

RECEIVED

03-21-2018

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2017AP1779-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARCIA RENDER,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND
AN ORDER DENYING A POSTCONVICTION MOTION
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE STEPHANIE ROTHSTEIN AND
THE HONORABLE MARK A. SANDERS, PRESIDING

**PLAINTIFF-RESPONDENT'S BRIEF AND
SUPPLEMENTAL APPENDIX**

BRAD D. SCHIMEL
Wisconsin Attorney General

ANNE C. MURPHY
Assistant Attorney General
State Bar #1031600

Attorneys for Plaintiff-Respondent
State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9224
(608) 266-9594 (Fax)
murphyac@doj.state.wi.us

TABLE OF CONTENTS

	Page
ISSUE PRESENTED	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
INTRODUCTION.....	1
STATEMENT OF THE CASE.....	2
STANDARD OF REVIEW	13
ARGUMENT.....	14
The circuit court properly denied Render’s motion for a new trial alleging ineffective assistance of counsel without a hearing.....	14
A. Relevant legal principles	14
B. The record conclusively demonstrates that Attorney Bowe did not perform deficiently by not calling a rebuttal expert witness to testify about Head’s cause of death.	16
C. The record conclusively demonstrates that Render was not prejudiced because the jury’s guilty verdicts would not have been different had a rebuttal expert testified.	20
CONCLUSION.....	24

TABLE OF AUTHORITIES

Cases

<i>State v. Allen</i> , 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433.....	13, 15, 16
<i>State v. Bentley</i> , 201 Wis. 2d 303, 548 N.W.2d 50 (1996).....	13, 15, 16
<i>State v. Curtis</i> , 218 Wis. 2d 550, 582 N.W.2d 409 (Ct. App. 1998).....	15
<i>State v. Jeannie M.P.</i> , 2005 WI App 183, 286 Wis. 2d 721, 703 N.W.2d 694.....	21
<i>State v. Kimbrough</i> , 2001 WI App 138, 246 Wis. 2d 648, 630 N.W.2d 752	14
<i>State v. Machner</i> , 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).....	15
<i>State v. Phillips</i> , 2009 WI App 179, 322 Wis. 2d 576, 778 N.W.2d 157	13
<i>State v. Trawitzki</i> , 2001 WI 77, 244 Wis. 2d 523, 628 N.W.2d 801	14
<i>State v. Tulley</i> , 2001 WI App 236, 248 Wis. 2d 505, 635 N.W.2d 807	15
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	14, 15
<i>Thomas v. Clements</i> , 789 F.3d 760 (7th Cir. 2015)	18, 19
<i>United States v. Anderson</i> , 61 F.3d 1290 (7th Cir. 1995)	17

Statutes

Wis. Stat. § 939.24(1) 22
Wis. Stat. § 940.06(1) 17, 22
Wis. Stat. § 940.24..... 17
Wis. Stat. § 940.235..... 17, 22

Other Authorities

WI JI-Criminal 1060 22
WI JI-Criminal 1255 22

ISSUE PRESENTED

Did the circuit court properly deny without a hearing the postconviction motion of Marcia Render, in which she alleged that her trial counsel provided ineffective assistance by not calling an expert witness, because the record conclusively demonstrated that her trial counsel did not perform deficiently and Render was not prejudiced?

The circuit court answered yes.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication, as the issue presented can be decided based on the record in this case and the briefs of the parties.

INTRODUCTION

During an argument between Render and her sister Sheri Head, Render called 911 multiple times, complaining that Head would not stop screaming and throwing Render's belongings. The confrontation culminated in Render sitting on top of her sister and holding her down by her head until police arrived. Render met police at the door and the officers found Head unconscious, face down on the floor. Paramedics could not revive Head and she died at the scene.

The State charged Render with second-degree reckless homicide and strangulation/suffocation, both as domestic abuse. At trial, the responding officers testified that they found Head's body face down on the floor. The jury heard the recordings of Render's eight 911 calls, during which the verbal confrontation escalated and Render stated she was afraid she was going to "snap" and hurt her sister. The forensic pathologist who conducted the autopsy of Head testified that, based on the hemorrhaging in both of Head's eyes and in her

neck muscles, her death was caused by asphyxia and manual strangulation. Because it is impossible for a person to choke herself manually, the pathologist determined that Head's death was a homicide. Render testified on her own behalf, admitting that she was angry and that she held her sister down by straddling her, placing her knee on her back while she was face down, and holding her head until police arrived. The jury convicted Render on both counts.

Render seeks a new trial, alleging that her trial counsel Ann Bowe was ineffective for not calling an expert witness to testify that Head died of a cardiac arrest, not strangulation. However, Render has not shown that Attorney Bowe was deficient. The record conclusively demonstrated that Bowe's trial strategy and performance was reasonable. Nor has Render demonstrated prejudice. Based on all the evidence at trial and the jury's credibility determinations, Render would have been convicted even if a rebuttal expert had testified about Head's cause of death. This Court should deny Render's request for a new trial and affirm her convictions.

