STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2020AP2149-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL J. FOSTER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND A SENTENCE AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR JEFFERSON COUNTY, THE HONORABLE WILLIAM F. HUE (TRIAL) AND THE HONORABLE ROBERT DEHRING (POSTCONVICTION), PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

MAURA WHELAN
Assistant Attorney General
State Bar #1027974

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859
(608) 294-2907 (Fax)
whelanmf@doj.state.wi.us

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ISSUE PRESENTED

Defendant-Appellant Michael Foster was convicted, after a jury trial, of resisting an officer during the booking process and causing him substantial bodily harm. The defense theory of the case was that the officer had not acted with lawful authority (which is one element of the crime) because he used excessive force in attempting to secure Foster's wallet. Defense counsel pursued this theory in both his cross-examination of the officer and his closing argument. Postconviction, Foster claimed that counsel provided ineffective assistance by failing to ask for a modified jury instruction suggested for use in resisting arrest cases by the Wisconsin Jury Instructions Committee.

To prevail on an ineffective assistance of counsel claim, a defendant must prove both deficient performance and prejudice. Where, as here, the modified jury instruction identified in the postconviction motion did not fit the facts of the case, defense counsel effectively presented the theory of defense in closing argument, and the defense did not present sufficient evidence to the postconviction court, was ineffective assistance of counsel proved?

The postconviction court answered: no.

This Court should answer: no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are requested because the issue presented can be resolved by applying well-established legal principles to uncontested facts.

STATEMENT OF THE CASE

Criminal Complaint.

In a Criminal Complaint filed in the Jefferson County Circuit Court, Defendant-Appellant Michael Foster was charged with one count each of resisting an officer, causing substantial bodily harm, in violation of Wis. Stat. § 946.41(2r); criminal damage to property in violation of Wis. Stat. § 943.01(1); disorderly conduct, domestic abuse with a dangerous weapon in violation of Wis. Stat. §§ 947.01(1), 968.075(1)(a); all as a repeater. (R. 2.) The criminal damage to property count was dismissed at trial on Foster's motion. (R. 98:114.) The disorderly conduct count was dismissed on the State's motion at the beginning of trial. (R. 98:3.) The jury found Foster guilty of the resisting charge, and he was convicted by the court. (R. 63.)

Trial.

The resisting charge was based on Foster's conduct in resisting City of Watertown Officer Jason Smith's[1] efforts to secure Foster's wallet during Foster's booking for disorderly conduct. (R. 2:2–3.) The trial consisted of Officer Smith's testimony and a videorecording of the incident viewed by the jury.

Officer Smith and Officer Robert Heimerl reported to Foster's home and arrested him for "domestic abuse related to disorderly conduct." (R. 98:63.) Foster had threatened his roommate with a knife. (R. 2:2–3.) The officers placed Foster under arrest for "domestic abuse related disorderly conduct" because he was the "primary aggressor." (R. 98:63, 64.)

The officers brought Foster to the Watertown Police Department to "complete the booking process." (R. 98:66.)

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[1] The State uses a pseudonym, Jason Smith, to refer to the victim. *See* Wis. Stat. § (Rule) 809.86(4).

Officer Smith described what booking entails in the usual course and in this specific case.

The arrestee is almost always "unhandcuff[ed]," as Foster was here. (R. 98:66.) The officer then "start[s] an inventory sheet of their property so everything's documented that they came in with, and the person that's arrested gets to sign it . . . to verify that all the property's correct." (R. 98:66–67.) The reason for the inventory is to ensure that the parties agree about the property taken at booking to avoid any disagreement when it is returned, and to guarantee officer safety. (R. 98:68–69.) Regarding the latter, Officer Smith explained that the concern is "[j]ust to make sure that there's no additional, like, weapons hidden, or sometimes people have handcuff keys, like, hidden in their shoes." (R. 98:68.) Next, the officer photographs the arrestee ("a mug shot, I guess"), and takes his fingerprints. (R. 98:67.) "In this situation . . . I would have taken Mr. Foster into the inventory room, activated the video, read him his Miranda rights and tried to do a more thorough interview with him in regards to the situation." (R. 98:67.)

