STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2018AP1619-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PHYLLIS M. SCHWERSENSKA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN ADAMS COUNTY CIRCUIT COURT, THE HONORABLE PAUL S. CURRAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Defendant-Appellant Phyllis M. Schwersenska faced trial for theft after stealing money from her deaf, adult daughter. The jury heard evidence that Schwersenska and her daughter had a joint savings account and then executed a durable power of attorney agreement. The jury also heard that Schwersenska's daughter put a large sum of money into the account, and that Schwersenska then took large sums of money out for herself and others.

Did trial counsel provide ineffective assistance by not:

(a) introducing as an exhibit the personal signature card for the joint savings account?

Following a *Machner* hearing, the circuit court answered, "no."

This Court should answer, "no."

(b) moving for a judgment of acquittal because the State failed to prove that the power of attorney agreement changed the intent of a joint savings account with joint ownership?

Following a *Machner* hearing, the circuit court answered, "no."

This Court should answer, "no."

(c) requesting a particular, special jury instruction concerning the power of attorney agreement and joint savings account?

Following a *Machner* hearing, the circuit court answered, "no."

This Court should answer, "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State seeks neither oral argument nor publication.

INTRODUCTION

Schwersenska raises three claims of ineffective assistance of counsel. All fail.

Schwersenska cannot establish any ineffective assistance from counsel not introducing the joint account's personal signature card, because the jury already heard evidence establishing the nature of a joint account as described on the card. She cannot establish that counsel performed deficiently by not seeking a judgment of acquittal and a specific instruction resting on unsettled areas of law. Additionally, because her arguments would have in turn required the introduction of legal principles that would have hurt—not helped—her case, she cannot show a reasonable probability of a different outcome.

On top of all of that, Schwersenska's claims rest on the incorrect premise that, because she and her daughter had a joint account, she had equal ownership over all of the money in the account. As the circuit court recognized, the evidence instead established the account was intended to be an account of convenience, to allow Schwersenska to help her daughter manage her daughter's money. Because Schwersenska cannot show a reasonable probability of a different outcome based on an incorrect premise, her claims fail. This Court should affirm.

STATEMENT OF THE CASE

Procedural overview. The State charged Schwersenska with theft, contrary to Wis. Stat. § 943.20(1)(b), for taking money from her daughter, H.S., without H.S.'s consent and contrary to Schwersenska's authority. (R. 4:1.) The State

alleged the theft occurred between October 8, 2010, and July 30, 2012. (R. 4:1.)[1]

As set forth in the police report attached to the complaint, H.S.'s attorney advised police that: (1) H.S. received roughly $30,000 from a lawsuit settlement, (2) both H.S. and Schwersenska signed an agreement making Schwersenska H.S.'s power of attorney for finances, and (3) checks showed that Schwersenska withdrew thousands of dollars from H.S.'s account for her own personal use. (R. 4:3–4.)

When asked why she "had a POA for [H.S.]," Schwersenska told police that she handled H.S.'s finances because H.S. was "hanging around a bad crowd and [H.S.] had no idea how to handle her money." (R. 4:6.) Schwersenska told police that the "problems started" when H.S. met her husband. (R. 4:6.)

With regard to penalty, the State originally charged Schwersenska with a Class H felony for taking property from an individual at risk, pursuant to Wis. Stat. § 943.20(3)(d). (R. 4; 14.) Following the evidence at trial, the State amended the penalty to a Class G felony for theft in an amount over $10,000, pursuant to Wis. Stat. § 943.20(3)(c). (R. 157:6–17.)

The State also charged Schwersenska with felony bail jumping, for committing the theft while on bond for a felony offense, from June 4, 2012, to July 30, 2012. (R. 4.)

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[1] H.S. is at times referred to by her maiden name, H.R. To avoid confusion, the State will refer to her only as H.S.

The three-day jury trial occurred in May of 2016. (R. 155; 156; 157.)[2] The jury returned guilty verdicts on both counts. (R. 157:101, 109–10.)

The circuit court withheld sentence and placed Schwersenska on a total of five years of probation with one year of conditional jail. (R. 95; 150:63–88.)

Schwersenska, by counsel, filed a Wis. Stat. § (Rule) 809.30 postconviction motion on February 21, 2018, alleging ineffective assistance of trial counsel. (R. 117; 118.) The circuit court, the Honorable Paul S. Curran still presiding, held a *Machner* hearing on June 4, 2018. (R. 161.) Following post-hearing supplemental briefing, the circuit court denied Schwersenska's motion. (R. 123; 126; 129; 162.)

The jury trial. In opening, trial counsel explained that the jury would hear that Schwersenska helped her fiscally irresponsible daughter. (R. 155:104–05.) Counsel stressed the State could not determine how much money Schwersenska took from the account. (R. 155:107–08.)

The State called five witnesses, one in rebuttal; the defense called one witness. (R. 155; 156; 157.)

H.S., 38-years-old at the time of trial, testified through an interpreter that she met her husband in May of 2012; she lived with him and her three young sons. (R. 155:115–17.) She received social security disability payments because she is deaf. (R. 155:116–17.)

