STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

APPEAL NO. 2018AP216 CR
CIRCUIT COURT CASE NO. 2015CT360

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Kristy L. Malnory,

Defendant-Appellant.

ON APPEAL FROM FINAL ORDER ENTERED ON JANUARY 29, 2018, IN THE CIRCUIT COURT FOR WOOD COUNTY, THE HONORABLE GREGORY J. POTTER, PRESIDING, DENYING DEFENDANT-APPELLANT'S POST-CONVICTION MOTION

BRIEF OF PLAINTIFF-RESPONDENT

Submitted by:

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as the issues should be fully presented by the briefs with well settled case law. Publication is not necessary or appropriate and the State is not seeking publication.

STATEMENT OF FACTS

The defendant-appellant, Kristy Malnory, was charged in Wood County Case No. 2015CT360 with one count of operating under the influence of an intoxicant, and operating with a prohibited alcohol concentration of .08 g/100mL or above, both second offenses. On October 20, 2015, Public Defender Jessica Phelps was assigned to represent Ms. Malnory. Eight months later, a jury trial commenced, and the defendant-appellant was found guilty of both charges due to the overwhelming evidence that came in at trial. (Trial Transcript, "R." 218:12-25). Ms. Malnory confessed to having driven the vehicle on the road before pulling over onto a stranger's property, and further admitted to drinking vodka both before getting behind the wheel, and while driving. (R. 71:19-20). The officer noted immediate signs of impairment in Ms. Malnory, and she failed field sobriety testing. (R. 74-84). Ms. Malnory's blood alcohol concentration was .186 g/100mL (R. 167:20-22).

During the trial, though the hospital's phlebotomist was subpoenaed by the State, the phlebotomist who drew Ms. Malnory's blood did not

appear for trial. (R. 171:17-18.) The officer testified first at trial, and offered testimony about the blood draw that was conducted, and the fact that he personally witnessed the defendant-appellant's blood being drawn by a phlebotomist, and that the blood draw took place without issue, irregularity or concern at St. Joseph's Hospital. (R. 118-122:1). The officer also testified about the chain of custody of the blood not being disturbed and that he watched Ms. Malnory's blood tubes being sealed and packaged, and that the officer took custody of the blood, and processed the evidence in the standard way, submitting it to the Laboratory of Hygiene. (R. 120-122).

When the phlebotomist did not appear for the trial, after the officer testified and laid the proper foundation for the blood, the State offered testimony from the laboratory analyst. (R. 171:14-20). At the conclusion of the analyst's testimony, Exhibits 4 and 7, the Blood Urinalysis Screening form, and the Laboratory Report were offered by the State into evidence. (R. 173:12-17). Even before the admission, trial counsel objected to these exhibits being received on the grounds that the phlebotomist was not there to

testify, and that the defense thought the phlebotomist was coming, and that the witnesses were just being called out of order. (R. 170:21-25,171:1-12). Trial counsel also objected to the court receiving this evidence on the grounds that the State did not prove that the blood was drawn by a qualified person acting under the direction of a physician in accordance with Wis. Stat. § 343.305(5). *Id.* The court overruled this objection finding that both exhibits were admissible on the grounds that the officer laid the foundation, and testified to personally observing the blood draw, the blood draw taking place at a hospital by a phlebotomist, who is a person acting under the direction of a physician, and the chain of custody to the Laboratory of Hygiene. (R. 171:13-25, 172, 173:1-9). The Blood Urinalysis Screening form (Exhibit 4), a business record, along with the report of the laboratory analysis (Exhibit 7) was admitted into evidence. (R. 173:9). Trial counsel did not ask for the testimony of the analyst be stricken, because the defense's strategy was a drinking after driving defense (*Machner* Transcript ("App. 1") 15:24-25, 16:1-4).