At this point in Officer Smith's testimony, the prosecutor played the video of the booking process and Foster's resistance. (R. 98:70.) After the video was finished, the prosecutor resumed his direct examination of Smith.

Officer Smith reported that Foster, unhandcuffed, went to the restroom. When he came out he was holding a wallet in his hand. (R. 98:72.) Officer Smith was surprised because when he had handcuffed and placed Foster under arrest at the residence, he asked Foster if he had his wallet and Foster said no. (R. 98:72.) Smith did not realize that Foster had his wallet on his person because, although Smith did a pat-down for weapons, he "didn't do a more thorough pat-down" that would have brought the wallet to his attention. (R. 98:73.)

When Officer Smith saw the wallet after Foster exited the bathroom, "[m]y only intention was to just take custody of it, add everything into property, because he, obviously, had money in his hand; just to make sure . . . everything was documented just to go through the wallet further, just to make sure there wasn't any contraband there, once again, handcuff keys, razor blades, I don't know, just for everybody's safety." (R. 98:73.)

The situation escalated. Officer Smith activated his radio and called for back-up. "That's just standard procedure, if you feel that might happen at any point, just ask for somebody else to come in and assist with it." (R. 98:74.) By that time, Smith felt that Foster's "demeanor had changed into what I consider a more aggressive demeanor." (R. 98:74.) "At one point, . . . he actually bladed his body towards me and had his hands down at his sides in fists, which is a pre-attack posture that they teach you in the academy and other DA[A]T[2] trainings." (R. 98:74–75.) That looks "like how a boxer would stand with your dominant foot in back so you have more power to either run or lunge or swing, and I didn't want that to occur." (R. 98:75.)

Officer Smith's intention continued to be taking the wallet, but "that was not happening. I just wanted to handcuff him and just . . . basically freeze the situation, again, for his safety and mine." (R. 98:75.) Officer Smith also testified that he asked Foster "a couple of times" to give him the wallet, but he refused. (R. 98:78.) That's why Smith "grabbed him." (R. 98:78.)

Officer Smith thought he saw Foster put the wallet in his back pocket, and tried to find it there. (R. 98:76.) Then he saw that Foster "had it in his hand, I believe kind of over his

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[2] The acronym stands for "Defensive and Arrest Tactics." Law Enf't Standards Bd., Wis. Dep't of Justice, *Defensive and Arrest Tactics: Training Guide for Law Enforcement Officers* 1 (June 2017).

head, partly in front of his face." (R. 98:76.) Unsuccessfully, Smith tried to grab it again. (R. 98:76.) When asked why he made physical contact with Foster to secure the wallet before backup came, Smith explained that he did not know how long he would have to wait for backup, and judging from Foster's "posture and demeanor," he felt that "possible physical confrontation was imminent." (R. 98:76–77.) Therefore, he didn't "feel that there was time to wait or even disengage at that time." (R. 98:77.)

The prosecutor asked Officer Smith what happened between his first approach to Foster and "the point you ended up on the ground." (R. 98:77.)

> So I grabbed his wrists I felt some resistive tension, him trying to pull away. I tried to put his hand behind his back to handcuff him; he resisted that. We went up against the wall so I could have a better -- it's easier to contain somebody at that point, because there's no other way for them to go. You can kind of hold him there.
>
> I tried to pull him out by his arms, again, to just handcuff him; he pulled his arms back. At that point I went to the decentralization and took him down to the ground.
>
> . . . .
>
> Again, it's just easier when somebody's on the ground and they're actively resisting to control them, I guess, while we're on the ground 'cause they're not standing on their feet as far as swinging at you or anything like that.
>
> So if they're on their stomach, they can't punch you either. It's just safer and easier for the officer to take control of the situation at that time.