H.S. had owned the same house for 16 years and managed the mortgage payments and the other household bills. (R. 155:122–23.) She acknowledged that daily interactions with "the hearing world" are often more difficult

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[2] Duplicate copies of the trial transcripts appear in the appellate record. (*Compare* R. 146; 147; 148, *with* 155; 156; 157.) The State cites to appellate record items 155 through 157.

than her interactions with people who know sign language—"there's often miscommunications." (R. 155:121.)

H.S. testified that she had a savings account for her money, with her mother; she explained that this account started when she was a child. (R. 155:144.) She believed her "mother controlled it" even after she became an adult. (R. 155:126.) Schwersenska told H.S. that she thought H.S. would "waste all of [her] money" if Schwersenska was not on the account. (R. 155:127.) H.S. explained that she had to ask her mother if she wanted money from the account. (R. 155:138.)

In 2008, H.S. explained, her mother became her power of attorney for finances. (R. 155:125.) She and her mother went to the courthouse and signed the paperwork. (R. 155:125.) H.S. testified that "it was not explained clearly to [her]." (R. 155:125.) "My mom just said it was in case of an accident happened [sic] or if I could [sic] take care of you, or prevent anyone from stealing my money. I said, well, okay, mom. I'll sign it." (R. 155:125.)

In October of 2010, H.S. received roughly $30,000 from a civil settlement. (R. 155:131.) At Schwersenska's prompting, H.S. gave $6,000 to Schwersenska as a gift for helping her with the lawsuit—for talking with lawyers and interpreting for her: "[S]he said she wanted that much money, I agreed and gave it to her." (R. 155:133.) H.S. used $7,000 to buy a used car and put the rest in her savings account. (R. 155:131–32.)

When H.S. later started online banking, she noticed that money was missing. (R. 155:134.) She confronted Schwersenska, who said that she "needed it" and seemed upset that H.S. had online access. (R. 155:134–35.)

H.S. testified to withdrawals she did not make. (R. 155:135–36.) H.S. said she would occasionally loan her brothers $10 or $20 but would never loan large amounts. (R. 155:136.) She estimated spending between $800 and

$1000 per month on bills. (R. 155:137.) H.S. had receipts from October 2010 to July 2012, documenting the bills she paid. (R. 57; 58; 59; 155:128–29, 189.)

The State asked her whether—if records showed that roughly $22,000 was withdrawn from the account between October and December of 2010, and her bills totaled roughly $4,000—she could think of anything else for which she may have used that money, and she answered, "No." (R. 155:137.) She noted her money started disappearing long before she met her husband in May of 2012. (R. 155:142–43.)

H.S. stated that her mother would go to the casino two to three times per week. (R. 155:140.)

Schwersenska, H.S. explained, lived with her husband, Tom, H.S.'s three brothers, and H.S.'s daughter. (R. 155:117-18.) H.S.'s daughter was 19 years old and had lived with Schwersenska since she was a child. (R. 155:117-18.)

On cross-examination, defense counsel pressed H.S. on the differences in the total amount she claimed her mother stole at various points in the investigation. (R. 155:149–50, 156–57.) Counsel asked, and H.S. acknowledged, that there were times where Schwersenska withdrew money at her request; she could not say exactly how much Schwersenska inappropriately withdrew. (R. 155:153.) Counsel brought out other inconsistencies; for example, H.S. testified that she never filed an insurance claim for lightning damage to her house, but later acknowledged she did receive insurance money for lightning damage. (R. 64; 65; 66; 155:139, 160.)

Defense counsel questioned H.S. about the power of attorney agreement, and the agreement was admitted into evidence. (R. 61; 155:144–46, 189.) The beginning of the document read, "I [H.S.] of [H.S.'s address] make and appoint Phyllis Schwersenska Thomas Schwersenska [sic] as my

attorney in fact (hereinafter 'agent'), to make the following actions for me." (R. 61:1.)

The agreement provided that, except with regard to gifts the agent believed would "provide tax benefits" to H.S., the agent "shall not exercise this power in favor of him or herself." (R. 61:2–3.)

Bank manager Tanya Walsh-Laehn testified to bank statements and teller withdrawal slips from H.S. and Schwersenska's joint savings account, as well as from an account Schwersenska shared with her husband. (R. 156:6–16; *see also* R. 66; 67; 68; 69; 70; 71; 156:25, 118.)

Defense counsel asked Walsh-Laehn about joint bank accounts:

> Q. Is a joint account a bank account in which two or more people have ownership rights over the same account?
>
> A. Yes.
>
> Q. And is it true that in a joint account, those rights include the right for all account holders to deposit, withdraw, or deal with the funds in the account regardless of who puts the money in the account?
>
> A. Yes.

(R. 156:10.)

Counsel also asked, and Walsh-Laehn confirmed, that where a power of attorney agreement and joint account exist, one person could put money in and take money out that may not necessarily "involve the power of attorney." (R. 156:15.)

Sergeant Paul Morrison testified about his investigation. (R. 156:17–109.) He presented summaries of the various deposits and withdrawals to and from H.S. and Schwersenska's joint savings account, as well as those to and from a separate account Schwersenska shared with her husband. (R. 72; 73; 156:22–23, 33.) The State also admitted

Sergeant Morrison's summary of H.S.'s bills and receipts during the charged timeframe. (R. 75; 156:33.)

Morrison testified that when H.S. received her $30,000 civil settlement, Schwersenska and her husband had almost no money in their account—a total of $6.56 on October 25, 2010. (R. 73:1; 156:51.)

