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CASE NO. 2021AP000405-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

-vs- **Case No. 2018 CF 1**
(Dodge County)

MARTY S. MADEIROS,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND THE ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN DODGE COUNTY CIRCUIT COURT, THE HONORABLE MARTIN DE VRIES PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

BY:

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Despite extensive briefing related to defendant's postconviction motions for a new trial, on 3/3/21, the trial court denied the motions without a hearing (157, App. at 101-02).

II. WHETHER A NEW TRIAL SHOULD BE ORDERED BASED ON ERRORS COMMITTED AT TRIAL.

Despite extensive briefing related to defendant's postconviction motions for a new trial, on 3/3/21, the trial court denied the motions without a hearing (157, App. at 101-02).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not requested.

STATEMENT OF THE CASE

On 1/2/18, defendant was charged in Dodge County Circuit Court with the commission of the offense of operating while intoxicated as a fifth offense, the offense allegedly committed on or about 12/30/17 (1). On 1/3/18, a preliminary hearing waiver was filed on defendant's behalf (5). On 1/25/18, an information was filed which alleged two offenses, operating while intoxicated as a fifth offense and obstructing (13). On 1/31/18, defendant entered not guilty pleas to the charges (173:2). On 2/8/18, motions to suppress were filed on defendant's behalf (16, 19). On 8/6/18, an amended information was filed which alleged three counts, operating while intoxicated as a fifth offense, operating with a prohibited blood alcohol concentration as a fifth offense and obstructing (37). On 8/17/18, a motion hearing was held regarding pretrial issues (171). On 9/12/18, a jury trial commenced (170). On 9/13/18, at the conclusion of trial, defendant was found guilty of the OWI offenses but not

guilty of the obstructing charge (47, 73, 75, 169:185). On 12/12/18, a sentencing hearing was held (168). Defendant was sentenced to eight years in prison, with three years of initial confinement (168:40). Defendant filed a timely notice of intent to seek postconviction relief (118).

On 8/20/20, a motion for a new trial was filed on defendant's behalf (149). On 9/17/20, the trial court set a briefing schedule on the issue of whether a postconviction motion hearing was necessary (152). On 10/16/20, the State filed a brief arguing a postconviction motion hearing was not necessary and there was no basis for defendant to obtain relief (153). On 11/2/20, a reply brief was filed on defendant's behalf (154). Despite the briefing by both parties, the trial court did not issue a decision.

On 1/8/21, defendant wrote a letter to the trial court and asked it to issue a decision (155). The trial court did not respond.

On 3/1/21, defendant again wrote a letter to the trial court and asked it to issue a decision (155). The defense indicated to the trial court the postconviction motion had been pending for six months and that a decision was necessary (155). The defense indicated a postconviction motion hearing was necessary (155). The defense indicated that if the court was not going to rule on the motion, it should sign the defense's proposed order denying relief so relief could be sought in the court of appeals (155).

On 3/3/21, the trial court denied the motion without a hearing and, based on what is in the record, without any analysis of the issues raised (157, App. at 101-02). On 3/12/21, a notice of appeal was filed in the trial court (160).

STATEMENT OF FACTS

Defendant Madeiros was charged with operating while intoxicated/while exhibiting a prohibited blood alcohol concentration and obstructing for conduct taking place in the early morning hours of December 30, 2017 (1). At 1:02 a.m., a Dodge County dispatcher was contacted about an abandoned vehicle along Highway 60 (1). An officer arrived at defendant's vehicle parked along Highway 60 at about 1:21 a.m. (1). Defendant was not with the vehicle (1). Around 2:21 a.m., an officer found defendant walking on Wild Goose Trail (1). Defendant told police his vehicle had stopped and he was

walking home (1). He told police he left his vehicle at about 8 p.m. (169:35-36). He denied drinking and driving and told one or more officers he had only consumed intoxicants after he last drove his vehicle (1). Blood was drawn from defendant at 3:37 a.m. (64). His blood had an alcohol concentration of .164 (64).

Defendant's defense at trial was that he was not intoxicated when he drove his vehicle and that there was no evidence that he had operated while intoxicated.