(R. 98:77–78.) Smith explained that he had been trained in the decentralization technique and that it was common police procedure. (R. 98:79.)

As Officer Smith "was performing the decentralization," his ankle was injured. (R. 98:79.) He heard it pop and felt it swell. (R. 98:79.) That's when he cuffed Foster. (R. 98:80.) After the cuffing, the wallet appeared in Foster's mouth, and Foster moved his head away from Smith to prevent his grabbing it. (R. 98:80.) But Smith was ultimately able to pull the wallet out of Foster's mouth. (R. 98:80.)

Officer Smith was taken to the hospital. (R. 98:81.) His ankle was broken in three places and he also had tendon damage. (R. 98:81.) He missed four months of work. (R. 98:81.)

On cross-examination, Foster's counsel tried to establish that Officer Smith was responsible for the escalation of the incident and therefore his own injuries. Counsel asked Smith how many times he verbally asked for the wallet. Smith said, "[t]wo, three, somewhere around there." (R. 98:86–87.) Based on the video, counsel told Smith that he only asked once. (R. 98:87.) Smith next admitted that Foster "never verbally threatened me," but only pointed at him. (R. 98:87.) Smith agreed that he engaged Foster physically after just a few seconds. (R. 98:87.) And he conceded that he did not ask Foster if he would agree to be handcuffed before handcuffing him. (R. 98:88, 93.) He acknowledged that he did not execute the decentralization technique exactly as he had been instructed at the academy. (R. 98:89.) "It's looked at as a dynamic application of a training technique." (R. 98:89.) He also acknowledged that department policy included a "force continuum" prior to using physical force. (R. 98:92.) He explained that the continuum does not consist of mandatory steps: "Just kind of depends what the situation is, then use that amount of force for that situation." (R. 98:92.)

The court instructed the jury. It explained that "[r]esisting an officer . . . is committed by one who knowingly resists an officer while the officer is doing any act in an official capacity and with lawful authority." (R. 98:143.) To secure a guilty verdict, the State must prove four elements beyond a

reasonable doubt. (R. 98:143.) First, "the defendant resisted an officer," which "means to oppose the officer by force or threat of force." (R. 98:143–44.) Second, "the officer was doing an act in an official capacity," i.e., "perform[ing] duties that they are employed to perform." (R. 98:144.) Third, "the officer was acting with lawful authority," which means his "acts are conducted in accordance with the law. In this case it is alleged that the officer was booking or processing the defendant after arrest." (R. 98:144.) Fourth, the defendant knew the officer was acting in his "official capacity and with lawful authority" and the defendant knew he was resisting the officer. (R. 98:144.)

Because Foster was charged with causing bodily harm to Officer Smith while resisting, the State was also required to prove causation, i.e., "that the defendant's act[ ] . . . was a substantial factor in producing substantial bodily harm." (R. 98:145.)

Defense counsel's closing argument focused on the "resisting," "official capacity," and "lawful authority" elements. With respect to the resisting element, counsel argued that Foster was calm, "not tense," and made no threats. (R. 98:134.) On the contrary, according to counsel, Officer Smith grabbed Foster's wrists, "grab[bed] him by the shirt, slam[med] him into the wall and into the corner. And then he has him in the corner, he dragged his foot out." (R. 98:134–35.) Finally, according to counsel, Smith "proceeds to grab him and throw him down to the ground in a manner that Officer [Smith] testified that he was not trained to do, that it was a spur of the moment thing." (R. 98:135.)

Counsel conceded the second element, that Officer Smith was acting in an official capacity. (R. 98:135.)

