thought that his performance was deficient because he admittedly "did not know the law well . . . with regard to bailee versus joint owner." (R. 155:7.) The court further reasoned that Attorney Masnica had been unaware that Moorefield and Carpio could have testified about H.K.'s intent when setting up his joint bank account. (R. 155:5–6.) The court, however, concluded that Attorney Masnica did not prejudice the defense. (R. 155:9.) It reasoned that the jury knew that H.K. and Kawalec had a "joint ownership account" together, and the jury also knew what the joint account meant. (R. 155:9.) Even if Moorefield and Carpio had testified that H.K. intended to give Kawalec joint ownership, the court concluded that there was no reasonable probability that this

[4] The Honorable Kristine E. Drettwan presided over the *Machner* hearing and ruled on Kawalec's motion for a new trial.

testimony would have affected the outcome of the trial. (R. 155:10.) The court also concluded that the jury instructions at issue correctly stated the law and did not prejudice the defense. (R. 155:10.)

Kawalec appeals her judgment of conviction and the circuit court's order denying her motion for a new trial. (R. 128; 131.)

SUMMARY OF ARGUMENT

I. Kawalec has failed to prove that Attorney Masnica performed deficiently.

A. A reasonably competent attorney could think that the State did not need to prove H.K.'s lack of donative intent in order to prove that Kawalec was a bailee. The civil cases on which Kawalec relies do not address this issue.

B. A reasonably competent attorney could have thought that Kawalec had no viable defense based on her alleged co-ownership of H.K.'s bank account or H.K.'s alleged donative intent when creating the joint account. Thus, Attorney Masnica had a reasonable basis for not introducing testimony by bankers to show that H.K. had intended to make Kawalec a co-owner.

C. Attorney Masnica had a reasonable basis for not objecting to the jury instruction suggesting that Kawalec was a bailee because she was a power of attorney. A reasonable attorney could think that this jury instruction was correct.

D. Attorney Masnica also had a reasonable basis for not objecting to the jury instruction stating that H.K. and Kawalec owned their joint bank account. A reasonable attorney could think that this instruction was correct and not misleading.

II. Further, Kawalec has failed to prove that Attorney Masnica's performance prejudiced her defense, even if she had a viable co-ownership defense. A banker testified that Kawalec and H.K. equally owned their joint bank account. Thus, there is not a reasonable probability that the trial would have ended differently had the jury heard testimony and instructions on whether H.K. intended to make Kawalec a joint owner.

STANDARD OF REVIEW

"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). "Findings of fact include the circumstances of the case and the counsel's conduct and strategy." *Id.* (citation omitted). "However, the ultimate determination of whether counsel's assistance was ineffective is a question of law, which [this Court] review[s] de novo." *Id.* (citation omitted).

ARGUMENT

I. Kawalec's trial counsel's performance was adequate because there was a reasonable basis to think that a joint-ownership defense was unavailable.

A. A lawyer provides adequate assistance if there was a reasonable basis for his or her conduct at issue, regardless of the lawyer's actual thought process.

The Sixth Amendment to the U.S. Constitution gives a criminal defendant the right to counsel, which includes a right to effective assistance of counsel. *State v. Trawitzki*, 2001 WI 77, ¶ 39, 244 Wis. 2d 523, 628 N.W.2d 801, *holding modified on other grounds by State v. Davison*, 2003 WI 89,

¶ 36, 263 Wis. 2d 145, 666 N.W.2d 1. If defense counsel does not object to a jury instruction, this Court may review the instruction only within the framework of an ineffective assistance of counsel claim. *See State v. Tulley*, 2001 WI App 236, ¶ 14, 248 Wis. 2d 505, 635 N.W.2d 807.

A defendant who asserts ineffective assistance of counsel must demonstrate that (1) counsel performed deficiently and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If a defendant fails to prove one prong of the *Strickland* test, a court need not consider the other prong. *Id.* at 697.

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.*

"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). Whether counsel performed deficiently hinges on the reasonableness, not correctness, of counsel's judgment. *State v. Weber*, 174 Wis. 2d 98, 115, 496 N.W.2d 762 (Ct. App. 1993).