STATEMENT OF THE CASE

Criminal Complaint and Information. According to the criminal complaint, Milwaukee County police responded to investigate a domestic complaint at Render and Head's home. Render met them on the front porch and admitted that during a confrontation with Head, Render had "sat on" Head, "holding her down until police arrived," and told police that Head was "passed out." Police found Head unconscious on the floor, with blood and vomit on her mouth and in her airway. Paramedics attempted to administer CPR but Head died at the scene. A forensic examiner from the Milwaukee County Medical Examiner's office conducted a preliminary examination of Head at the scene and determined that she had "the appearance of petechial hemorrhaging in her eyes," which was "consistent to an asphyxia caused death." (R. 1:2.)

Later the same day, Dr. Wieslawa Tlomak from the Milwaukee County Medical Examiner's Office conducted an autopsy of Head. Dr. Tlomak found petechial hemorrhaging in Head's eyelids and plainly visible trauma caused by hemorrhaging from Head's neck muscles. Dr. Tlomak concluded to a reasonable degree of medical certainty that Head's death was the "result of manual strangulation and ruled her death a homicide." (R. 1:3.)

Police interviewed Render who told them that she lived with her sister Head. On the night of the homicide, she and Head had been at a bar drinking and got into an argument. Render left alone and went back to their house, where she moved her belongings into a pile in the living room as if she were going to move out. When Head returned, she was upset and screamed at Render to "get out" of the residence. (R. 1:3-4.) Render called 911 and told the operator, "[Y]ou guys need to come and get my sister man, 'cause I'm about to snap on her." Render alleged that Head was throwing her property down the stairs and stated she was "destroying my property. I'm about to snap for real." Render further stated: "I'm trying to control myself, man, I will throw her out the window, man." (R. 1:5.) Render told the 911 operator that "I don't want to do nothing to my sister that I'm going to regret." Head could be heard in the background repeatedly yelling "get out" at Render. (R. 1:6.)

After police arrived, Render told them Head went unconscious while Render was "holding her down" waiting for police. Render described that after a "book case fell to the floor along with" Render and Head, a "mirror shattered on the ground and she and [Head] began wrestling somewhat." (R. 1:7.) While Head was on her stomach, Render sat on top of her and "put her right knee in the middle of [Head's] back as she straddled" Head to pin her down. As Head struggled, Render attempted to hold her down by placing her knee on her back with one hand on her head and the other hand on

her “upper back or shoulder.” Render told police she held Head down so Head would not “fight her.” At some point during the altercation, Head stopped struggling and Render continued to hold her down until police arrived. Render told police that she did not remember holding Head down by her neck but that it was “possible.” (R. 1:8.)

The State charged Render with one count of second-degree reckless homicide, domestic abuse – infliction of physical pain or injury and one count of strangulation and suffocation, domestic abuse. (R. 1:1; 3.)

Jury trial and verdict. At trial, the State called Officer Fitzpatrick, who arrived on the scene and saw Head lying on the floor and called paramedics because “something was wrong.” (R. 104:36.) Officer Fitzpatrick testified that Render told him that “she was trying to hold her sister down as she was calling police.” (R. 104:37.) Lieutenant Kurth, a paramedic with the Milwaukee Fire Department, testified that when he arrived, Head was not breathing and had no pulse. Attempts to revive her with CPR were not successful. (R. 104:38–39.) He testified that Head was originally found lying face down, but by the time he arrived, paramedics had moved her onto her back so that they could perform CPR. (R. 104:40.)

Detective Bell, another responding officer, testified that “minimal DNA or fingerprints . . . were gathered” because they were not needed “for identification or determining who the perpetrator was” based on the events involving the fight between Render and Head that took place before police arrived. (R. 104:46–47.) Detective Bell testified that when he arrived he noticed “there was quite a bit of property that was on the ground,” such as “things scattered across the floor that aren’t typically there in a home,” including some “broken glass” as well as Head’s body. (R. 104:50.) Detective Bell identified Head’s body in a picture of the living room, in the corner. (R. 104:57.) He testified that he did not send any

evidence to the crime lab because “this wasn’t so much of an identification case where we needed to identify someone through DNA or fingerprints.” (R. 104:60.)

Detective Huston testified that on the night of Head’s death, there were eight 911 calls made from the address: seven calls between 11:22 p.m. and 11:48 p.m. and then the final call at 12:38 a.m. (R. 104:74–75.) The recordings of the calls were played for the jury. (R. 104:78–85.) Detective Huston testified that the caller identified herself as Marcia Render. On the recordings, Render was arguing with another person in the background who she identified as her sister Head. (R. 104:81–82.) In one of the calls, Detective Huston heard Head say, “Get the fuck out” followed by, “You ain’t paid me shit, more than once.” (R. 104:83.) At least twice, Head said, “Don’t mother fucking threaten me.” The last phone call from Render to 911 was placed at 12:38 a.m., about 50 minutes after the previous call. (R. 104:84.)

Dr. Tlomak, the deputy chief medical examiner at the Milwaukee County Medical Examiner’s Office, testified that she had been deputy chief medical examiner for five years. In that capacity, she had performed approximately 2400 “autopsies to determine cause and manner of death.” (R. 104:130–31.) She specialized in forensic pathology, which “describes changes in the body that are due to diseases or trauma.” She “was specifically trained to determine cause of death in cases involving strangulation or asphyxiation.” (R. 104:131–32.)