Counsel's argument on the third element, lawful authority, was more nuanced.[3] Counsel agreed that Officer Smith was conducting the booking process lawfully and that it was "part of his legal duties." (R. 98:136.) He also agreed that the arrest was lawful. (R. 98:136.) But counsel argued that "he was unlawful [in] his actions, where he preemptively decides to use excessive force against an individual that he knows has significant health issues . . . some sort of mental health issues." (R. 98:136.) He was "not acting in lawful authority because he was not following the many general orders, the procedural guidelines that officers are supposed to follow. He gave no warning that force was going to be used." (R. 98:136.) He could have waited for the backup he had called. (R. 98:136.) Counsel noted that "Foster was on the ground in 13 seconds, from the time his back hit the wall to when he was on the ground." (R. 98:136.) Furthermore, Smith could have searched Foster more thoroughly in the first place, and discovered the wallet when he did the weapons pat-down. (R. 98:136–37.) Finally, he could have verbally asked Foster for the wallet or asked him to agree to be handcuffed. (R. 98:137.)

On the fourth element of resisting, counsel argued that Foster believed he was being unlawfully arrested. (R. 98:138.) With regard to the causation of substantial bodily harm element, he argued that Officer Smith's injuries were caused by his own use of excessive force, not by Foster's resistance. (R. 98:138–39.)

The jury found Foster guilty. (R. 98:155.) Judge William F. Hue, who presided at trail, entered a judgment of conviction. (R. 63.)

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[3] The State summarizes trial counsel's analysis, but does not agree with it.

Postconviction motion and hearing.

On August 24, 2020, Foster filed a Postconviction Motion for a New Trial. (R. 80.) He argued that trial counsel provided ineffective assistance because he "failed to request an appropriate jury instruction consistent with his defense." (R. 80:1 (capitalization and emphasis removed).) He requested a *Machner* hearing,[4] which was granted. (R. 80:1.) Judge Robert Dehring presided at the postconviction hearing. (R. 106:1.)

Foster contended that trial counsel should have requested a modified jury instruction that would instruct the jury as to his theory of the case. (R. 80:6.) He cited comment 8 to Wisconsin Jury Instruction (Criminal) 1765, which suggests "specifying the lawful function being performed." (R. 80:6.) Specifically, Foster argued, trial counsel should have requested that the jury be instructed with the following language recommended by the Wisconsin Jury Instructions Committee ("Committee"): "[I]t is alleged that the officer was making a lawful arrest. An arrest is lawful when the officer has reasonable grounds to believe that the person has committed a crime. An officer making an arrest may use only the amount of force reasonably necessary to take the person into custody." Wis. JI–Criminal 1765 cmt. 8 (2012).

Foster argued that trial counsel's theory of the case was that "Officer [Smith's] excessive force was the real cause of his injuries, not defendant's conduct. In other words, but for the overly aggressive actions of Officer [Smith], he would not have been injured at all." (R. 80:6.) An instruction on "excessive force" "would have provided a legal basis for the jury to consider whether the force used by Officer [Smith] was excessive and whether defendant's actions were a real,

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

substantial factor in the causation of the officer's injuries." (R. 80:6–7.)

Foster argued that not asking for a modified instruction was not only deficient but prejudicial because if "the jury [had] been advised . . . that the officer had to use reasonable force in order for him to act lawfully, there is every reason to believe the outcome of the proceedings would have been different." (R. 80:7.)

Trial counsel testified at the *Machner* hearing. He said that he did not know about the Committee's suggestions for modifying the jury instruction on the lawful authority element. (R. 106:11.) He had no strategic reason for not asking for it and thought it would have been helpful at trial. (R. 106:11–12.)

After trial counsel finished his testimony, the court asked postconviction counsel why he had not presented the videotape evidence of the police-station incident at the *Machner* hearing. (R. 106:18.) Postconviction counsel answered that he assumed Judge Hue, who presided at trial, would also hear the postconviction motion; therefore, he failed to anticipate the necessity of airing the videotape at the postconviction hearing. (R. 106:18–19.) He asked the court to watch the videotape. (R. 106:19–20.)