Morrison identified places where Schwersenska's own bank book for her account with H.S. omitted deposits and withdrawals. (R. 156:41–43.) He also identified places where Schwersenska's bank book had other family members' names next to a withdrawal. (R. 156:47–48, 62.) For example, he pointed to a note in the bank book from July of 2011, reflecting "Tom, Jr. for lawyer"; online records reflected that Schwersenska's son retained a private attorney in July of 2011. (R. 60:3; 156:46–47.)

Among other examples, Morrison noted that on August 29, 2011, $500 was withdrawn from H.S.'s account with Schwersenska, and $500 was deposited into Schwersenska's account with her husband. (R. 156:53.) Three days earlier, Schwersenska's account with her husband had a balance of $3.95. (R. 72; 73; 156:53.)

Morrison cross-compared H.S.'s bills with the withdrawals and deposits. (R. 156:56.) From October to December 2010, H.S.'s bills were $4,364.55, and there were $22,144.00 in withdrawals from H.S.'s and Schwersenska's joint account. (R. 77; 156:56.) In the year 2011, H.S.'s bills were $9,084.17, and there were $46,610.00 in withdrawals from the account. (R. 77; 156:56–57.)

On cross-examination, Morrison acknowledged that he had not developed a final dollar figure as to how much he believed Schwersenska improperly took from the account. (R. 156:89.) He did not know why his initial investigation gave him a different total than H.S.'s totals. (R. 156:81.) He recognized that in his initial investigation, he reported that

Schwersenska deposited roughly $20,000 into the account; he clarified, though, that at that point he had not subpoenaed all of the bank records. (R. 156:69–70.)

Morrison acknowledged that he initially made a few errors in his summary of H.S.'s bills and mistakenly identified two withdrawals from the joint account as being listed as made by Schwersenska, that were instead listed as made by H.S. (R. 156:72–73, 78–79, 96–97.)

A surveillance director for Ho-Chunk Gaming testified that he looked up Schwersenska's player's club account for activity between October of 2010 and July 30, 2012. (R. 55; 156:109–12.) Schwersenska's account showed that she put $18,442 into slot machines during that period. (R. 55; 156:112, 118.) She took out $17,636, meaning she lost a total of $860. (R. 156:112, 115–16.)

Schwersenska did not testify. (R. 156:120–21.)

The defense called H.S.'s daughter. (R. 156:121–41.) She lived with Schwersenska and viewed her as a mother. (R. 156:123, 138.) She testified that Schwersenska did not "control family members." (R. 156:125.)

H.S.'s daughter said that H.S. had "[e]xpensive" shopping habits. (R. 156:126.) She testified that Schwersenska would get H.S. money from the bank a couple times per month. (R. 156:127.) She explained that H.S. would ask Schwersenska to do this because Schwersenska went "to town" more often. (R. 156:127.)

According to H.S.'s daughter, Schwersenska and H.S. would go through the "joint account bank book" together at least two times per month. (R. 156:128–29.) H.S.'s daughter said that she received money from this account when she and H.S. would go shopping. (R. 156:132.) She testified that the family dynamics changed when H.S.'s husband came into the picture. (R. 156:132–33.)

Though H.S.'s daughter testified that H.S. would ask—via text message—either Schwersenska or her to pick up money for H.S., she no longer had the text messages. (R. 156:136.) Though she testified that H.S. loaned money to one of her (H.S.'s) brothers for a car, she could not say which brother or when this occurred. (R. 156:138–40.)

As to the bail jumping charge, the parties stipulated that Schwersenska was on felony bond, had been released from custody, and knew the terms of her bond. (R. 157:30–31 (court instructing jury on stipulations and elements of bail jumping).)

The court discussed jury instructions with the parties. (R. 157:5–19.) Defense counsel objected to the State's request to amend the penalty subsection for the theft charge; counsel did not request a special instruction concerning joint savings accounts and power of attorney agreements. (R. 157:5–19; *see also* R. 39; 40; 47 (defense proposed jury instructions, submitted pre-trial).)

In closing, defense counsel argued that the State had to prove that Schwersenska "stole from the power of attorney portion" of the joint account. (R. 157:51.) Defense counsel argued that the State could not even prove that she "was an actual power of attorney," because the last page of the document had H.S.'s own signature under the agent's signature, and Phyllis and Thomas Schwersenska's signatures under "successor agents." (R. 157:79; 61:4.)

Counsel also argued that Schwersenska had full authority to use the joint account: "Yes, Phyllis actively used that joint account. She had every right to do so. That's why it existed. She put money in. She took money out." (R. 157:51.)

Counsel noted that if Schwersenska wanted to steal money from H.S., "strong arm[ing]. . . [H.S.] into signing a document that [H.S.] didn't understand that provided for a power of attorney protection" would make Schwersenska "the

dumbest criminal that we have ever heard of": "the only impact to Phyllis's actions is to provide extra protection for [H.S.]'s money that didn't exist when this was simply a joint account." (R. 157:52–53.)