The defendant-appellant filed a motion with the circuit court asking for a new trial based on alleged grounds that trial counsel was ineffective for failing to object to the Blood Urinalysis Screening form being admitted into evidence, and failing to move to strike testimony from the analyst. (See Appellate Motion for New Trial, dated May 2, 2017). The defendant-appellant argued that her blood results were inadmissible because the State did not prove, through the phlebotomist's testimony, that it was drawn in compliance with Wis. Stat. § 303.305(5)(b), specifically, whether it had been drawn by a qualified person acting under the direction of a physician. After the *Machner* hearing, the circuit court denied the defendant-appellant's motion, ruling that because the officer observed the blood draw, and because there was evidence of no issues with the chain of custody, the issue of whether the blood was drawn by a person acting under the direction of a physician was an issue of credibility rather than admissibility, and the court found, based on the testimony, that the blood was drawn by a person acting under the direction of a physician. (Oral Ruling of *Machner* hearing "App. 2" 4-5).

The circuit court found that trial counsel was not deficient as it relates to the objection of the Blood Urinalysis Screening from, and found that trial counsel did object on both chain of custody, and confrontation grounds. (App. 2 7:10-13). The court held that trial counsel was deficient in failing to move to strike the analyst's testimony, but that that deficiency did not cause the defendant-appellant prejudice, as the result at trial would still have resulted in her conviction. (App.2 7:24-25, 8-10). Additionally, the court found that trial counsel's strategy of the defense, a defense the defendant-appellant supported, was not based on attacking the blood result, but rather was a drinking after driving defense. (App.2 9:9-25, 10:1-9). The circuit court ruled that trial counsel's failing to move to strike the testimony of the analyst was harmless error, as there was more than enough evidence of the defendant's intoxicated condition from the officer. (App.2 9-10). The defendant-appellant's motion for a new trial was denied.

ARGUMENT

THE CIRCUIT COURT DID NOT ERR AND PROPERLY RULED THAT THE DEFENDANT-APPELLANT'S TRIAL COUNSEL WAS NOT INEFFECTIVE, AND THEREFORE, SHOULD NOT RECEIVE A NEW TRIAL

I. Ineffective Assistance of Counsel

Law

The standard of review of ineffective assistance of counsel claims is a mixed question of law and fact, and therefore, the circuit court's findings of fact will "not be overturned unless clearly erroneous," but the ultimate determination of whether trial counsel's performance was deficient and prejudicial to the defendant are issues of law that the appellate court reviews independently. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 847 (1990). The court will uphold a circuit court's factual findings unless they are clearly erroneous, including the circumstances of a case, and the strategy of the defense. *State v. Thiel,* 2003 WI 111, ¶23, 264 Wis. 2d 571. The appellate court should be "highly deferential" and not second-guess trial counsel's strategy, unless it was "irrational," or very clearly unreasonable. *State v. Breitzman*, 2017 WI 100, ¶65, 378 Wis. 2d 431, 466. Ineffective

assistance of counsel claims are to be reviewed from the trial counsel's perspective during the time of the trial, rather than in hindsight, and the reviewing court is to give trial counsel "great deference" to make every effort to prevent an ineffective assistance of counsel claim determination. *Strickland v. Washington*, 466 U.S. 668, 687, (1984).

All defendants in criminal cases have the Constitutional right to be represented by effective counsel under both the U.S. and Wisconsin Constitutions. U.S. Const. amends. VI, XIV; Wisc. Const. art I §7. Effective counsel does not mean that trial counsel has to be perfect; it is not even required for counsel to be good to be legally sufficient. *State v. Williquette,* 180 Wis. 2d 589, 603, 510 N.W.2d 708, (Wis. Ct. App. 1993). A convicted defendant-appellant must identify acts or omissions by trial counsel that were not the "result of reasonable professional judgment," to show that trial counsel was deficient. *State v. Pitsch*, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (Wis. 1985).