The prosecutor disagreed with the premise of the postconviction motion. He did not object to the court's watching the videotape, but argued "that there's really no evidentiary foundation being presented to the Court in favor of the Defendant's motion." (R. 106:23.) "There's no evidence that we've heard today that Officer [Smith's] actions were in any way excessive, other than the opinion [of trial and postconviction counsel], which of course neither of those are evidence . . . ." (R. 106:23–24.) He concluded that postconviction counsel was asking the court "to make a factual determination on your own after viewing the video

that the actions of [Officer Smith] may or may not have been potentially excessive." (R. 106:24.) He also observed that there was no evidence that Judge Hue would have granted the modified jury instruction had it been offered. (R. 106:24.)

Ruling from the bench, the court held that Foster had proven neither deficient performance nor prejudice. The court emphasized prejudice. Pointing to Foster's burden to prove the claim of ineffectiveness, the court concluded that Foster's failure to ask the court to review the videotape before the *Machner* hearing meant there was no evidence before the court to prove prejudice, i.e., "that Judge Hue would have granted that instruction or should have granted that instruction." (R. 106:29.) Moreover, the judge went on to note that he did not believe he could "simply watch this [videotape] and be the finder of fact" regarding whether Officer Smith's use of force was excessive. (R. 106:31.) The opinions of trial and postconviction counsel that Smith used excessive force were insufficient. (R. 106:29.) Regarding deficient performance, the court did not "think that expecting an attorney to delve through the comments on the Jury Instruction renders his total performance ineffective." (R. 106:29.)

This appeal follows.

STANDARD OF REVIEW

When reviewing a claim of ineffective assistance of counsel, this Court upholds the circuit court's factual findings unless they are clearly erroneous, and it independently determines whether counsel was ineffective. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695.

ARGUMENT

Defense counsel did not provide ineffective assistance by failing to request a modified jury instruction that was not supported by the trial evidence.

A. Legal principles.

1. To prevail on a claim of ineffective assistance of counsel, the defendant must prove both deficient performance and prejudice.

"Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant is guaranteed the right to effective assistance of counsel." *State v. Balliette*, 2011 WI 79, ¶ 21, 336 Wis. 2d 358, 805 N.W.2d 334. A defendant who asserts ineffective assistance of counsel must show that (1) counsel performed deficiently and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If a defendant fails to prove one prong of the *Strickland* test, a court need not consider the other prong. *Id.* at 697.

"Courts afford great deference to trial counsel's conduct, presuming that it 'falls within the wide range of reasonable professional assistance.'" *State v. Savage*, 2020 WI 93, ¶ 28, 395 Wis. 2d 1, 951 N.W.2d 838 (citation omitted). "To prove deficient performance, a defendant must show specific acts or omissions of counsel that were 'outside the wide range of professionally competent assistance.'" *State v. Tobatto*, 2016 WI App 28, ¶ 12, 368 Wis. 2d 300, 878 N.W.2d 701 (quoting *Strickland*, 466 U.S. at 690). Phrased differently, the defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v.*

Flores-Ortega, 528 U.S. 470, 481 (2000) (citing *Strickland*, 466 U.S. at 688).

To establish prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced him. *Strickland*, 466 U.S. at 693. The defendant must show something more than that counsel's errors had a conceivable effect on the proceeding's outcome. *Id.* He must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lee v. United States*, 137 S. Ct. 1958, 1964 (2017) (quoting *Flores-Ortega*, 528 U.S. at 482).

In order to make the requisite showing under *Strickland*, a defendant must preserve counsel's testimony in a postconviction *Machner* hearing. *State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998). Whether to accept specific evidence at the *Machner* hearing is a matter of trial court discretion. *See State v. Arredondo*, 2004 WI App 7, ¶ 50, 269 Wis. 2d 369, 674 N.W.2d 647. A postconviction court does not erroneously exercise its discretion by refusing to consider evidence not presented in "a timely fashion." *State v. Rohl*, 104 Wis. 2d 77, 91, 310 N.W.2d 77 (Ct. App. 1981).