Postconviction motion. Schwersenska, by postconviction counsel, filed a Wis. Stat. § (Rule) 809.30 postconviction motion on February 21, 2018. (R. 117; 118.) She argued that trial counsel provided ineffective assistance by not:

(1) introducing the "Personal Signature Card" from the joint savings account. The "Card" stated that the "JOINT SAVINGS ACCOUNT WAS OPENED" on February 23, 2007. It also noted, in relevant part: "If this account is designated as 'joint', THE ACCOUNT IS JOINTLY OWNED BY THE PARTIES NAMED HEREIN";

(2) filing a motion to dismiss and move for a judgment of acquittal based on Wis. Stat. § 705.03 (explaining that unless clear and convincing evidence of a different intent exists, a joint account belongs to both parties without regard to the proportions of their contributions), and *Russ v. Russ*, 2007 WI 83, 302 Wis. 2d 264, 734 N.W.2d 874 (holding, in a civil case, that when a principal and agent with a preexisting joint account enter a power of attorney agreement, the execution of the agreement, in and of itself, is not clear and convincing evidence of a different intent);[3] and

(3) requesting a special jury instruction based on Wis. Stat. § 705.03 and *Russ*.

(R. 118; *see also* R. 122 (redacted joint savings account personal signature card)).

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[3] On appeal, Schwersenska only argues that counsel provided ineffective assistance by failing to move for a judgment of acquittal after the close of evidence. (Schwersenska's Br. 18–22.) She does not renew any argument that counsel should have filed a pre-trial motion to dismiss on these grounds.

Postconviction counsel acknowledged that Schwersenska's arguments concerning section 705.03 and *Russ* involved unresolved legal questions. (R. 126:10–11 ("Wisconsin courts have not specifically addressed the issue of whether a defendant can face criminal prosecution for making unauthorized withdrawals from a joint account . . . ."); R. 162:5 ("We are in unchartered water, so to speak, in applying this particular statute . . . .").)

The circuit court held a *Machner* hearing; trial counsel was the only witness. (R. 161.)

Trial counsel explained that his strategy was not to contest that Schwersenska was H.S.'s power of attorney, but instead argue that the money was missing because of H.S.'s carelessness with her finances. (R. 161:17.) They submitted the ledger Schwersenska kept to the prosecution to show how well Schwersenska managed H.S.'s money. (R. 161:17–18.) Additionally, counsel sought to show—as part of the trial strategy—that the power of attorney document was invalid. (R. 161:19–20.)

As to the claimed errors, first, counsel testified that he did not admit the personal savings card because he obtained testimony from the bank representative about joint accounts and felt that admission of the card would have been redundant. (R. 161:13.)

Second, trial counsel testified that he reviewed both Wis. Stat. § 705.03 and *Russ* before trial. (R. 161:15, 20.) As to why he did not argue for a judgment of acquittal on those grounds following evidence, he explained that he thought such a motion would be "clearly denied." (R. 161:24, 28–29.) He concluded that *Russ* explained that where "conflicting mandates" existed, "it's up to the trier of fact to determine." (R. 161:21–22.)

Third, counsel testified that he did not contemplate a special jury instruction including language from

Wis. Stat. § 705.03 and *Russ*. (R. 161:29–30.) He could not say he would have requested the proposed instruction, as he did not believe it fully encapsulated the *Russ* holding. (R. 161:31.)

Decision and order denying postconviction motion. The circuit court issued an oral ruling denying Schwersenska's motion. (R. 123, 126, 162.)

The court noted that all of Schwersenska's arguments came down to "this fundamental point, that because it was a joint account, Ms. Schwersenska was an owner of the account and she had full access to the funds to spend as she pleased." (R. 162:21–22.)

The court noted that section 705.03 provides that money in a joint account belongs to both parties "[u]nless there is clear and convincing evidence of a different intent." (R. 162:26–27.) It concluded that there *was* clear and convincing evidence of a different intention here—an intention for an "account of convenience." (R. 162:27–34.)

The court explained that this intention showed Schwersenska did not actually have ownership interest in the account; instead, it was an account designed for Schwersenska to help H.S. manage H.S.'s money. (R. 162:27–34.) The court noted that it appeared H.S. was mistaken that the joint account was opened when she was a child, but that much of her testimony—specifically, her testimony about the difficulties she faces being deaf—was uncontested. (R. 162:22–23.)

The court noted that case law holds that failure to raise an issue of law does not constitute deficient performance "if the trial court later determines that the legal issue is without merit." (R. 162:34–35.) The court so concluded. (R. 162:35.)

The court explained that it anticipated that it might receive such a challenge: "[B]efore the trial started, I was thinking about this. How is the State going to prove that she

stole money when she was an owner of the account? And then I remembered account of convenience." (R. 162:35.)

The court continued: "And I wondered about that, and I thought, well, if I get the motion, I'm going to have to hear the evidence before I can make that determination. . . . [A]t least until the end of the State's case in chief." (R. 162:35.)

The court held that counsel did not provide ineffective assistance by failing to raise these arguments: "Well, I never did get the motion, but I did hear the evidence. And this is an account of convenience. . . . So if there's no deficient performance and no prejudice, there's no ineffective assistance of counsel." (R. 162:35.)

The court entered a written order denying the motion. (R. 129.) This appeal follows.