A court judges an attorney's performance based on "an objective test, not a subjective one." *State v. Jackson*, 2011 WI App 63, ¶ 9, 333 Wis. 2d 665, 799 N.W.2d 461 (citation omitted). "So, regardless of defense counsel's thought process, if counsel's conduct falls within what a reasonably competent defense attorney could have done, then it was not deficient performance." *Id.* (citation omitted). 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 (citation omitted). Thus, even if an attorney does not remember the rationale for his or her conduct at issue, this Court must determine whether the conduct had an objectively reasonable basis. *State v. Honig*, 2016 WI App 10, ¶ 28, 366 Wis. 2d 681, 874 N.W.2d 589, *review denied*, 2016 WI 78, 371 Wis. 2d 607, 885 N.W.2d 379.

To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. 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).[5]

B. A reasonable attorney could think that the State did not need to prove H.K.'s lack of donative intent beyond a reasonable doubt.

Before advancing her specific claims of ineffective assistance of counsel, Kawalec argues that the State had to prove that H.K. lacked donative intent when he converted his bank account into a joint account with her. (Kawalec Br.

[5] The reliability and fairness of Kawalec's trial are *not* part of the prejudice analysis. *See Goodman v. Bertrand*, 467 F.3d 1022, 1028 (7th Cir. 2006); *Floyd v. Hanks*, 364 F.3d 847, 852 (7th Cir. 2004).

16–19.) She relies on *Russ ex rel. Schwartz v. Russ*, 2007 WI 83, 302 Wis. 2d 264, 734 N.W.2d 874, and Illinois cases on which *Russ* relied. (Kawalec Br. 17–19.) She argues that under *Russ*, "whether Kawalec was a joint owner able to spend the money as she wished pursuant to Wis. Stat. § 705.03(1) or a bailee prohibited from self-dealing depends on what H.K. intended when he made her joint owner." (*Id.* at 19.) She claims that because the State had to prove that she was a bailee, it also had "to prove beyond a reasonable doubt that H.K. didn't have donative intent when he made Kawalec joint owner." (*Id.* at 19–20.)

Kawalec is wrong. At the very least, a reasonable attorney could think that Kawalec is wrong—which is what matters, as explained more below in Section I.D. "When the law is unsettled, the failure to raise an issue is objectively reasonable and therefore not deficient performance." *Jackson*, 333 Wis. 2d 665, ¶ 10 (citation omitted). "When case law can be reasonably analyzed in two different ways, then the law is not settled." *Id.* (citation omitted). A reasonable attorney could interpret *Russ* differently than Kawalec does.

Russ and the Illinois cases on which it relied were civil cases that did not discuss bailees or the crime of theft. In *Russ*, Johnnie Russ sued her son, Elliott Russ, for conversion because Elliott used funds from their joint bank account for his own personal use while he served as Johnnie's power of attorney. *Russ*, 302 Wis. 2d 264, ¶ 1. The court noted "that a [power of attorney] agent has a fiduciary duty to the principal, and that the agent is usually prohibited from self-dealing unless the power to self-deal is written in the [power of attorney] document." *Id.* ¶ 28 (citation omitted). But Johnnie and Elliott's joint bank account "complicated" the ban on self-dealing. *Id.* "Under Wis. Stat. § 705.03, 'unless there is clear and convincing evidence of a different intent,' the parties to a joint account may withdraw and use the

funds in the account without being required to account to any other party to the joint account." *Id.* ¶ 29. The court held "that, when a [power of attorney] agent and a principal share a preexisting joint checking account, the execution of a [power of attorney] document, in and of itself, is not 'clear and convincing evidence of a different intent' under Wis. Stat. § 705.03." *Id.* ¶ 31.

The court then explained that the Russes' case "involve[d] conflicting and inconsistent presumptions." *Id.* On the one hand, "a joint checking account established under Wis. Stat. § 705.03 prior to the execution of a [power of attorney] creates a presumption of donative intent." *Id.* ¶ 36. On the other hand, "when an agent acting under a [power of attorney] transfers funds deposited by the principal from such joint account, but for the agent's own use, a presumption of fraud is created." *Id.* The conflicting presumptions "cancel each other out," leaving the trier of fact free to decide the parties' intent based on the facts and witnesses' credibility. *Id.* ¶¶ 34, 36 (citation omitted).