2. Trial courts may give the jury non-standard instructions as long as they are supported by the trial evidence; defense counsel may be ineffective if he fails to request such an instruction.

Wisconsin trial courts instruct the jury using standard instructions written and approved by the Wisconsin Jury Instructions Committee. *See State v. Trammell*, 2019 WI 59, ¶ 13, 387 Wis. 2d 156, 928 N.W.2d 564. Whether to submit a particular instruction is left to the discretion of the court. *State v. Chew*, 2014 WI App 116, ¶ 7, 358 Wis. 2d 368, 856 N.W.2d 541. But the court may not give a jury instruction that

is not supported by the evidence presented at trial. *Id.* ¶¶ 7, 9–10.

Courts may modify the standard jury instructions at the request of either party. *Trammell*, 387 Wis. 2d 156, ¶ 23. In some instances, the Committee itself may provide optional language for trial courts to use in specific circumstances. *Id.* A defendant may also request a "theory of defense instruction" that "relates to a legal theory of defense" that "is not adequately covered by other instructions" and is "supported by sufficient evidence." *State v. Lesik*, 2010 WI App 12, ¶ 14, 322 Wis. 2d 753, 780 N.W.2d 210 (quoting *State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996)).

A defendant may point to an attorney's failure to request a modified jury instruction or theory of defense instruction to support an ineffective assistance of counsel claim. *See Holder v. United States*, 721 F.3d 979, 992 (8th Cir. 2013); *Miller v. State*, 658 S.E.2d 765, 768 (Ga. 2008). But, to prevail, the defendant must show both that the failure constituted deficient performance and that it prejudiced the defense. *See Holder*, 721 F.3d at 992; *Miller*, 658 S.E.2d at 768. Because a defendant claiming deficient performance must prove trial counsel's specific acts and omissions, *Strickland*, 466 U.S. at 680, the defendant must, in this context, point to specific language that trial counsel should have proposed for a modified jury instruction. To prove prejudice, the defendant must show a reasonable probability that the court would have given the instruction and that the jury would have reached a different verdict had the modified instruction been given. *See Holder*, 721 F.3d at 992; *Miller*, 658 S.E.2d at 768.

B. Foster has failed to prove either that defense counsel performed deficiently or that any deficiency prejudiced the defense.

Foster contends that trial counsel's failure to request a modified jury instruction[5] including the language of comment 8 constitutes ineffective assistance of counsel. The claim fails because Foster has proved neither deficient performance nor prejudice.

1. Foster failed to prove deficient performance because the modified jury instruction was not supported by the facts of this case and defense counsel effectively presented the defense theory in closing argument.

Foster fails to prove deficient performance for three reasons. First, he has not provided a jury instruction that the trial court could have given the jury in this case. Second, he ignores the fact that trial counsel's closing argument effectively put before the jury the theory that Officer Smith's reaction to Foster's resistance was unnecessary and excessive. Third, the premise that the ineffectiveness argument is based on, that Smith used excessive force, is false.

To prove that counsel performed deficiently by failing to request a modified jury instruction, Foster must provide the court with instructional language that would have been useable by the court in his case. *See Tobatto*, 368 Wis. 2d 300, ¶ 12 ("specific . . . omissions"). Here, Foster asserts that trial counsel should have asked for the following language:

> In this case, it is alleged that the officer was making a lawful arrest. An arrest is lawful when the officer has reasonable grounds to believe that the person has committed a crime. An officer making an arrest may

[5] The State will use this term to refer to both a modified jury instruction and a "theory of defense" instruction.

> use only the amount of force reasonably necessary to take the person into custody.

Wis. JI–Criminal 1765 cmt. 8 (2012).