To prevail on an ineffective assistance of counsel claim, the burden is on the defendant-appellant to show

both deficient performance by trial counsel, and prejudice to the defense. *Strickland v. Washington, 466 U.S.* at 687. There is a strong presumption that trial counsel offered effective and reasonable assistance within what one would expect of a legal professional. *Id.* To show deficient performance, a defendant-appellant must show that trial counsel's errors were so serious that the lawyer was not acting as counsel, which deprived the defendant-appellant of the right to a fair trial. *Id.* at 687. Trial counsel's performance is only deficient if it falls under an objective standard of reasonableness. *Id.* There are many ways to provide proper effective assistance of counsel in each case, and even "the best criminal defense attorneys would not defend a particular client in the same way. *Id*. Though there is not a specific test to determine whether counsel's assistance was inefficient, "intensive scrutiny...and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Id.* at 690.

Only if the court finds that there was deficient performance do we then look to see if that deficiency prejudiced the defendant-appellant, depriving him or her of their right to a fair trial, and that but for the deficiency, the result of the trial would have turned out in favor of the defendant-appellant. *Id.*; *State v. Foster*, 2014 WI 131, ¶64, 360 Wis. 2d 12, 42. The defendant-appellant has to affirmatively prove prejudice. *Id.* at 693. It is not enough for a defendant-appellant to show that counsel committed some errors that might have had some effect on the outcome of the trial, as many errors impair the presentation of the defense, but do not affect the ultimate result. *Id*.

Confrontation Clause

Whether admission of evidence violates a defendant's right of confrontation is a question of law that this court reviews *de novo*. *State v. Williams*, 253 Wis. 2d 99, ¶7, 644 N.W.2d 919 (2002). A defendant in a criminal proceeding has a right to confront any person whose out of court statements are testimonial, and are being offered by the State at trial. *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354 (2004).

Though there is not a comprehensive definition of which statements are testimonial, statements where the declarant would reasonably know that the statement would later be used to prove some fact at trial are generally deemed to be testimonial. *Id*. at 51.

Not all hearsay implicates the Confrontation Clause under the Sixth Amendment. *Id.* Expert witness testimony does not violate the Confrontation Clause when his or her opinion is based in part on data created by a non-testifying witness when the testifying expert formed an independent evaluation. *State v. Williams*, 2002 WI 58,¶¶ 20,25, 253 Wis. 2d 99. When a non-testifying expert documents "with sufficient detail for another expert to understand, interpret, and evaluate," the testifying expert's testimony does not violate the Confrontation Clause. State v. Griep, 2015 WI 40, ¶40, 361 Wis. 2d 657, 682-683.

Analysis

I. Deficient Performance

The first step in the review of any ineffective assistance of counsel claim is to determine if the circuit court's findings of fact were erroneous

relating to deficient performance and prejudice. *State v. Foster*, 2014 WI 131, ¶64, 360 Wis. 2d 12, 42. The State argues that the circuit court's findings of fact were not clearly erroneous. The State further argues that trial counsel was not deficient in her performance as it relates to the objection made to the admission of Exhibit 4, the Blood Urinalysis Screening form, and similarly for not moving to strike testimony from the analyst. It is undisputed that trial counsel did object to the admission of the Blood Urine Analysis collection form (Exhibit 4) being admitted into evidence, and similarly objected to the court receiving the laboratory report (Exhibit 7) into evidence. (R. 170:21-25, 171:1-24).