Dr. Tlomak testified that she conducted the autopsy of Head and concluded that her cause of death was “asphyxia due to manual strangulation and a compression of her chest.” (R. 104:132–33.) Tlomak further concluded that Head’s manner of death was “homicide.” (R. 104:34.) During the autopsy, Tlomak found that Head had “severe abrasion” or “skin scrapes on the right side of the forehead” and “multiple petechial hemorrhages in both eyes.” (R. 104:135.) Tlomak

identified a photograph of Head depicting these injuries, and described the petechial hemorrhages as “small bleedings . . . that are due to rupture of the small blood vessels” in the eyes. (R. 104:136–37.) The photos and her observation of those hemorrhages showed there was an “obstruction of the blood vessels that supply brain with blood. The pressure inside the head will increase, and it will cause rupture of the small blood vessels” in both eyes. (R. 104:137–38.) Head had these hemorrhages on both the upper and lower portion of her eye caused by an increase in her blood pressure. This indicated, along with the additional injuries to her neck, “that there was pressure applied to the neck.” (R. 104:139–40.)

In addition to the eye hemorrhages, Dr. Tlomak conducted an internal examination and found “three subcutaneous hemorrhages in the skin of her neck” and “hemorrhages in the muscles of the neck.” (R. 104:141.) These hemorrhages in both the fat tissue and neck muscles also “indicated that there was pressure applied to the neck.” (R. 104:142.) Dr. Tlomak testified that the hemorrhages in Head’s neck were “very extensive.” (R. 104:143.) Dr. Tlomak noted that Head had hemorrhages in all the multiple layers of six muscle groups in her neck, from her collarbone up both sides of her neck. (R. 104:143–44.) Tlomak confirmed with a microscopic examination of the muscle that the hemorrhages were “not only on the surface of the muscle, but they were also inside the muscle.” Her observations led her to determine that Head’s injuries were caused by “pressure applied to the neck” affecting Head’s “jugular veins,” “carotid arteries,” and “vertebral arteries,” blocking blood from coming back to her heart and causing the eye rupture petechial hemorrhages. (R. 104:146–47.)

Based on her observations during the autopsy, Dr. Tlomak concluded that Head’s cause of death was asphyxia due to manual strangulation. She based her conclusion on both the obstruction of Head’s airways and

compression of her chest: “there was a compression of the neck which occluded blood vessels, so the brain didn’t receive enough oxygen,” and there was also compression of the chest, and “both contributed to lack of oxygen in the brain.” (R. 104:147–48.) Based on her training and experience, she concluded that the combination of the manual strangulation, and the resultant hemorrhaging in her neck, and the compression of her chest, caused Head’s death. (R. 104:148–49.)

In her experience, Dr. Tlomak testified that she had seen cases involving a cause of death of manual strangulation that had less and more injuries to the neck than this one. Although there was no visible injury to the outside of Head’s neck, “[s]ometimes we don’t see anything on external examination especially when the person has darker skin.” (R. 104:150.) Thus, Tlomak made an incision to confirm that there was hemorrhaging in Head’s tissue and muscles. (R. 104:151.) In addition to concluding that Head’s cause of death was asphyxia by manual strangulation, Dr. Tlomak concluded that her “manner of death was homicide” because manual strangulation is “impossible” for a person to do to himself to herself: “even if the pressure is applied to the neck, when the person becomes unconscious, the pressure would be released, and then the blood flow...would flow to the brain, and the person would be able to breathe again.” (R. 104:151–52.) Here, “there was a combination of both. There was pressure applied to the chest and pressure applied to the neck. So forensic point of view is death at the hand of another.” (R. 104:153.)

Render testified that she and her sister Head lived together and that she was aware that Head had health problems and was on disability. (R. 105:25–26.) On the night Head died, Render and Head went to a bar to meet their brother. (R. 105:26–27.) Render left and went home before Head, and when Head got home she was “screaming and

cussing.” (R. 105:28.) Head told Render to “[g]et the fuck out. You done went too far now” and accused Render of not paying rent. Head began throwing Render’s property down the stairs. (R. 105:31.) Render called 911 and “told them that my sister was tearing up my property” and asked them to “send somebody over. “ (R. 105:32.) Render testified that she called police several times to tell them Head was wrecking her property, and Render “was just letting her do it because I didn’t want to go to jail. I didn’t want to get into an altercation with her.” (R. 105:33.)

Render testified that on the 911 call, she stated that “I was gonna snap” because “police weren’t coming and [Head] was just tearing up my property.” (R. 105:35.) Render confirmed that on the 911 call she said “Imma throw her out the window” because she “was just angry because the police were not coming.” Render further stated on the 911 call that she was “trying to hold it together” and she was not “trying to fight with my sister.” (R. 105:36.) Render testified that she was “upset that [Head] was tearing up my property” and because Render “had never seen her like that” and did not “know what was wrong with her.” She told the 911 operator that she did not “want to do nothing to my sister that I’m going to regret.” (R. 105:37.)

Head kept telling Render to “get out,” but Render testified that she did not leave because she lived there and it was her home, and because Head was tearing up her property and she “wouldn’t have had nothing left by the time I had come back.” (R. 105:38.) At some point Head walked into a room where there was a large bookcase and she was “trying to push it down and [Render] was trying to push it up.” When Render let go, Head “pushed it and it fell on the ground and then” Render and Head “fell behind the bookcase.” (R. 105:43.) Render testified that when Head fell she was face down and Render fell on top of her. (R. 105:48.)