The language proffered by Foster postconviction was not supported by the facts of this case. Foster was not charged with resisting an officer while the officer was making an arrest. He was charged with resisting the officer in the course of booking. (R. 2:2–3.) The language in comment 8 that "[a]n arrest is lawful when the officer has reasonable grounds to believe that the person committed a crime" is thus wholly irrelevant. The language that "[a]n officer making an arrest may use only the amount of force reasonably necessary to take the person into custody" is also irrelevant, but a defendant could arguably adapt this language to fit the booking situation. However, Foster has not bothered to do that. Even with the benefit of hindsight, Foster has never—in either his postconviction motion or on appeal—provided instructional language designed to fit the facts of his case that the trial court could have actually used. *See Chew*, 358 Wis. 2d 368, ¶ 7; *Lesik*, 322 Wis. 2d 753, ¶ 14.

The second reason Foster's deficiency claim fails is that trial counsel effectively argued the lawful authority issue in the context of the instruction the court actually gave the jury. The court explained the third element of the resisting charge as follows: "[T]he officer was acting with lawful authority. Police officers act with lawful authority if their acts are conducted in accordance with the law. In this case it is alleged that the officer was booking or processing the defendant after arrest." (R. 98:144.)

In his closing argument, trial counsel examined the trial testimony in the framework of the instruction given to argue that Officer Smith was not acting within his lawful authority such that the State had not satisfied the third element of the resisting charge:

> Was he lawful in the booking process. Yeah, that's part of his legal duties. Was he lawful in what he assumed was a lawful arrest at that time? Yes. But where I'd argue that he was unlawful is his actions, where he preemptively decides to use excessive force . . . .
>
> And I would say he was not acting in lawful authority because he was not following the many general orders, the procedural guidelines that officers are supposed to follow. He gave no warning that force was going to be used. He could have called for backup. He did. And we saw how quick officers got there. . . . It's a procedure that could have been used.
>
> . . . .
>
> He could have attempted to just handcuff him. He could have said, Mr. Foster, I need to handcuff you again, I don't like where this is going. Could have gave some verbal communication. The communication that was provided was, give me back your wallet.

(R. 98:135–37.) With this argument, trial counsel successfully put before the jury the defense theory that Officer Smith was not acting with lawful authority because he used (in the defense view) excessive force that did not conform to department guidelines and failed to use non-force options for obtaining the wallet from the recalcitrant Foster. If the jury had been convinced by counsel's argument, it would not have needed the modified jury instruction to find that the State had failed to satisfy the lawful authority element. Therefore, trial counsel's performance was not deficient.

Finally, Foster's deficiency claim fails because it is based on the premise that Officer Smith used excessive force. In the State's view, Smith did not use excessive force. (R. 98:133.) The postconviction court refused to make a finding that Smith did or did not use excessive force. The court complained that Foster had failed to carry his evidentiary burden on the ineffectiveness claim by not presenting evidence—i.e., the videotape—from which the court could

decide the excessive force question. (R. 106:29.) Furthermore, even if he had, the court did not believe he could "simply watch this and be the finder of fact" regarding whether Smith's use of force was excessive. (R. 106:31.)

Foster has failed to prove deficient performance.

2. Foster failed to prove prejudice because he did not show that Judge Hue would have given the modified jury instruction or that it would have altered the jury's verdict.

Foster also fails to prove prejudice for reasons similar to his failure to prove deficiency.

First, to prove prejudice from trial counsel's failure to ask for a modified jury instruction, Foster must show that Judge Hue would have agreed to give the instruction. In the view of the postconviction court, Foster could not satisfy this burden because his failure to ask the court to review the videotape before the *Machner* hearing meant that there was no evidence before the court to prove prejudice, i.e., "that Judge Hue would have granted that instruction or should have granted that instruction." (R. 106:29.) Because Foster had the burden of proving *Strickland* prejudice with evidence at the postconviction proceeding, that decision was correct and should be affirmed.