On 8/17/18, a motion hearing was held (171). During the motion hearing, the State agreed defendant's four prior convictions for operating while intoxicated could not be introduced at trial (171:32). The State moved to admit evidence facts related to Dodge County Case 2017 CT 280, State v. Marty Madeiros, including that defendant was convicted of hit and run, that he was placed on probation, his license was revoked and that he was prohibited from consuming alcohol pursuant to the conviction (171:19-23). The State argued the information was relevant to the offense of obstructing and defendant's intent to mislead the investigating officer (171:19-23). The defense objected to the State's motion (171:27-29).

Without conducting a *Sullivan*[1] analysis, the trial court found the evidence was relevant "because basically it's part of the whole context of what Mr. Madeiros is talking about here. And it does relate to his intent to lie to police" (171:36, App. at 110).

Trial took place on September 12 and 13, 2018 (169, 170). At the commencement of the evidence, the court read stipulations of the parties, including:

> Number three. The defendant's probation status on December 30, 2017. On December 30, 2017, defendant was placed on probation for hit and run in Dodge County, Wisconsin, case number 17 CT 280. Conditions of probation that were in effect on December 30, 2017, included a prohibition against violating any law as well as a prohibition against consuming or possessing alcohol.

[1] *State v. Sullivan,* 216 Wis.2d 768, 576 N.W.2d 30 (1998).

> Number four. The defendant's driving status on December 30, 2017. The defendant's operating privilege was revoked on December 30, 2017. Defendant did have a valid occupational operator's license that day. However, this occupational license only authorized driving on a Saturday between the hours of seven o'clock and ten o'clock a.m. and three o'clock p.m. and seven o'clock p.m. and only for the purposes of employment and homemaker duties. Restrictions placed on the occupational license included that defendant maintain absolute sobriety and not drive with an alcohol concentration of greater than .02.
>
> Number five. The hit and run accident on June 22, 2017. On June 22, 2017 at 2:25 a.m., the defendant drove a 2014 Chrysler motor vehicle westbound on State Highway 33 in the Town of Beaver Dam, Dodge County, Wisconsin. The defendant's motor vehicle struck and damaged the rear of a westbound Chevrolet motor vehicle. Although the struck Chevrolet motor vehicle stopped along side the road, the defendant continued driving his damaged 2014 Chrysler motor vehicle for one mile before abandoning it at the side of the road. Both air bags were deployed in the 2014 motor vehicle. Defendant then fled the scene on foot and failed to call or report the crash to police. This hit and run incident was investigated by Deputy Duane Olbinski of the Dodge County Sheriff's Office and others. The defendant called Deputy Olbinski the day after the crash. The defendant told Deputy Olbinski that he walked away from his motor vehicle and that he walked three hours to his residence.
>
> Finally, number 6, hit and run disposition. Defendant was convicted of hit and run in Dodge County, Wisconsin, case number 17 CT 280 on September 18, 2017, and placed on probation. The defendant was on probation for hit and run on December 30, 2017 (170:101-02).

During trial, Emily Laufer testified as a witness for the State (160:125-67). She testified she had 20 years of law enforcement experience and that she had experience investigating drunk driving offenses (170:125-26). She testified she observed defendant's disabled vehicle along Highway 60 as she was headed westbound (170:126). The vehicle was partially in the roadway (170:126). She observed shoeprints leading from the vehicle to Goose trail (170:126, 129). She followed the prints with her vehicle northbound on

the trail (170:129). Evidence was presented regarding her discussion with dispatch through the State's direct:

> Q: All right. So where it says D, that must mean dispatcher. E is Emily. Why don't we read through this for the record. I'll read the dispatcher part, okay?
> A: Okay.
>
> Q: *The officer should be there shortly*. Would you read your line then?
>
> A: *The only question I have is do you know did the driver call this in or a passer-by*?
>
> Q: *That I don't know*.
>
> A: *Okay. Like I said, I'm a retired cop. That the reason why I ask these questions. To me I've had people walk in the ditch—they're so damn drunk that they pass out*.
>
> Q: Okay. All right now, then there's a break and a subsequent conversation between you and the dispatcher. Do you see that?
>
> A: Yes.
>
> Q: All right. And what point in time are you having this conversation with the dispatcher? I mean, where are you you think when you're having this? Are you out on the trail at this point?
>
> A: I'm just looking to see. Yeah, this is like—probably two minutes or a minute I got out on the goose trail, I could see that just what I say to the—
>
> Q: Okay.
>
> A: --dispatcher.
>
> Q: All right. So let's read this for the jury. You start off there.
>
> A: Okay. *Hi ya' this is*—I don't remember saying that but*, hi ya', this is Emily calling back. Deputy Jackson showed up by the car*.
>
> Q: Yes.
>
> A*: Tell me I'm actually driving down the goose trail because the footprints are going northbound*.