STANDARD OF REVIEW

Whether an attorney rendered ineffective assistance presents a mixed question of law and fact. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695. This Court upholds the circuit court's factual findings unless clearly erroneous. *Id.* "Findings of fact include 'the circumstances of the case and the counsel's conduct and strategy.'" *Id.* (citation omitted). This Court reviews de novo the ultimate legal question of whether counsel provided ineffective assistance. *Id.*

ARGUMENT

Schwersenska cannot meet her burdens to prove ineffective assistance of trial counsel.

A. Relevant legal principles

1. Ineffective assistance of counsel

A criminal defendant has the constitutional right to the effective assistance of counsel. *Carter*, 324 Wis. 2d 640, ¶ 20; U.S. Const. amend. VI; Wis. Const. art. I, § 7.

A defendant alleging ineffective assistance of counsel must prove that his attorney performed deficiently and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If this Court concludes that the defendant has failed to prove one of the prongs, it need not address the other. *Id.* at 697.

The *Strickland* standards impose a "high bar" on defendants. *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citation omitted).

To prove deficient performance, a defendant must overcome the "strong presumption" that counsel's performance fell "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 689–90. Counsel's performance "need not be perfect, nor even very good, to be constitutionally adequate." *Carter*, 324 Wis. 2d 640, ¶ 22.

Reviewing courts must make "every effort" to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

"It is well-established that trial counsel could not have been ineffective for failing to make meritless arguments." *State v. Allen*, 2017 WI 7, ¶ 46, 373 Wis. 2d 98,

890 N.W.2d 245. Further, failure to raise an argument premised on unsettled law generally does not constitute deficient performance. *State v. Lemberger*, 2017 WI 39, ¶ 18, 374 Wis. 2d 617, 893 N.W.2d 232.

To prove prejudice, a defendant must prove that his attorney's deficiency actually had an adverse effect on the defense. *Strickland*, 466 U.S. at 693. Courts assess prejudice based on the cumulative weight of proven deficient performance. *State v. Thiel*, 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 665 N.W.2d 305.

Strickland's prejudice analysis asks whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. 466 U.S. at 694.

Though this standard does not require proof that the deficient performance "more likely than not altered the outcome," *Strickland*, 466 U.S. at 693, it does require a defendant to prove a "substantial, not just conceivable" likelihood of a different result, *Harrington*, 562 U.S. at 112.

Thus, the question is whether it is "reasonably likely" the result would have been different—not "whether it is *possible* a reasonable doubt might have been established if counsel acted differently." *Harrington*, 562 U.S. at 111 (emphasis added).

2. Theft from a joint bank account and through a power of attorney agreement.

A defendant accused of theft under Wisconsin's embezzlement statute "has by definition been given consent to hold or use the property for some purpose. It is the use beyond the scope of this consent that is the essence of this crime." Wis. JI–Criminal 1444, cmt. 4 (2006). The defendant commits theft under the statute when, "[b]y virtue of his or her office, business or employment, or as a trustee or bailee,"

having possession of money of another, he or she "intentionally uses, transfers, conceals, or retains possession of such money . . . without the owner's consent, contrary to his or her authority, and with intent to convert to his or her own use or to the use of any other person except the owner." Wis. Stat. § 943.20(1)(b).

A defendant may have possession of money belonging to another from a joint bank account and through a power of attorney agreement. Wisconsin Stat. § 705.01(4) defines a "joint account" as "an account, other than a marital account, payable on request to one or more of 2 or more parties whether or not mention is made of any right of survivorship."[4]

Wisconsin Stat. § 705.03(1) provides, in relevant part, that "[u]nless there is clear and convincing evidence of a different intent," a joint account, during the lifetime of the parties, belongs "to the parties without regard to the proportion of their respective contributions to the sums on deposit and without regard to the number of signatures required for payment."

Wisconsin Stat. § 705.03(1) discusses the liability of financial institutions for sums withdrawn, but makes no mention of criminal liability.

In *Russ*, a civil case, the Wisconsin Supreme Court addressed a matter of first impression: how the entry of a power of attorney agreement affects the intent of joint account, as discussed in section 705.03. *Russ*, 302 Wis. 2d 264, ¶ 3. The Court first explained that a joint account "established under Wis. Stat. § 705.03 prior to the execution of a POA creates a presumption of donative intent." *Id.* It then held that "when a POA agent and a principal share a preexisting

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[4] It also means an account, payable to either party, established by married couples with the right of survivorship. Wis. Stat. § 705.01(4).

joint checking account, the execution of a POA document, in and of itself, is not 'clear and convincing evidence of a different intent' under Wis. Stat. § 705.03." *Id.* ¶ 31.

Importantly, however, the Court also held that "the transfer of funds from such joint account by an agent acting under a POA, but for the agent's own use, creates a presumption of fraud, unless the POA explicitly authorizes self-dealing." *Russ*, 302 Wis. 2d 264, ¶ 3; *see also* Wis. Stat. § 244.07(2) ("Unless specifically stated, a power of attorney does not authorize gifting, self-dealing, or oral amendment of the power of attorney, and any such specific authority shall be strictly construed.").

Even outside of a power of attorney agreement, both parties on a joint account still may not have ownership, if a different intention existed. For example, a joint account may be an account of "convenience"—where "the joint names were adopted for convenience without the intent of conferring ownership." *Michaels v. Kruke*, 26 Wis. 2d 382, 390, 132 N.W.2d 557 (1965) (citation omitted).