Foster insists that the postconviction court erred by not reviewing the videotape despite his failure to provide it to the court. (Foster's Br. 10–11.) But the court expected any evidence relevant to the postconviction hearing to be presented at or before the hearing. (R. 106:29.) The *Machner* hearing is, after all, the defendant's opportunity to support his motion with evidence—that's the whole point. Misleadingly, Foster asserts that "counsel referenced the video in defendant's postconviction motion." (Foster's Br. 11.) The motion stated: "The incident was captured on a recording

at the City of Watertown Police Department." (R. 80:3.) That reference was hardly sufficient to put the postconviction court on notice to watch the videotape—indeed, this language did not even inform the court that *the jury* had watched the videotape. Foster's excuse for not providing the videotape was counsel's assumption that Judge Hue, the trial judge, would also be the postconviction judge. (R. 106:22.) But the court website indicates that the case had been reassigned to Judge Dehring more than one month before the postconviction hearing. And, even if Judge Hue had presided at the postconviction hearing, it would have been unreasonable to presume he would remember the details of a one-day trial from nearly two and one-half years before. (R. 98:1; 106:1.)[6]

Beyond this evidentiary shortfall, Foster cannot prove that the trial court would have agreed to give the comment 8 instruction because it was not appropriate for Foster's case. As noted earlier, comment 8 is written to elaborate the "lawful authority" element of resisting an officer when the resistance occurs during an arrest. *See supra* at 16. It is not tailored to resistance during booking. A trial court may only give jury instructions that fit the facts that have been presented to the jury. *See Chew*, 358 Wis. 2d 368, ¶ 7. Therefore, the trial court could not have agreed to give the inapposite instruction promoted by Foster postconviction and on appeal without running afoul of basic jury instruction principles.

Finally, the trial evidence showed beyond a reasonable doubt that Officer Smith was acting within his lawful authority. As trial counsel conceded in his closing argument, the incident occurred during booking, and booking individuals

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[6] Judge Dehring was assigned to this case on November 2, 2020. *State v. Foster*, No. 17CF431 (Wis. Cir. Ct. Jefferson Cty.), https://wcca.wicourts.gov/caseDetail.html?caseNo=2017CF000431&countyNo=28&mode=details (last visited Apr. 7, 2021). The postconviction hearing was held on December 8, 2020. (R. 106:1.) Trial took place on August 20, 2018. (R. 98:1.)

who have been arrested is within a police officer's lawful authority. (R. 2:2–3; 98:136.) Smith explained why his attempt to get control of Foster's wallet was necessary, appropriate, and justified. (R. 98:68–69, 73.) He testified that Foster refused to cooperate and surrender his wallet, (R. 98:73–74)—a fact that Foster has never denied. (R. 98:73–74) He explained step-by-step how the situation escalated. (R. 98:74–78.) He explained why, although he called for back-up, he proceeded to take the wallet before back-up arrived. (R. 98:76–77.) The jury saw the videotape, and was able to determine whether it agreed with Smith's testimony describing the incident, or trial counsel's description in closing argument. The jury obviously agreed with Smith's description, not trial counsel's. There is no reasonable probability that a modified jury instruction would have changed that decision.

Foster has failed to prove prejudice. Therefore, his claim of ineffective assistance of counsel fails and the decision of the court below should be affirmed.

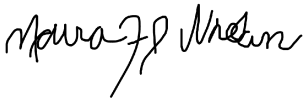
CONCLUSION

For the reasons stated, the State of Wisconsin respectfully requests that this Court affirm the order of the circuit court.

Dated this 8th day of April 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



MAURA WHELAN
Assistant Attorney General
State Bar #1027974

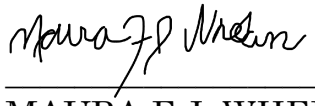
Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859
(608) 294-2907 (Fax)
whelanmf@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 5,544 words.

Dated this 8th day of April 2021.



MAURA F.J. WHELAN
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.

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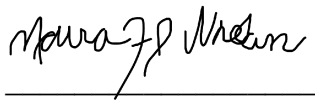

MAURA F.J. WHELAN
Assistant Attorney General