Trial counsel's arguments centered around Wis. Stat. § 343.305(5)(b)which reads, "Blood may be withdrawn from a person arrested for [operating while intoxicated]…to determine the presence or quantity of alcohol…in the blood only by a physician, …nurse, …phlebotomist, or other medical professional which is authorized to draw blood acting under the direction of a physician." Trial counsel argued that because the phlebotomist was not there to testify in person, the

State failed to prove that the blood was drawn by a qualified person, and therefore, the blood result is inadmissible. The court rightfully overruled this objection, as § 343.305(5)(b) does not say that if the phlebotomist is not there to testify in person as to his or her qualifications, the blood result is *per se* inadmissible. The court found that the officer testified to going to St. Joseph's Hospital, one that is known country-wide. The officer asked medical staff for a qualified person to come and draw the blood, something this officer has done during his hundreds of OWI arrests. It is presumed that when one goes to a reputable hospital to ask for a blood draw that a qualified person is going to conduct the blood draw. The officer testified that a phlebotomist drew the defendant-appellant's blood, and that he observed the entire process and collected the evidence. The officer collected the form that both he and the phlebotomist filled out, a form that is prepared as a business record, a form that indicated that the phlebotomist was acting under the direction of a physician. The circuit court properly ruled that Exhibit 4 should be admitted into evidence over the defense's objections, because

the State offered proof through the officer that a qualified person drew the defendant's blood, and that there was no statutory violation. (R. 171:13-25, 172-173:1-11).

Though the court during its ruling did not say the phrase "Confrontation Clause", the court ruled that Exhibit 4 was admissible, as the officer witnessed the blood draw, witnessed the qualified medical phlebotomist conduct the draw, and maintained the evidence from the moment it left the defendant-appellant's arm until the evidence was submitted to the Hygiene Lab, that the phlebotomist not being there to testify went to credibility rather than admissibility of the evidence. (R. 172:6-7). The court went on to say that even though the defense is arguing that the officer does not have first-hand knowledge of the phlebotomist's qualifications, because the officer was at a reputable hospital, and the officer witnessed the phlebotomist check the box that she was acting under the direction of a physician, the court was going to rely on that information in accepting the laboratory report into evidence. (R. 173:1-11).

Additionally, whether a person drawing the defendant's blood is a qualified person under the statute, is not a material issue for the jury to decide, nor for the State to prove beyond a reasonable doubt at trial, as it does not go to the elements of the offenses of OWI or Operating With a Prohibited Alcohol Concentration. (See WI Jury Instruction 2669). Had the legislature intended this, this language would be added to the elements of the offense.

Lastly, as it relates to Exhibit 4, the court found that trial counsel did object on "implied confrontation grounds." (App. 2 7:10-13). The State argues that this finding of fact was not erroneous. The defense's objection was, "Yes Judge, I am objecting to the admissibility of the blood results basically under § 343.305(5) and (emphasis added) because the phlebotomist is not being called. I am objecting to the admissibility of the blood test. There was no stipulation to that person not being called. The defense did not become aware that she was not going to be called as a witness until after the analyst testified. It was our understanding and assumption that witnesses were being called out of order, as the

phlebotomist was on the witness list, was also introduced to the jury during *voir dire*, and said she was on her way. It was discovered after that she was not coming or has not appeared…" (R. 170:21-25, 171: 1-10). For trial counsel to state the statutory objection and then and we were under the understanding she was coming to testify, and that there was no stipulation to that person not being called does imply that the defense will now not have an opportunity to cross examine the phlebotomist. Had this objection been all about the statute, all trial counsel would have argued is that there is no proof that the phlebotomist was a qualified person under the statute. Saying that the defense did not stipulate to the phlebotomist not testifying implies that the State had an obligation to produce the phlebotomist, from the defense's perspective, and if true, not producing her, would have been a violation of the confrontation clause, according to the defense. Trial counsel only arguing a statutory objection would not have cared about the phlebotomist not being there, as if there truly was a statutory violation, and the court interpreted the statute to mean that failure to provide proof that the blood was

drawn by a qualified person meant that the blood was *per se* inadmissible, this would have been a very successful defense victory on the objection. Based solely on statutory grounds, it is better for the defense that the phlebotomist not be there in person to be able to make these arguments. The alleged confrontation violation argument was implied by counsel's statements.