After they fell, Render testified that she “just stayed on top of her,” grabbed her by her hoodie and “pinned her shoulders down with it and then I took my hand and put it on her head and I sat on her and I said ‘you not going nowhere until the police come.’” (R. 105:48–49.) Render testified that she was “straddling her” and that she “pushed her head down.” (R. 105:49.) When Render first landed on top, Head tried to get up and then Render “sat back down on her” because she “didn’t want to fight her, and so I just held her down until police came.” (R. 105:50.)

When Head stopped talking, Render thought she may have “passed out because she was drunk.” Render did not check to see whether Head was breathing because she “had no reason to.” (R. 105:52.) Head was not making any audible noises, but Render testified that she did not think she was putting Head in any danger or intend to do so. (R. 105:53.) After two or three minutes, Render heard the phone ring, got up off her to answer the phone in the next room, which was a call from police saying they were about to arrive. (R. 105:54.) Render “went straight downstairs when police called” and did not check to see whether Head had got up. (R. 105:56.)

When the two police officers came in, they saw Head laying on the floor and asked, “What’s wrong with her?” Render responded that she was “drunk” or “just playing,” but when Head did not respond, the police called paramedics. (R. 105:57–58.) Render testified that when the police officer first turned Head over, it looked like there were “bubbles” coming out of her mouth. (R. 105:59.) An officer took Render and put her in a police car and, while she was in the police car, a detective told her that her “sister passed.” (R. 105:58–59.)

On cross-examination, Render admitted that during their altercation, Head threw things down the stairs and demanded that Render leave, but Render refused to leave. Render stated that she was “about to lose it.” (R. 105:76.)

After Render's seventh call to 911, Render decided to prevent Head from damaging more property by "standing in front of her" and the property on the floor of the living room. Render admitted that Head was never physically aggressive toward her. (R. 105:78-79.) After about 40 minutes, Render stated that Head suddenly grabbed the bookcase and pulled it over. (R. 105:85.) After they fell to the ground, Render put her knee on Head's back. Render denied putting her hands on the back of Head's neck. (R. 105:87-88.)

Instead, Render testified that she "had her hoodie pinned down, holding her to the ground and then I did have her head." The prosecutor questioned, "A hoodie?" and Render responded that she held Head down with her hoodie by twisting it "and I just pinned her down with it." (R. 105:88.) Render stated that "[t]he only thing I used to hold her down by her neck was her hoodie and I had my hand on top of her head. That's the only thing I did. And I did not think doing those two things would cause her breathing to be impeded." (R. 105:90.) Again, the prosecutor questioned Render's statement that she "used a hoodie" and Render responded that Head "was wearing it." Render testified that she "took the hoodie" and "twisted it" and "pinned her down with her clothes and then I held her head down." (R. 105:92.)

As a rebuttal witness, the State called Michael Braunreiter, who was a police service specialist investigator. In that capacity, Braunreiter monitors homicide autopsies for the Milwaukee Police Department by watching, photographing, and taking evidence collected during an autopsy such as clothing and then inventorying the evidence. (R. 105:106-07.) When a victim needs to have clothing removed at the scene, the typical practice is that an investigator will make sure the clothing that is cut off or pulled off goes with the victim to the medical examiner's office. (R. 105:107.)

Braunreiter testified that he was involved in the investigation of Head's death, observed her autopsy, and collected Head's clothing that she was wearing at the time of the incident. (R. 105:108–09.) In this case, he placed all her clothing items into police inventory and made a report. (R. 105:109.) After reviewing the report, Braunreiter stated that the clothing items that he inventoried that were recovered from Head, including any clothing items that were cut or removed from Head by paramedics, were “a long-sleeved dark green and gold Green Bay Packer shirt,” “a white bra, a tan tank top, a black bra, multicolored underwear,” “jeans, denim pants,” and “a black leather belt.” (R. 105:110.) The prosecutor provided Braunreiter with a bag of the actual clothing items and asked him to remove an item of green and gold clothing with a Packer logo and hold it up for the jury. (R. 105:111–112.) The item was damaged because paramedics had cut through it to look for injuries. Braunreiter testified that the shirt did not have a hood: “It's just a long-sleeved shirt” with a crew neck and with the weight of a t-shirt. (R. 105:112.) Braunreiter testified that there were no items removed from Head's person that had a hood attached that were conveyed to the Medical Examiner's office. (R. 105:113.)

The jury returned guilty verdicts on both counts: second degree reckless homicide and strangulation and suffocation. (R. 41; 106:5.) The court sentenced Render and entered a judgment of conviction reflecting the sentence of 12 years of initial confinement and 10 years of extended supervision on count one and three years of initial confinement and three years of extended supervision on count two, to be served concurrently. (R. 61; 107:72–73.)