Q: Okay.

A: *This guy is drunk, he's walking all over the place. But because it's so damn cold, I thought I would just drive to him.*

Q: *Drive to find him*?

A: Oh, drive to find him. Yes.

Q: Okay. And the dispatcher says, *okay*.

A: Forgive me, I don't have my glasses on.

Q: Oh, I'm sorry.

A: I don't have any in my pocket, but I'm okay. All right. *If that's okay, you only have one deputy. It's not big deal, I'll go find this guy*.

Q: *You are headed north on the Wild Goose Trail*.

A: *Yes. Yes, his footprints are heading north. There is only one set, of course, so— …*

A: When I called back I asked the deputy—or the dispatcher, *do you have another one on the way—referring to another officer. This guy, just by the way he's walking, he's drunk, disoriented or having a medical condition*.

Q: So let me ask you what you meant when you're telling the dispatcher, this guy, just by the way he's walking, he's drunk, disoriented or having a medical condition. What, what—

A: He's not walking in a straight line like a sober person. This person was weaving back and forth with a person that—the appearance that someone who is impaired either by intoxicants, drugs, or a medical condition (170:140-43).

Later during cross-examination of the witness, the following took place:

Q: Let's ask a little bit about that. You were an officer for 20 some years you said?

A: Yes.

Q: Okay. You were trained on how to handle OWI situations?

A: Yes.

Q: Were you ever trained by that just looking at a vehicle's placement and footprints in the snow that you could conclude someone was drunk?

A: Yes.

Q: You were trained that way.

A: Yes.

Q: Was that part of your field sobriety training?

A: Yes.

Q: That you could determine if somebody was drunk simply by the placement of their car?

A: Yes.

Q: You believe you could determine if somebody's drunk just by footprints in the snow?

A: If you're referring, if you're asking the question that way, the answer is going to be no. But, based on coming up on the car, seeing where it's parked partially on the roadway, the headlights, there's no taillights on, I look at the footprints, they're not walking straight in the snow. They walk down into the ditch. They lead back up out of the ditch and come on to the roadway. All indications to me—because I've had situations where I've come upon vehicles like this in my experience and the person walked away in an attempt to avoid getting caught for drunk driving.

Q: So from the very beginning on this kind of a basis, you came to the hypothesis that he's just drunk, correct?

A: I was referring to him being drunk. I wasn't, I couldn't say one hundred percent that he was drunk.

Q: Yeah.

A: But everything's there with my experience led me to believe that this person was intoxicated, yes.

> Q: Because you had never seen Mr. Madeiros operate or drive the vehicle, did you?
>
> A: Never, never met him in my life, no (170:156-58).

On redirect, the prosecutor asked the witness why she believed the operator of the vehicle was intoxicated:

> Well first of all, the vehicle is parked partially in the roadway. Now I have stopped or come upon vehicles like that before who had mechanical problem, they couldn't get their vehicle off the road. I thought that when I saw the vehicle. But as I approached it, I didn't see any kind of mechanical problem with it. I also didn't walk all away around the vehicle simply because it's not my job to do that. I was just concerned for anybody else coming along at that time to not hit this vehicle because it was partially parked or stopped in the roadway. … And based on my observation of no one being around, seeing those fresh footprints weaving down into the ditch, not walking down into the ditch, making a turn and coming back up like a sober person—forgive me for saying that, but his footprints and my experience of being an officer and making how many drunk driving arrests over the years, that this person appeared to be intoxicated. More intoxicated at that point in time as opposed to having a medical condition. So— (170:165-66).

Finally, she testified:

> In all my years of being an officer and running into situations like this, because this is not the first time I have come upon a vehicle in the exact circumstances, it didn't turn out to be a medical condition, it turned out to be that person was under the influence (170:167).