II. Confrontation Clause: Exhibit 4

The admission of Exhibit 4 was not a violation of the Confrontation Clause, as this Blood Urinalysis Screening form is not testimonial. Non-testimonial statements are not subject to the Confrontation Clause analysis. *Crawford v.* Washington, 541 U.S. 36, at 51; *State v. Mattox,* 2017 WI 9, ¶24, 373 Wid. 2d 122, 138. This form primarily contains biographical data about the defendant known by both the defendant and the police officer. The primary purpose of the blood screening from is to establish the chain of custody for the defendant's blood from the time that it leaves her arm until the time that it is received to be analyzed by the Laboratory of Hygiene. This is the reason that

both the officer and the phlebotomist have a section of the form to fill out. It's primary purpose is not to prove that the phlebotomist was acting under the direction of a physician, as when a person goes to the hospital to have a blood draw, and medical staff send in a phlebotomist from their lab, it is presumed that he or she is acting under the direction of a physician.

In *Mattox,* the court ruled that if a document's primary purpose was to create an out of court substitute for trial testimony, it is likely testimonial, and it's admission subject to the Confrontation Clause analysis. *Id.* at ¶32, quoting *Bryant,* 562 U.S. at 538, 131 S.Ct. 1143. Just as the toxicology report in *Mattox*, the primary purpose of the phlebotomist Blood Urinalysis Screening form is to provide information to the Laboratory of Hygiene's analyst as it relates to date and time of collection, both of which are things the officer personally observed and acknowledged, and not to serve as a substitute for trial testimony. In *Mattox*, the defendant was convicted of reckless homicide as a result of a drug overdose, and our Supreme Court held that the toxicology report, a pivotal piece of

evidence, that showed the presence of drugs in the victim's system at the time of death, was not testimonial, and therefore did not implicate *Mattox's* right to confrontation of the toxicologist that prepared the report. *Id.* at ¶4.

Similarly in *Griep,* our Supreme court upheld the defendant's conviction for OWI third offense, even though the analyst that performed the defendant's blood analysis was not available for trial. *State v. Griep*, 2015 WI 40, ¶3, 361 Wis. 2d 657, 661. The laboratory analysis of a defendant's blood in an OWI trial is obviously a pivotal piece of evidence, more pivotal than a phlebotomist report.

In an unpublished opinion, authored by the Honorable J.P. Johnson, which certainly is not binding on this court, but can be considered, this court upheld the conviction of the defendant for OWI. *State v. Barden* 2008 WI App. 36, ¶28, 308 Wis. 2d 396. In *Barden,* the State introduced into evidence the Blood Urinalysis Screening form signed by the phlebotomist as evidence that the phlebotomist was acting under the direction of a physician without testimony, in accordance with Wis. Stat. § 343.305(5). *Id*. at 9.

Trial counsel did not object to its admission, (unlike in the present case), and the court ruled that because the State introduced evidence that the blood draw took place at a hospital, a controlled setting, by a person designated as a phlebotomist, that that person was acting under direction of a physician in accordance with the statute. *Id.*

In this case, the admission of Exhibit 4 was not a violation of the Confrontation Clause, nor was trial counsel deficient in failing to state the phrase "Confrontation Clause" during her objection argument, because, as the trial court found, a confrontation argument was implied. If the admission of an actual blood analysis report into evidence without the analyst that performed the analysis being available to testify or being subject to cross examination is legally permissible, it just cannot be that a phlebotomist, not appearing at trial despite a subpoena, and not being available to testify is a violation of the Confrontation Clause. Because the court found, based on facts and circumstances presented at trial through the officer about the circumstances surrounding this legitimate blood draw, the court properly held that the

blood was drawn in compliance with Wis. Stat. § 343.305(5). Whether blood is drawn in compliance with the statute is not an issue for the jury to decide, but for the court, as it does not go to the elements of the offenses that are the subject of the trial.

Trial counsel properly objected to the admission of Exhibit 4 (and Exhibit 7), and was not deficient in her performance. Even if she was, this deficiency did not cause any prejudice to the defendant to warrant a new trial.