A reasonable attorney could reject Kawalec's view of *Russ* for two reasons. First, the *Russ* court held that the two conflicting presumptions cancel each other out only if the joint account *predated* the power of attorney relationship. *Id.* ¶¶ 34–36. Because Kawalec was H.K.'s power of attorney *before* they shared a joint bank account, her trial counsel could reasonably conclude that *Russ* was inapplicable.

Second, the *Russ* court did *not* hold that the State must disprove donative intent in a theft-by-bailee prosecution of a joint account holder. It said nothing about whether a person's donative intent when creating a joint bank account affects another person's status as a bailee under the theft statute, Wis. Stat. § 943.20(1)(b). A reasonable attorney could thus think that *Russ* shed no light on whether Kawalec was a bailee with respect to her and Kawalec's joint bank account.

And even if *Russ* applied here, Kawalec interprets it too broadly. *Russ* requires a fact finder to determine whether a principal intended to allow his or her power of attorney agent to engage in self-dealing with joint account funds. *See Russ,* 302 Wis. 2d 264, ¶¶ 28–36. The *Russ* court did *not* hold that a principal's donative intent trumps his or her agent's fiduciary duties. In criminal-theft cases in other states, courts have rejected the notion that joint ownership of a bank account trumps a power of attorney agent's fiduciary duties with respect to the account. *See, e.g.*, *Walch v. State*, 909 P.2d 1184, 1187–88 (Nev. 1996) (concluding that Walch, who was the victim's power of attorney agent, was properly convicted of theft for using funds from their jointly-owned bank account for his own personal use). Here, H.K.'s power-of-attorney document banned Kawalec from self-dealing unless she had written consent from all of H.K.'s heirs. (R. 141:13–14; *see also* R. 34:2.) Kawalec does not have any evidence that H.K. intended to remove the ban on self-dealing. Any general evidence about whether H.K. thought of the joint account money as both his and Kawalec's would not answer the relevant question under *Russ*—whether H.K. intended to allow self-dealing.

In sum, *Russ* does not support Kawalec's argument that the State had to disprove H.K.'s donative intent in order to prove that Kawalec was a bailee. At the very least, a reasonable attorney could think that *Russ* did not control this issue.

C. Kawalec's trial counsel reasonably declined to have two bankers testify about H.K.'s intent when making a joint bank account with Kawalec.

Wisconsin's general theft statute prohibits a "trustee or bailee" from stealing several types of property "of another." Wis. Stat. § 943.20(1)(b). It even prohibits theft by a co-owner of the property. *See id.* § 943.20(2)(c). It states

that "'[p]roperty of another' includes *property in which the actor is a co-owner* and property of a partnership of which the actor is a member, unless the actor and the victim are husband and wife." *Id.* (emphasis added).

Indeed, Wisconsin law has long recognized that a person may be convicted for stealing money in which he has an ownership interest. *See, e.g.*, *State v. Wolter*, 85 Wis. 2d 353, 270 N.W.2d 230 (Ct. App. 1978). The defendant in *Wolter* was a real estate developer who bought land in Milwaukee on which to build an apartment complex. *Id.* at 360. A bank gave him a loan to fund the construction project. *Id.* at 360–61. He spent some of the loan money on business expenses unrelated to the construction project. *Id.* at 361. He was convicted of theft by contractor as a result. *Id.* at 362. He argued on appeal that Wis. Stat. § 943.20(1)(b) was "inapplicable to him" because he was "the owner described in that section" and "he cannot steal from himself." *Id.* This Court rejected that argument and concluded that his misuse of the mortgage funds was theft by contractor. *Id.* at 362–63. Wolter further argued that he could not be a "trustee" for purposes of that subsection because he owned the land. *Id.* at 365. This Court rejected that argument and concluded that he was a trustee under the statute even though he was also an owner. *Id.*

Kawalec's first claim of ineffective assistance fails because it rests on her mistaken view that a co-owner cannot be convicted of theft. She argues that whether she had a right to use money from her and H.K.'s joint bank account hinged on H.K.'s donative intent when he created the joint account. (Kawalec Br. 17–19.) She argues that her trial counsel was ineffective by not having two bankers testify about H.K.'s donative intent. (*Id.* at 21–23.) She argues that "[t]his evidence clearly would have added a great deal of substance to Kawalec's joint ownership defense." (*Id.* at 21.)