Postconviction motion and appeal. Render filed a postconviction motion alleging ineffective assistance of trial counsel. In support of her claim, Render submitted the affidavit and report of Dr. Shaku Teas and the affidavit of

Render's postconviction counsel Christopher Rose. (R. 73:2.) Specifically, Render alleged that because her trial counsel Attorney Bowe "did not consult with an independent expert forensic pathologist in this case prior to trial," she provided ineffective assistance. Render asserted that the report from Dr. Teas indicated her opinion that Head "most likely died from sudden cardiac arrest associated with the stress of a verbal altercation with" Render "and the physical activity involved in discarding household items and furniture." (R. 73:2-3.) Render argued that Attorney Bowe's decision to not consult an independent expert was "not a reasonable trial decision and [was] deficient." (R. 73:6.) Render further argued that she was prejudiced by Attorney Bowe's deficient performance because Dr. Teas' report showed "a reasonable probability sufficient to undermine confidence in the outcome" as the report made it "substantially likely that Marcia Render could have raised at least a reasonable doubt and had a different outcome at trial." (R. 73:10-11.)

After briefing by the parties, the circuit court entered a decision and order denying Render's motion without a hearing. (R. 85; 86; 88, R-App. 101-04.)¹ The court determined that Attorney Bowe did not perform deficiently because calling a rebuttal expert would not have changed the fact that "there was ample evidence for the jury to find that [Render's] actions created a substantial and unreasonable risk of death or great bodily harm for" Head. Moreover, even if Dr. Tlomak had testified that the cause of Head's death was inconclusive, this had "no special import because the focus is on [Render's]

¹ Although Render included the Decision and Order Denying Motion for Postconviction Relief in her Appendix, the State has included it in its supplemental appendix for this Court's convenience, because Render failed to number the pages of her appendix.

actions *in creating a risk of death or great bodily harm.*” (R. 88:3, R-App. 103.)

The circuit court determined that even if Render could show that Attorney Bowe was deficient, Render was not prejudiced by Bowe’s decision not to call an expert to rebut Dr. Tlomak because based on all the evidence, “there is not a reasonable probability that the jury would have acquitted” Render. Thus, the circuit court found that Attorney Bowe was not deficient and that Render was not prejudiced, and denied Render’s motion for a new trial. (R. 88:3–4, R-App. 103–04.)

Render appeals from the decision and order denying her postconviction motion for a new trial and from the judgment of conviction. (R. 90.)

STANDARD OF REVIEW

On review, this Court first determines *de novo* whether Render pled sufficient facts in her postconviction motion to entitle her to a new trial. *See State v. Phillips*, 2009 WI App 179, ¶ 17, 322 Wis. 2d 576, 778 N.W.2d 157. In the context of an ineffective assistance of counsel claim, sufficient facts are facts that establish both deficient performance and prejudice. *State v. Allen*, 2004 WI 106, ¶¶ 12, 26, 274 Wis. 2d 568, 682 N.W.2d 433. “If the motion fails to allege sufficient facts, the trial court has the discretion to deny the motion without an evidentiary hearing. This discretionary decision will only be reversed if the trial court erroneously exercised that discretion.” *Phillips*, 322 Wis. 2d 76, ¶ 17 (citing *State v. Bentley*, 201 Wis. 2d 303, 310–11, 548 N.W.2d 50 (1996)). Thus, because the circuit court denied Render’s claim for a new trial based on her claim that Attorney Bowe was ineffective without a hearing, this Court looks to Render’s postconviction motion, not her appellate brief, to determine if Render alleged sufficient facts to entitle her to relief. If she did not, this Court then looks to the circuit court’s decision denying her motion without a

hearing to determine if the court properly exercised its discretion.

This Court reviews the circuit court's denial of a claim of ineffective assistance of counsel as a mixed question of fact and law. The reviewing court must accept the circuit court's factual findings unless they are clearly erroneous. The reviewing court then determines independently as a question of law whether, under the facts as found by the circuit court, the trial attorney's performance was deficient and prejudicial. *State v. Kimbrough*, 2001 WI App 138, ¶ 27, 246 Wis. 2d 648, 630 N.W.2d 752.

ARGUMENT

The circuit court properly denied Render's motion for a new trial alleging ineffective assistance of counsel without a hearing.

A. Relevant legal principles

"Both the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution afford a criminal defendant the right to counsel. This right to counsel includes the right to the effective assistance of counsel." *State v. Trawitzki*, 2001 WI 77, ¶ 39, 244 Wis. 2d 523, 628 N.W.2d 801. Trial counsel's performance is presumed to be effective. *Id.* ¶ 40. A convicted defendant who claims that trial counsel was ineffective must satisfy the two-prong test set forth by the United States Supreme Court, proving both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See id.* ¶¶ 39–40; *see also Strickland v. Washington*, 466 U.S. 668, 690 (1984).

To demonstrate deficient performance, the defendant must show that counsel's actions or omissions fell "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Reasoned choices of trial

strategy, made after consideration of the applicable law and known facts, are virtually unassailable. *See id.* at 690–91. The test for prejudice is whether “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* at 687. To demonstrate 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.” *Id.* at 694.

The defendant bears the burden of proving both deficient performance and prejudice. *State v. Tulley*, 2001 WI App 236, ¶ 12, 248 Wis. 2d 505, 635 N.W.2d 807. This Court may approach an ineffectiveness claim by first considering either the performance component or the prejudice component, and if a defendant fails to satisfy one component of the analysis, the court need not address the other. *See Strickland*, 466 U.S. at 697.