As then-Chief Justice Abrahamson explained in her concurrence in *Russ*, "Joint accounts can serve many purposes and take several forms"; one such form: "accounts of convenience; the funds belong to the depositor of the funds and the other person accesses the account for the benefit of the owner of the funds, such as to pay the owner's bills." 302 Wis. 2d 264, ¶ 61 (Abrahamson, C.J., concurring).

A classic example of an account of convenience: "[A] father placed money in a joint bank account in the names of himself and daughter. The evidence established that this was done pursuant to an understanding between father and daughter that, if he got ill. . . she would be able to withdraw money for [medical attention]." *Michaels*, 26 Wis. 2d at 392.

In the civil arena, a presumption imposes a burden on the party relying on it to prove the basic facts; once those

"facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." *Russ*, 302 Wis. 2d 264, ¶ 31 n.8 (quoting Wis. Stat. § 903.01). Presumptions, of course, must work differently in criminal cases. *See* Wis. Stat. § 903.03 (presumptions in criminal cases).

B. Schwersenka's ineffective assistance claims fail.

1. Trial counsel did not provide ineffective assistance by failing to introduce the joint savings account personal signature card.

a. Schwersenska cannot prove deficient performance.

Trial counsel articulated a reasonable strategic reason for not introducing the personal signature card for the joint savings account: he already elicited information from the bank manager concerning joint ownership rights with a joint account, and therefore concluded that admission of the card would have been redundant. (R. 161:13.)

Counsel asked, and the bank manager confirmed, that "in a joint account," "all account holders" have "ownership rights"—the right to "deposit, withdraw, or deal with the funds in the account regardless of who puts the money in the account." (R. 156:10.) Introducing the card to show language reflecting that a joint account is "jointly owned by the parties named" would not have added anything. (R. 122.)

Counsel, thus, reasonably chose not to waste the jury's time with cumulative evidence. His decision cannot be said to fall "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 689–90.

Schwersenska nevertheless argues that counsel's failure to admit the card constituted deficient performance because it "precluded trial counsel from successfully" arguing for dismissal at the close of the State's case, and from a "solid closing argument that the defendant had committed no crime because she owned the account." (Schwersenska's Br. 18.) How? Counsel already presented evidence concerning ownership of a joint account, and he specifically argued in closing that she had "every right" to use the account: "That's why it existed. She put money in. She took money out." (R. 157:51.)

Beyond discussion of ownership in joint accounts, the only other piece of information Schwersenska points to is that this joint account was opened in 2007, as opposed to when H.S. was a child. (Schwersenska's Br. 17–18.) She fails to offer any explanation, though, as to why this information would have been helpful to her or relevant. This Court should reject as undeveloped Schwersenska's argument about the date of the opening of the joint account. *State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992) (this Court need not address undeveloped arguments).

On its merits, Schwersenska cannot show that counsel performed deficiently by failing to introduce that information. Counsel's trial strategy was to acknowledge that Schwersenska did manage H.S.'s money to help H.S., but establish that Schwersenska did so properly. (R. 161:17–18.) It would not have advanced this theory to show that this particular bank account was opened in 2007 as opposed to earlier.

Schwersenska, with the benefit of hindsight, asks this Court to second-guess counsel's trial strategy. (Schwersenska's Br. 25.) Viewed from counsel's perspective at the time, counsel's strategy makes sense; indeed, as set forth in the complaint, when Schwersenska voluntarily spoke with police at the start of the investigation, and police asked why

she had a power of attorney agreement with her daughter, she acknowledged that she *was* responsible for handling H.S.'s finances. (R. 4:6.) That counsel's strategy ultimately proved unsuccessful does not make it deficient. *See Strickland*, 466 U.S. at 689.

Schwersenska's counsel made a reasonable decision not to introduce an exhibit because it was nearly identical and cumulative to trial testimony. Schwersenska demands perfect representation; the Constitution does not. *See Carter*, 324 Wis. 2d 640, ¶ 22 (counsel's performance need not even be "very good, to be constitutionally adequate").

b. Schwersenska cannot prove prejudice.

Just as Schwersenska cannot show that trial counsel performed deficiently by failing to introduce redundant information on the card concerning the nature of joint accounts, she similarly cannot show any reasonable probability of a different outcome from counsel's failure to present information the jury already learned. *See Strickland*, 466 U.S. at 694.

Nor can she show a reasonable probability that the jury would have acquitted had counsel presented the card to show that the joint account was opened in 2007, as opposed to when H.S. was a child. Again, Schwersenska offers no explanation as to why this would have made any difference; she just says that "[i]t would have been helpful for the jury to know this important fact." (Schwersenska's Br. 18.) This does not show prejudice. Her argument here too is undeveloped, and this Court should reject it. *Pettit*, 171 Wis. 2d at 646–47.

Nor could she show prejudice if she had tried. That this particular joint account was opened in 2007, as opposed to when H.S. was younger, would not have had any bearing on the jury's assessment of whether Schwersenska was improperly using money from the account. Schwersenska

asks this Court to speculate about possibilities, but her prejudice burden demands more. *Harrington*, 562 U.S. at 111.

2. Trial counsel did not provide ineffective assistance by failing to move for a judgment of acquittal following the close of evidence.

a. Schwersenska cannot prove deficient performance.