But Kawalec had no such defense available to her. Except for spouses, a person can be criminally liable for stealing property that he or she co-owns. *See* Wis. Stat. § 943.20(2)(c); *see also Wolter*, 85 Wis. 2d at 362–63, 365 (concluding that an owner could be guilty under section 943.20(1)(b)); *accord People v. Day*, 958 N.E.2d 300, ¶¶ 29–30 (Ill. App. Ct. 2011) (concluding that a co-owner may be guilty of theft under Illinois law). There is no evidence that Kawalec and H.K. were married to each other. Thus, even if Kawalec was a co-owner of the joint bank account because of H.K.'s donative intent, Kawalec's co-ownership would not have been a defense to the theft charges against her. At the very least, a reasonable attorney could have reached this conclusion. Thus, Kawalec's trial counsel did not perform deficiently by declining to seek testimony from H.K.'s bankers about H.K.'s alleged intent to make Kawalec a co-owner of his bank account.

Kawalec argues that she had a right to use money in H.K.'s joint account because of Wis. Stat. § 705.03. (Kawalec Br. 17–18.) This statute provides that "[u]nless there is clear and convincing evidence of a different intent," "[a] joint account belongs" to its parties. Wis. Stat. § 705.03(1). But this statute does *not* provide that a joint account holder cannot be prosecuted for stealing money from the account. *See id.* It does not even mention theft or criminal liability. It merely absolves financial institutions from some civil liability. *See id.*

Section 943.20(2)(c), on the other hand, indicates that co-ownership is *not* a defense to criminal liability for theft, except in cases involving spouses. "If two statutes that apply to the same subject are in conflict, the more specific controls. Conflicts between statutes are not favored and will not be held to exist if the statute may be reasonably interpreted otherwise." *State v. Anthony D.B.*, 2000 WI 94, ¶ 11, 237 Wis. 2d 1, 614 N.W.2d 435 (citations omitted). To avoid a

conflict between sections 705.03 and 943.20(2)(c), a reasonable attorney could interpret section 705.03 as having no bearing on criminal liability for theft. And even if these two statutes conflicted, a reasonable attorney could think that 943.20(2)(c) controlled because it is more specific—it specifically provides that co-ownership is not a defense to a charge of theft, except in the case of spouses.

Kawalec further argues that the bankers' potential testimony about H.K.'s donative intent was "crucial" because there was no evidence at trial about H.K.'s intent when creating the joint account with Kawalec. (Kawalec Br. 21–22.) That argument is unavailing. Although the bankers' testimony would have been crucial for establishing H.K.'s intent, H.K.'s intent was not crucial to Kawalec's defense. Kawalec argues that because H.K. had donative intent, she "owns the funds" in the joint account and thus "cannot be guilty of theft." (*Id.* at 10.) She is wrong. Even if H.K.'s donative intent made Kawalec a co-owner, a reasonable attorney could think that co-ownership was not a defense for the reasons stated above.

The circuit court erred by concluding that Attorney Masnica had performed deficiently.[6] It reasoned that Attorney Masnica was unaware before trial that H.K.'s bankers could have testified about H.K.'s donative intent and because Attorney Masnica "admitted that he did not know the law well." (R. 155:4–8.) The circuit court erred because it applied a subjective test that focused on Attorney Masnica's thought process. An attorney's performance is *not* deficient if it "falls within what a reasonably competent defense attorney could have done," "regardless of defense

[6] This Court will affirm "if a circuit court reache[d] the right result for the wrong reason." *Milton v. Washburn Cnty.*, 2011 WI App 48, ¶ 8 n.5, 332 Wis. 2d 319, 797 N.W.2d 924 (citation omitted).

counsel's thought process." *Jackson*, 333 Wis. 2d 665, ¶ 9 (citation omitted). The circuit court here failed to recognize that it may consider reasons justifying an attorney's conduct even if the attorney overlooked or disavowed them. *See Williams*, 296 Wis. 2d 834, ¶ 18. Even if Attorney Masnica had been aware of the bankers' potential testimony about H.K.'s donative intent, and even if he had been well-versed in the relevant law, he reasonably could have declined to seek that testimony because co-ownership and H.K.'s donative intent did not provide a defense here.