Even if this court finds that there was a confrontation clause violation, this error was harmless due to the overwhelming evidence in this case. Had the court ruled that the analyst's testimony was inadmissible, based on the defendant's inability to cross examine the phlebotomist, the State could have moved for a mistrial, as they were unaware the phlebotomist was not going to obey her subpoena, produced the phlebotomist, or her supervisor at a subsequent trial, and the defendant would still have been convicted of both counts.

III. Deficient Performance, Failure to Strike Lab Analyst's Testimony

The State concedes that trial counsel did not move to strike the testimony from the laboratory analyst, and argues that, based on the strategy of the defense, and the court ruling that the blood was drawn in conformance with the statute, that this was not deficient performance, despite the circuit court's ruling of deficiency. (App. 2 7:14-17). Through the officer, the proper foundation was laid for the analyst to testify, and through the admission of Exhibit 4, after the court ruled that the blood was drawn in conformance with the statute. (R. 173:1-9). The analyst personally performed the defendant-appellant's blood analysis, and drafted a report of her findings. This report was introduced the jury, and admitted into evidence. The analyst was subject to intense cross-examination. Her testimony was proper and probative as to the issues the jury was tasked to decide.

Additionally, the officer offered ample testimony as to the defendant-appellant's intoxicated condition, and a video showing the same was represented to the jury. The defendant admitted that she had been drinking

during her contact with law enforcement, and the strategy of the defense was drinking after driving. (*Machner* 16:1-11). Therefore, what the lab analyst testified to, was irrelevant to the theory of the defense. The defense had an ample amount of time to cross-examine the analyst, and was able to get the analyst to admit she had not witnessed the driving, nor had anyone, she did not draw the blood, and she had no idea as to what the defendant-appellant's BAC was at the time she was driving, and that the BAC would be higher if she had consumed more alcohol after driving. This testimony advanced the theory of the defense, and to have it stricken would have been damaging to the defendant's case.

The appellate court should be "highly deferential" and not second-guess trial counsel's strategy, unless it was "irrational," or very clearly unreasonable. *State v. Breitzman*, 2017 WI 100, ¶65, 378 Wis. 2d 431, 466. In this case, a drinking after driving defense was very reasonable, given the open bottles of vodka that were found in the defendant-appellant's vehicle, and given her apparent intoxicated state. (R. 72:15-23). Therefore, the court should be deferential to trial

counsel's strategy. Ineffective assistance of counsel claims are to be reviewed from the trial counsel's perspective during the time of the trial, rather than in hindsight, and the reviewing court is to give trial counsel "great deference" to make every effort to prevent an ineffective assistance of counsel claim determination. *Strickland v. Washington*, 466 U.S. 668, 687, (1984). Trial counsel was not deficient in failing to move to strike the analyst's testimony, and even if she was, this failure did not cause prejudice to the defendant to warrant a new trial.

Prejudice

Only if this court finds deficient performance, meaning that trial counsel's performance was so unreasonable, outside of the standards of care of a reasonable attorney, that prevented the defendant from receiving a fair trial, does the court look to see if there was prejudice. *State v. Foster*, 2014 WI 131, ¶64, 360 Wis. 2d 12, 42. The State argues that the court's inquiry should end here, and hold that trial counsel was not deficient. If this court disagrees, and finds that there was deficient performance, there was not

prejudice to the defendant-appellant such that the result at trial would have been different to warrant a new trial. *Strickland v. Washington, 466 U.S.* at 687. The burden of proving prejudice is affirmatively on the defendant-appellant, and the defendant-appellant has not met this burden, nor could it. *Crawford v. Washington*, at 693. It is not enough for a defendant-appellant to show that counsel committed some errors that might have had some effect on the outcome of the trial, as many errors impair the presentation of the defense, but do not affect the ultimate result. *Id*.