Schwersenska cannot show that counsel performed deficiently by failing to move for a judgment of acquittal following the close of evidence, based on her theory that she could not have committed the crimes because she "was the owner of the monies in the account jointly with her daughter." (Schwersenska's Br. 19.)

First, counsel did not perform deficiently by failing to raise a losing argument. Schwersenska's argument—that section 705.03 provided her with an absolute defense—rests on an incorrect legal premise: that absent a valid power of attorney agreement, Schwersenska owned H.S.'s money in the account.

Schwersenska's postconviction logic is as follows: If the power of attorney agreement was invalid because of its technical flaws, all that remained was the joint account. If all that remained was the joint account, a reasonable probability exists Schwersenska would have been acquitted had counsel not failed to take the respective actions, because Schwersenska had joint ownership of all of the money in the account.

Put differently, Schwersenska's argument depends on the conclusion that, but-for the power of attorney agreement (or proof that the power of attorney agreement changed the intent), she owned, and thus could not steal, the money in the joint account.

As the circuit court properly recognized, (R. 162:27–35), Schwersenska mistakenly equates the joint account at issue here with joint ownership.

Because section 705.03—explaining that a joint account belongs to both parties—does not apply if there is sufficient evidence of a different intent, Wis. Stat. § 705.03, and because the evidence overwhelmingly established a different intent (an account of convenience), *see infra* Section B.2.b. (discussing the overwhelming evidence of an account of convenience), the court—as it explained—would not have granted a motion for a judgment of acquittal, (R. 162:35).

A trial court may grant a motion to dismiss only where, viewed in the light most favorable to the state, "the evidence adduced, believed and rationally considered," is insufficient to prove guilt beyond a reasonable doubt. *State v. Scott*, 2000 WI App 51, ¶ 12, 234 Wis. 2d 129, 608 N.W.2d 753 (citation omitted). The State presented ample evidence that Schwersenska intentionally used H.S.'s money for her own and others' benefit, without H.S.'s consent and contrary to Schwersenska's authority to use it. *See* Wis. Stat. § 943.20(1)(b); *see infra* Section B.3.b. (discussing the evidence establishing that Schwersenska used H.S.'s money without H.S.'s consent and contrary to Schwersenska's authority).

Trial counsel explained that he did not raise a motion for judgment of acquittal because it would have been "clearly denied." (R. 161:24, 28–29.) Counsel was correct, and did not perform deficiently for failing to make "meritless arguments." *Allen*, 373 Wis. 2d 98, ¶ 46.

Second, Schwersenska's arguments—as she acknowledges—rest on unsettled law. (Schwersenska's Br. 19 ("[W]hile Wisconsin Courts have not specifically addressed the issue of whether a defendant can face criminal prosecution for making unauthorized withdrawals from a

joint account . . . ."); *see also* R. 162:5 (acknowledging at postconviction hearing that "[w]e are in unchartered water, so to speak").)

Schwersenska asserts that because this is a criminal case, the "clear and convincing evidence" standard in the section 705.03, to show a different intent for a joint account, should have mandated proof of a different intent beyond a reasonable doubt. (Schwersenska's Br. 21.) But Schwersenska (1) makes no mention of *Russ*'s corollary holding that a presumption of fraud exists where a power-of-attorney agent uses funds from a joint account for her own use, *Russ*, 302 Wis. 2d 264, ¶ 3, and (2) makes no attempt to explain how counsel should have made the argument she faults him for not making without grappling with the presumption of fraud and how should work in the context of a criminal case.

In short, counsel's failure to raise a complex argument premised on unsettled law does not constitute deficient performance. *Lemberger*, 374 Wis. 2d 617, ¶ 18.

b. Schwersenska cannot prove prejudice.

Similarly, Schwersenska cannot prove a reasonable probability of acquittal, because the motion would have been denied. *Strickland*, 466 U.S. at 694. Here, the circuit court explained there was clear and convincing evidence that the account was one of convenience, meaning that Schwersenska did not actually have an ownership interest in the account. (R. 162:27–34); *Michaels*, 26 Wis. 2d at 392.

As the circuit court noted, the evidence overwhelmingly established that the intention behind this joint account was for Schwersenska to help her manage *her daughter's* money—not for joint ownership of the money in the account.

H.S. testified that her mother controlled the account because she did not believe H.S. could manage her money.

(R. 155:126–27.) Further, H.S. testified that when she received the roughly $30,000 settlement, she gave $6,000 to Schwersenska as a gift for her help with the lawsuit, and that the gift was *Schwersenska's* idea. (R. 155:131–33.) If they intended for the joint account to mean joint ownership of all of the money in the account, why would H.S. have needed to gift a portion of it to Schwersenska?

On cross-examination, Sergeant Morrison did acknowledge that his initial investigation reflected that Schwersenska deposited roughly $20,000 into the account during the timeframe. (R. 156:69.) He made clear, though, that, at that point in his investigation, he did not have all of the bank records. (R. 156:69–70.) And even H.S.'s daughter's testimony—the only defense witness—showed that this joint account served to allow Schwersenska to help H.S. with *H.S.'s* money: that H.S. had "[e]xpensive" shopping habits, that H.S. would give her daughter money from the account to shop, that H.S. loaned money from the account to one of her brothers, that H.S. would ask Schwersenska to get money for her because Schwersenska went "to town" more often, and that Schwersenska would sit down and go through the bank book with H.S. (R. 156:126–40.)