In short, Kawalec's first claim of ineffective assistance fails because she has not shown deficient performance.

D. Kawalec's trial counsel reasonably declined to object to the jury instruction stating that a power of attorney is a bailee.

The circuit court instructed the jury that to prove the first element of theft, the State had to prove that Kawalec "had possession of money . . . belonging to another because of her status as a bailee. A person who acts as a power of attorney is a bailee." (R. 146:85.)

A reasonable lawyer could think that this instruction correctly stated the law. A bailee is someone who takes temporary control of another person's property for either party's benefit. *See Toyota Motor Credit Corp. v. N. Shore Collision, LLC*, 2011 WI App 38, ¶ 11, 332 Wis. 2d 201, 796 N.W.2d 832. A person with power of attorney likewise has control of another person's property for that other person's benefit. *See Praefke v. Am. Enter. Life Ins. Co.*, 2002 WI App 235, ¶¶ 9–10, 257 Wis. 2d 637, 655 N.W.2d 456. Thus, a person with power of attorney fits the definition of a bailee. At the very least, a reasonable attorney could think so.

A reasonable attorney could also have thought that Kawalec was a bailee because she was a power of attorney. Kawalec was H.K.'s power of attorney, which authorized her

to use the money in H.K.'s bank account without his signature. (R. 144:54–55.) But being power of attorney did not give Kawalec ownership rights of that money. (R. 144:56.) Further, H.K.'s power-of-attorney document prohibited Kawalec from using H.K.'s money for her own benefit unless she had the written consent from all of H.K.'s heirs. (R. 141:13–14.) Because Kawalec was managing H.K.'s bank account for his benefit as his power of attorney, her trial counsel had a reasonable basis for not objecting to the jury instruction's suggestion that Kawalec was a bailee.

Kawalec argues that this jury instruction misstated the law because "whether she was a bailee or joint owner depended on H.K.'s intent." (Kawalec Br. 23.) She cites *Russ*. (*Id.*) Her argument fails for two reasons.

First, her reliance on *Russ* is misplaced—or at least a reasonable attorney could have thought so. As explained above, *Russ* was a civil case that did not discuss whether a person's donative intent can affect another person's status as a bailee under the theft statute, Wis. Stat. § 943.20(1)(b). It did not mention bailees or the crime of theft even once. Thus, a reasonable attorney could have thought that *Russ* shed no light on whether Kawalec was a bailee under the theft statute.

Second, Kawalec's argument rests on the mistaken premise that she could not be guilty of theft if she was a joint owner of H.K.'s bank account. Again, a person can be criminally liable for stealing property that he or she co-owns. *See* Wis. Stat. § 943.20(2)(c). Thus, Attorney Masnica had a reasonable basis for not arguing that Kawalec could not be a bailee under the theft statute if she was a joint owner of the bank account.

Kawalec further argues that the jury instruction on bailment was wrong because "not all who act as power of attorney are bailees with regard to all of the principal's

property. They are not bailees to any property that the principal chooses to gift to them." (Kawalec Br. 23.) But Kawalec has not cited any authority for that proposition. "Arguments unsupported by references to legal authority will not be considered." *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (citation omitted). Further, as explained above, Wisconsin law is unsettled as to whether a person's donative intent trumps someone else's fiduciary duties as a power of attorney, thereby removing the latter person's status as a bailee. Kawalec's trial counsel performed reasonably by not raising this unsettled issue.

In short, Kawalec's second claim of ineffective assistance fails because she has not shown deficient performance.

E. Kawalec's trial counsel reasonably declined to object to the jury instruction on the joint bank account.

The circuit court instructed the jury that it had "heard testimony from [H.K.] that the funds in the US Bank account were the property of [H.K.]" (R. 146:87.) It said that the jury had also heard that "the bank recognized Johnalee Kawalec as a joint owner of that account." (R. 146:88.) It told the jury "to determine what effect, if any" Kawalec's status as a joint owner had on this case. (R. 146:88.)