The circuit court's findings of fact as it relates to prejudice were not clearly erroneous, and therefore, should be upheld during this court's ineffective assistance analysis. The court found that there was overwhelming evidence of the defendant-appellant's intoxication though the officer's testimony, and the admission of the squad car video, where the defendant-appellant made numerous admissions. As it relates to the OWI charge, lab analyst testimony is not required to prove intoxication. The court found, through the evidence, that the defendant-appellant admitted to consuming large amounts of vodka before getting behind

the wheel, and while driving. (App. 2 8:6-15). The defendant failed the field sobriety tests. (App. 2 8:16-21).

Even if the court would not have allowed the admission of Exhibit 4, on confrontation grounds, the State then could have dismissed the charge dealing with the operating with a prohibited alcohol concentration, and the jury would still have found the defendant guilty of the OWI 2nd. Similarly, even if trial counsel had moved to strike the testimony of the analyst, assuming that Exhibit 4 was not properly admitted, jurors would still have convicted the defendant-appellant of OWI 2nd. Not moving for this testimony to be stricken was part of the defense strategy of drinking after driving. And though this defense was not successful, looking at the case in hindsight is not the proper inquiry.

Even in a case where trial counsel failed to even attempt to collaterally attack three previous drunk driving convictions prior to the defendant's trial, where counsel's client was not represented by counsel in the previous cases, the court found that the defendant was not prejudiced to the extent that

Strickland requires, and therefore was not ineffective. State v. Foster, 2014 WI 131, at ¶9. In *Bowers*, the prosecutor misstated the plea agreement, asking for more incarceration than was bargained for prior to the defendant entering a plea to OWI 6th offense, and trial counsel did not object; the court found that the defendant did not meet his burden of proving prejudice, and therefore, did not prevail on his ineffective claim. *State v. Bowers*, 2005 WI App 72, ¶10, 280 Wis. 2d 534.

In *Lemberger*, trial counsel failed to object during the defendant's OWI trial when the prosecution offered evidence that the defendant refused to submit to a breath test, and was found by our Supreme Court to not have been ineffective. *State v. Lemberger*, 2017 WI 39,¶3, 374 Wis. 2d 617, 622. Similarly, even when trial counsel failed to impeach the credibility of a government witness at trial by asking about the witness's prior criminal convictions was not ineffective assistance of counsel. *State v. Manuel*, 2005 WI 75, ¶2, 281 Wis. 2d 554.

In *Dalton,* trial counsel failed to move the court to suppress the results of the defendant's warrantless

blood draw, because she thought that the motion would not prevail. *State v. Dalton,* 2018 WI 85, ¶29, N.W.2d, (decided July 3, 2018). The Supreme Court held that trial counsel was not ineffective. *Id.* at ¶3.

In *Erickson*, our Supreme Court reversed a Court of Appeals decision granting *Erickson* a new trial, and held that trial counsel was not ineffective for not objecting to the court's erroneous application of the number of preemptory strikes the defendant was able to exercise during *voir dire*. *State v. Erickson*, 227 Wis. 758, ¶1, 596 N.W.2d 749, (1999).

Here, the defendant-appellant was not deprived of her right to a fair trial. Even if this court finds that trial counsel was deficient, the defendant was not prejudiced such that her result at trial would have been different but for these errors.

CONCLUSION

Therefore, the State requests that this court affirm the decision of the Wood County Circuit Court, denying the defendant-appellant's post-conviction motion for a new trial on the grounds that trial counsel did not offer ineffective assistance of

counsel, and that there was no confrontation clause violation.

Dated this 7th day of August, 2018

Respectfully submitted:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this brief is 28 pages.

Dated this 7th day of August, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

I further certify that:

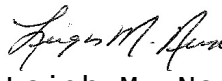
This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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 7th day of August, 2018.

Respectfully submitted:

WOOD COUNTY DISTRICT ATTORNEY



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