A court may only grant a motion to dismiss where the evidence, viewed in the light most favorably to the State, is insufficient to prove guilt beyond a reasonable doubt. *Scott*, 234 Wis. 2d 129, ¶ 12. Given that that the evidence, viewed in the light most favorable to the State, more than established guilt beyond a reasonable doubt, the motion would have been denied. Schwersenska cannot show prejudice.

3. Trial counsel did not provide ineffective assistance by failing to request a particular, special jury instruction concerning power of attorney agreements and joint savings accounts.

a. Schwersenska cannot prove deficient performance.

Schwersenska cannot prove that counsel performed deficiently by failing to request the specific proposed instruction she now advances. Paraphrased, that instruction would have told the jury: (a) a joint account belongs to both parties without regard to their respective contributions to the sums, and (b) execution of a power of attorney agreement between an agent and principal who share a joint banking account, in and of itself, is not proof beyond a reasonable doubt of a different intent as to ownership of the account. (Schwersenska's Br. 23.)

Here too, counsel cannot have performed deficiently by failing to raise arguments premised on unsettled law. *Lemberger*, 374 Wis. 2d 617, ¶ 18. Here too, Schwersenska fails to acknowledge or explain how counsel should have handled the corollary presumption of fraud, where a power-of-attorney agent uses the funds for her own use. *Russ*, 302 Wis. 2d 264, ¶ 3.

But further, jury instructions "must accurately and clearly state the law." *State v. Draughon*, 2005 WI App 162, ¶ 19, 285 Wis. 2d 633, 702 N.W.2d 412. To give Schwersenska's proposed instruction while "accurately and clearly stat[ing] the law," the court would have had to, in some way, also advise the jury that: (1) parties may intend an account of convenience, as opposed to joint ownership, when creating a joint bank account, and (2) an agent's use of funds for her own purpose is presumptive evidence of fraud. *See supra* Section B.2.a.

Trial counsel already presented the jury with evidence, through the bank manager, that a joint account means joint ownership rights to withdraw and deal with funds. (R. 156:10.) If anything, it would have *hurt* the defense to request a specific instruction that would have in turn required the jury to also be advised that a joint account does not always mean joint ownership, and that fraud is presumed where a power of attorney agent transfers money from a joint account for her own use.

Though counsel acknowledged he did not contemplate such a jury instruction, he further noted that he did not believe the suggested instruction captured the law entirely. (R. 161:29–31.) Counsel is correct; his performance did not fall "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 689–90.

b. Schwersenska cannot prove prejudice.

Schwersenska similarly cannot show a reasonable probability that the jury would have a reached a different outcome had the court given her proposed instruction. As noted, to give that instruction while accurately stating the law, the court would have had to further advise the jury that: (1) parties on a joint bank account may intend an account of convenience, where ownership is not conferred to both parties, and (2) an agent's use of funds for her own purpose is presumptively fraudulent. *See supra* Section B.3.a.

The jury heard extensive evidence that Schwersenska used H.S.'s funds for her own purposes. The jury heard that Schwersenska had almost no money in her account with her husband when her daughter received her roughly $30,000 settlement. (R. 156:51.) The jury heard the drastic differences between H.S.'s bills and the withdrawals from the account after H.S. received the settlement—during the same time that Schwersenska put over $18,000 into slot machines alone.

(R. 156:56–57, 112, 118.) The jury also heard that when H.S. confronted her mother about her missing money, Schwersenska said she "needed it." (R. 155:134–35.)

Given the overwhelming evidence both that this was intended to be an account of convenience, *see supra* Section B.2.b., and that Schwersenska used money in the account for her own purposes without H.S.'s consent, Schwersenska cannot show a reasonable probability of a different outcome. *Strickland*, 466 U.S. at 694.

Schwersenska argues, without any support, that the "State's theory of prosecution was never that the joint savings account in this case was an 'account of convenience' rather than a true joint savings account." (Schwersenska's Br. 31.) How not? The State's case focused on evidence that the money in the account belonged to H.S., and Schwersenska abused the trust H.S. placed in Schwersenska helping her to manage her money.

Schwersenska also argues that the circuit court erred in denying her postconviction motion because the State's theory involved the power of attorney agreement, not the joint account, and "nothing in the record confirms that trial counsel made a strategic decision" based on a conclusion that this was an account of convenience. (Schwersenska's Br. 31.) Schwersenska misunderstands the prejudice standard: the question is whether *she* can show a reasonable probability of a different outcome had counsel done what she faults him for not doing. She cannot.

Ultimately, Schwersenska asks this Court to search for a *possibility* that the jury may have reached a different outcome, but she has to prove a reasonable *probability*.

Strickland, 466 U.S. at 694; *Harrington*, 562 U.S. at 111. She cannot meet this burden.[5]

CONCLUSION

This Court should affirm the judgment of conviction and the circuit court's order denying Schwersenska's postconviction motion.

Dated this 14th day of June 2019.

Respectfully submitted,

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[5] Schwersenska does not argue cumulative prejudice, so the State does not address it further.

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 7514 words.

Dated this 14th day of June 2019.

_____
HANNAH S. JURSS
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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 14th day of June 2019.

_____
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