Kawalec argues that her trial counsel performed deficiently by not objecting to that jury instruction on two grounds. Neither argument has merit.

First, Kawalec argues that her trial counsel should have objected because the instruction falsely suggested that the money in H.K.'s bank account was not Kawalec's property. (Kawalec Br. 24–25.) But an attorney could have reasonably thought that the instruction was not misleading. The circuit court said that H.K. had testified that the money in the U.S. Bank account was his and then, *in the very next*

sentence, the court said that a bank employee had testified that Kawalec was a joint owner of that account. (R. 146:87–88.) Thus, an attorney could have reasonably thought that the circuit court was *not* suggesting that Kawalec did not own that money.

Second, Kawalec argues that her trial counsel should have objected when the circuit court told the jury to consider what effect, if any, her joint ownership had on this case. (Kawalec Br. 25.) She argues that this instruction "misstated the issue" because "[t]he real issue was whether H.K. established the joint account with donative intent or for convenience." (*Id.*) She contends that if H.K. had donative intent, she was a joint owner of the account and thus could not be guilty of theft. (*Id.*) But, again, a person can be guilty of stealing property that he or she co-owns. *See* Wis. Stat. § 943.20(2)(c). And, again, the law is unsettled as to whether a person's donative intent removes his or her power of attorney agent's status as a bailee under the theft statute. A reasonable attorney thus could have thought that this jury instruction did not misstate the issue.

In short, Kawalec's third claim of ineffective assistance fails because she has not shown deficient performance.

II. Further, Kawalec's trial counsel did not prejudice the defense even if a joint-ownership defense was available to her.

In any event, Kawalec has not shown prejudice even if she had a viable joint-ownership defense. One of H.K.'s bankers testified at trial that Kawalec and H.K. had a joint bank account, which meant that "they both own it equally and that they're both entitled to everything in the account." (R. 144:54.) The court reminded the jury of this testimony when it instructed the jury that "the bank recognized Johnalee Kawalec as a joint owner of that account." (R. 146:88.)

Yet Kawalec argues that her trial counsel should have had H.K.'s two bankers testify about their conversations with him when he set up his joint account. (Kawalec Br. 26–30.) She contends that this testimony would have shown that H.K. had intended for Kawalec to jointly own the bank account, which would have supported a joint-ownership defense. (*Id.*) She also argues that the circuit court should have instructed the jury to determine whether H.K. had donative intent when he set up his joint account with Kawalec. (*Id.* at 30–31.)

Kawalec's arguments fail to show prejudice. It is significant that one of H.K.'s bankers testified that Kawalec and H.K. equally owned their joint account. Even if that testimony was inaccurate because Kawalec's joint ownership hinged on H.K.'s intent, this inaccuracy only helped Kawalec's defense. That testimony was more helpful to Kawalec's defense than the testimony and jury instructions that she thinks should have been given. The jury heard a banker's testimony that Kawalec *was* a joint owner, period, but she thinks the jury should have instead heard that she was a joint owner *if H.K. had donative intent*. Adding that qualification would not have helped Kawalec's defense. The circuit court correctly reached the same conclusion. (R. 155:9–10.)

Kawalec argues that the circuit court erred by determining that the jury would have rejected the bankers' testimony about H.K.'s donative intent. (Kawalec Br. 30.) She is wrong. The circuit court made no such determination. It instead concluded that the bankers' testimony would not have made any difference. (R. 155:9–10.) It was right for the reasons just stated.

In sum, Kawalec's claims of ineffective assistance fail because she has not shown deficient performance. Her trial counsel performed adequately because he could have reasonably determined that Kawalec had no viable defense

based on her joint ownership or H.K.'s donative intent. Further, Kawalec failed to prove prejudice. The jury heard testimony about joint ownership that was better for her defense than the testimony and instructions that she now thinks the jury should have heard.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm Kawalec's judgment of conviction and the circuit court's order denying her postconviction motion.

Dated this 12th day of October, 2017.

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 7151 words.

_____
SCOTT E. ROSENOW
Assistant Attorney General

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

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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.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of October, 2017.

_____
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