When a defendant pursues postconviction relief based on trial counsel’s alleged ineffectiveness, the defendant must preserve trial counsel’s testimony in a postconviction hearing. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Nonetheless, a defendant is not automatically entitled to a *Machner* hearing upon filing a postconviction motion that alleges ineffective assistance of counsel. *State v. Curtis*, 218 Wis. 2d 550, 555 n. 3, 582 N.W.2d 409 (Ct. App. 1998). A circuit court must conduct a hearing on a claim of ineffective assistance only when the defendant alleges sufficient material facts that, if true, entitle him or her to relief. *State v. Allen*, 2004 WI 106 ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433; *Bentley*, 201 Wis. 2d at 309–10. Thus, “the motion must include facts that ‘allow the reviewing court to meaningfully assess [the defendant’s] claim.’” *Allen*, 274 Wis. 2d 568, ¶21 (alteration in original) (quoting *Bentley*, 201 Wis. 2d at 314). If the motion does not raise facts sufficient to entitle the defendant to relief, or presents only conclusory allegations, or if the record conclusively

demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. *Allen*, 274 Wis. 2d 568 ¶ 9; *Bentley*, 201 Wis. 2d at 310–11.

B. The record conclusively demonstrates that Attorney Bowe did not perform deficiently by not calling a rebuttal expert witness to testify about Head’s cause of death.

In her postconviction motion, Render alleges that Attorney Bowe’s failure to consult “a forensic pathology expert to review Dr. Tlomak’s conclusion that manual strangulation, compression of the chest contributed to asphyxia and death, under these circumstances constitutes deficient performance.” (R. 73:6.) Render’s allegations in her postconviction motion about why Attorney Bowe performed deficiently are conclusory, and the record conclusively demonstrates that Render is not entitled to relief. Thus, the circuit court properly denied her motion for a new trial without a hearing.

In support of her claim that Attorney Bowe performed deficiently, Render relies on the report and affidavit of Dr. Teas, who opined that Head did not die from strangulation, but “most likely died from sudden cardiac arrest associated with the stress of a verbal altercation with her sister, Marcia Render, and the physical activity involved in discarding household items and furniture.” Dr. Teas notes that there were no external marks on Head’s neck or “evidence of trauma to the torso, chest or back to suggest that compression of the chest lead to asphyxia and death.” (R. 73:14.) Dr. Teas’ conclusion contradicts the trial testimony of Dr. Tlomak, who conducted the autopsy on Head. Dr. Tlomak testified that her conclusion, based on the autopsy finding extensive hemorrhaging in her eyes and neck muscles, was that Head died of a combination of manual strangulation and compression of her chest. Dr. Tlomak further testified that death by manual strangulation can occur without

external marks or evidence of trauma, and that Head's death was a homicide. (R. 104:148–50.)

Render's claim that Attorney Bowe was deficient for not retaining an expert to question the findings of the forensic pathologist who conducted the autopsy of Head fails. When the State offers the testimony of an expert witness, defense counsel has no duty to consult with or call a rebuttal expert. *United States v. Anderson*, 61 F.3d 1290, 1298–99 (7th Cir. 1995). Here, according to the affidavit of Render's postconviction counsel Attorney Rose, Attorney Bowe told him that she did not consult with a forensic pathologist because she had no reason to doubt the conclusions of Dr. Tlomak, who conducted Head's autopsy and who she found credible. (R. 73:12.) Thus, Attorney Bowe made a strategic decision that a rebuttal expert would not have strengthened Render's case.

And that was a reasonable trial strategy, particularly because the elements that the State had to prove for the reckless homicide charge, unlike intentional homicide, did not include whether Render intentionally caused Head's death. Rather, the State had to show that Render's conduct was reckless: that by sitting on top of her sister and holding her face down by her head, knowing that she was in poor health, Render created "an unreasonable and substantial risk of death or great bodily harm" to Head. *See* Wis. Stat. §§ 940.06(1) and 940.235. Further, for the strangulation charge, the State did not have to show that Head's actions caused Head's death. *See* Wis. Stat. § 940.24. Hence, given the charges against Render and what the State had to prove, Attorney Bowe did not act unreasonably by not calling a rebuttal witness to testify about the cause of Head's death.

Further, a review of the trial record conclusively shows that Attorney Bowe did not perform deficiently as Render's counsel. Attorney Bowe vigorously cross-examined Dr. Tlomak and used that evidence in her closing argument,

highlighting that there were “no visible injuries on the outside of [Head’s] skin” and “[n]o bruising.” (R. 105:160.) She stressed that Head’s death could have occurred in as little as “10 to 15 seconds” and did not have to be the result of “injury in a fit of rage.” (R. 105:161–62.) Attorney Bowe argued that Head was intoxicated and out of control and that Head’s death was “just a terrible, terrible accident.” (R. 105:164.) Attorney Bowe further argued that Render was not guilty because she lacked the subjective awareness that her act “created a risk of death or great bodily harm” to Head. (R. 105:169.)

Thus, through her questioning and her closing argument, Attorney Bowe adduced at trial much of what the Teas report and opinion sets forth, such as Head’s intoxication and the lack of choke marks on her neck. In all, the record conclusively demonstrates that Attorney Bowe provided competent representation. Render has failed to overcome the strong presumption that Attorney Bowe’s performance as trial counsel fell within the wide range of professional acceptable representation.

On appeal, Render relies on a Seventh Circuit decision in *Thomas v. Clements*, 789 F.3d 760 (7th Cir. 2015), to support her position that Attorney Bowe was deficient for not calling a rebuttal expert witness to testify consistently with Dr. Teas’ opinion that Head died from a heart attack. (Render’s Br. 18.) Render argues that such testimony “would have led to significant questions about the theory of the case” that Head died of manual strangulation. Render asserts without explanation or support that Dr. Teas’ opinion “was readily available at the time of the trial,” that Attorney Bowe was defective for “not reaching out to an expert to review, or challenge Dr. Tlomak’s findings,” and that Bowe “acquiesced to the State’s strongest evidence, despite its perceived flaws as outlined in the Teas report, and

Dr. Tlomak's report.” (Render's Br. 21–22.) Render's reliance on *Thomas* is misplaced.

Thomas involved a charge of first-degree intentional homicide. At trial, the State's expert medical examiner testified that the victim's death “was not an accident.” *Id.* at 762, 764. Because intent was the key issue, the Seventh Circuit concluded that trial counsel's failure to obtain a pathology expert to review the State's medical examiner's conclusion was deficient performance. *Id.* at 768. By contrast, here, Render was charged with reckless homicide and strangulation, neither of which required the State to prove that Render intended to kill Head. Dr. Tlomak testified about the cause of Head's death: a combination of manual strangulation and compression of the chest, causing asphyxia. (R. 104:132–33.) Unlike the State's expert in *Thomas*, Dr. Tlomak offered no testimony about Head's intent or whether her death was an accident. Therefore, the holding in *Thomas* that trial counsel performed deficiently by not calling an expert to rebut testimony that the defendant intentionally, not accidentally, caused the victim's death, is inapplicable.

In its decision denying Render's motion for a new trial, the circuit court correctly decided that the critical issue in this case was “whether the elements of second degree reckless homicide were satisfied” and “the actual cause of death is not determinative of that issue in a reckless homicide case.” (R. 88:2–3, R-App. 102–03.) Here, the jury's verdict determined that Render's “actions constituted or created a substantial and unreasonable risk of death or great bodily harm under the totality of circumstances,” including Head's health and medical problems that were known to Render. Given Head's health issues and Render's actions of pinning Head down with her knee and holding her head while she was face down on the floor, “there was ample evidence for the jury to find that [Render's] actions created a substantial and

unreasonable risk of death or great bodily harm for” Head. (R. 88:2–3, R-App. 102–03.)

The circuit court agreed with the State’s argument that, even if Dr. Tlomak had testified that the cause of death was inconclusive, Head’s cause of death had “no special import because the focus is on [Render’s] actions *in creating a risk of death or great bodily harm.*” The circuit court concluded that because whether Render’s action created an unreasonable risk to Head was the critical issue, Attorney Bowe was not deficient because at trial, she brought out Head’s particular health problems and intoxicated condition “as noted by Dr. Teas.” (R. 88:3, R-App. 103.) Hence, Attorney Bowe performed reasonably as Render’s counsel and her trial strategy to not call an expert to testify about an alternative cause of death was not deficient performance.

The circuit court was correct. Attorney Bowe’s performance and strategic decision not to call a rebuttal expert witness was reasonable and not deficient. This Court should affirm.

C. The record conclusively demonstrates that Render was not prejudiced because the jury’s guilty verdicts would not have been different had a rebuttal expert testified.

In her postconviction motion, Render failed to allege sufficient facts to prove prejudice. Instead, Render made the conclusory assertion that “it is clear that Ms. Render was prejudiced by her counsel’s performance in failing to consult a forensic pathologist. Thus, counsel was deficient as there is a reasonable probability sufficient to undermine confidence in the outcome pursuant to Dr. Teas’ report.” (R. 73:10.) Render argues that if the jury had “been presented with this testimony of Dr. Teas, instead of just an argument unsupported by expert testimony, it is substantially likely that Marcia Render could have raised at least a reasonable

doubt and had a different outcome at trial.” (R. 73:11.) Render’s conclusory argument fails because the record at trial conclusively demonstrates that Render was not prejudiced. Thus, the circuit court properly denied her motion for a new trial without a hearing.

When this court assesses whether the defendant was prejudiced by trial counsel’s performance, it does so in light of the totality of evidence presented at trial. *State v. Jeannie M.P.*, 2005 WI App 183 ¶ 26, 286 Wis. 2d 721, 703 N.W.2d 694. At trial, a plethora of evidence was introduced that implicated Render’s reckless behavior in the death of her sister Head. It is undisputed that Render was the only person there when Head died. The jury heard testimony about the 911 calls Render made in the hour before Head’s death, painting a picture of an extremely volatile situation where Render admitted she might “snap” and hurt her sister because “police weren’t coming and [Head] was just tearing up my property[.]” (R. 105:35.) Render further admitted that she said she was going to throw Head “out the window” because she was angry and that she told the 911 operator that she did not “want to do nothing to my sister that I’m going to regret.” (R. 105:36–37.) Trial testimony from police investigators established that Head died face down, and Render in her own testimony admitted that as a result of her anger, she straddled Head and held her face down by her head for several minutes, until police arrived. (R. 105:48–49.)

Moreover, Render’s testimony that she held Head down by a “hoodie” was impeached by Investigator Braunreiter’s testimony that Head was not wearing a hoodie and that police did not inventory a hoodie with the items of clothing she was wearing when she died. (R. 105:48, 112–113.) After hearing all of the testimony at this trial, the jury made credibility determinations and properly inferred that Render held Head down by her neck, strangled her and recklessly caused her death by her conduct. Even without the testimony of

Dr. Tlomak, there was sufficient evidence to convict Render. Therefore, testimony from another expert stating the opinion that Head died of cardiac arrest is not reasonably likely to have changed the outcome of the trial.

On appeal, Render argues that her convictions for both reckless homicide and strangulation were based entirely on the testimony of Dr. Tlomak and that “Dr. Teas’ opinion, therefore, would have cast a reasonable doubt as to Ms. Renders’ guilt in this case, if she would have testified.” (Render’s Brief 27–28.) Render’s argument that she was prejudiced because Attorney Bowe failed to call a particular expert—Dr. Teas—fails because she would have been convicted even if Attorney Bowe had presented a rebuttal witness, based on the other evidence presented at trial, including Render’s testimony.

The jury’s guilty verdict for second-degree reckless homicide and strangulation is supported by all the evidence, not just the testimony of Dr. Tlomak. On the second-degree reckless homicide count, the State had to prove beyond a reasonable doubt that Render exhibited criminally reckless conduct that created a “substantial, unreasonable risk of death or great bodily harm,” that Render was aware of the risk, and that Render’s conduct was a substantial factor in Head’s death, although there may be more than one cause of death. *See* Wis. Stats. §§ 940.06(1) and 939.24(1); WI JI-Criminal 1060. On the strangulation count, the State had to prove beyond a reasonable doubt that Render intentionally impeded Head’s normal breathing or blood circulation by applying pressure on her throat or neck or by blocking her nose or mouth. Wis. Stat. § 940.235, WI JI-Criminal 1255. Render’s own testimony supports the jury’s inference that she acted recklessly, especially in light of Head’s health, obesity and intoxication, by sitting on Head and holding her head face down into the ground for several minutes. Moreover, Render’s testimony that she sat on Head

and held her face down by her head, and the fact that her testimony that she held her down by her “hoodie” was impeached, was sufficient for the jury to find Render’s testimony incredible and infer that Render, as she sat on top of Head with her face down, held Head’s neck, strangling and suffocating her.

In its decision denying Render’s motion for a new trial without a hearing, the circuit court correctly found that “even had the jury heard Dr. Teas’ opinion . . . , there is not a reasonable probability the jury would have acquitted” Render. (R. 88:3–4, R-App. 103–04.) Indeed, the jury likely would not have found the opinion of a defense rebuttal expert that Head died of cardiac arrest credible in light of the testimony of Dr. Tlomak who conducted the autopsy that found the extensive hemorrhages in Head’s neck and in her eyes that indicated manual strangulation. (R. 88:3, R-App. 103.) The circuit court determined that regardless of the expert testimony, the jury still would have found that Render “engaged in reckless behavior so as to create an unreasonable risk of death or great bodily harm given her sister’s medical condition, and that she was subjectively aware of the risk.” (R. 88:4, R-App. 104.) On the strangulation count, the circuit court determined that, because Head’s death was not an element that the State had to prove, the expert testimony about Head’s cause of death had “very little or no impact on the jury’s findings.” (R. 88:4 fn. 1, R-App. 104.)

The circuit court was correct. Render’s postconviction motion failed to alleged sufficient facts to support prejudice. Because Render failed to show that she was prejudiced by Attorney Bowe’s decision not to call an expert witness to testify that Head died of cardiac arrest, the circuit court properly exercised its discretion to reject Render’s ineffective assistance claim without a hearing.

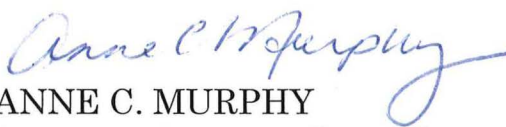
CONCLUSION

The State respectfully requests that this Court affirm the decision denying Render's postconviction motion for a new trial without a hearing and the judgment of conviction.

Dated this 21st day of March, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General


ANNE C. MURPHY
Assistant Attorney General
State Bar #1031600

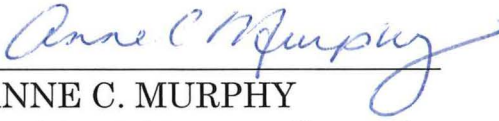
Attorneys for Plaintiff-Respondent
State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9224
(608) 266-9594 (Fax)
murphyac@doj.state.wi.us

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 7353 words.

Dated this 21st day of March, 2018.


ANNE C. MURPHY
Assistant Attorney General

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

I hereby certify that:

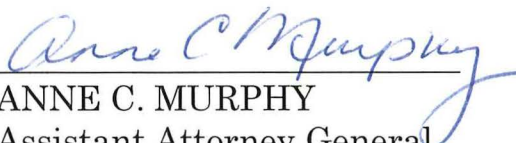
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

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 21st day of March, 2018.


ANNE C. MURPHY
Assistant Attorney General