During trial, a video of defendant's interaction with police was played during the direct testimony of Officer Ryan Jackson, Exhibit 2 (50:Exhibit 2 at 9:39, 170:205). Very early in the playing of the video, the prosecutor said:

> Okay. All right. I am having some problems here, judge because I meant to stop it. I'm sorry about that. But I'll try again in a minute. But let's talk about what we've seen so far. This conversation that's taking place, tell us where you are (50, 170:205).

At this point in the trial, the State had just inadvertently played a statement by an officer that defendant had four prior OWIs (50:Exhibit 2 at 9:39). There was no reaction from defense counsel to this comment.[2] There was no request for a sidebar from defense counsel. The prosecutor's direct examination of Officer Jackson's testimony was completed. When Officer Jackson concluded his testimony, the jury was excused for the day (170:231). The court asked the parties whether there was anything else that needed to be addressed (170:231). Both the State and defense indicated not (170:231).

It was not until the jury instruction conference at the conclusion of the evidence where the prosecutor's remarks were put in perspective on the record:

> Court: Jury has left and we're still on the record, we can go through instructions. I want to take a little break too. I did leave—there should be, what we talked about yesterday.
>
> Defense: Special instructions.
>
> Court; A special instruction. Now I think maybe what we need to think about is how that relates to Mr. Madeiros answer that he has four prior convictions. I don't want to make it too, you know, there might be a contrast or conflict there that we need to spend a little more time with—
>
> Prosecution: Right.
>
> Court: --To make sure we have the proper language, but that's what I came up with yesterday.
>
> Prosecution: And I think if you give this curative instruction close to the time you're talking about how these, you can consider these convictions but only for the purpose of credibility, and then just point them, you know, for no other reason.
>
> Court: Okay.
>
> Prosecution: I think that will work (169:77).

[2] While there is no immediate on-the-record discussion on the issue, as later cited, the record suggests the parties in some way addressed the issue the first day of trial.

During the instructions conference, the following took place:

> Court: Okay. Then let's read those two together. During the videos played at trial, you may have heard comments about prior convictions of the defendant. You may not consider these comments as proof that the defendant is guilty in this case. Follow that up with, evidence has been received that defendant has been convicted of crimes. This evidence was received solely because it bears on the credibility, etc. (169:89).

Thereafter, there was a discussion among the parties about perfecting the language of the instruction (169:89-91). When instructing the jury, the court read:

> During the videos played at trial you may have heard comments about prior convictions of the defendant. You may not consider these comments as proof that the defendant is guilty in this case. The defendant has testified that he has been convicted of crimes. This evidence was received solely because it bears on the credibility of the defendant as a witness. It must not be used for any other purpose, and particularly, you should bear in mind that a criminal conviction at some previous time is not proof of guilt of the offense now charged (169:111).

At the conclusion of the trial, defendant was convicted of operating while intoxicated and operating with a prohibited blood alcohol concentration and found not guilty of obstructing (159:185-86).

ARGUMENT

Summary of argument

Defendant is entitled to a new trial based on the fact three substantial errors were committed during the proceedings. First, the trial court erred in authorizing the admission of extensive other acts evidence regarding defendant's conviction for hit and run in Dodge County Case 2017 CT 280. The evidence was of dubious relevance to the charges defendant faced. While this was classic other acts evidence, a proper analysis was not conducted by the court

pursuant to the framework set forth in *Sullivan*, and many other cases.

Second, reversible error was committed when the State erroneously allowed the jury to hear that defendant had four prior convictions for operating while intoxicated. Defense counsel was ineffective in failing to immediately move for a mistrial based on this error. As set forth in *State v. Alexander*, 214 Wis.2d 628, 643, 571 N.W.2d 662, 668 (1997), this type of error is not cured by a cautionary instruction. Defendant was prejudiced by defense counsel's error because the jury weighed his guilt or innocence in the prism of a person who had been convicted of operating while intoxicated on four prior occasions.

Third and finally, witness Laufer's testimony was heavily laced with expert testimony that would have been inadmissible had a *Daubert* challenge been raised by defense counsel. This evidence invited the jury to conclude there was some science that allowed the witness to determine intoxication by the way a vehicle was parked or the pattern of footprints in snow.

Regardless of the trial court's odd decision not to address the issues in this case during a *Machner* hearing, case law indicates defendant is entitled to a new trial based solely on the improper admission of evidence of evidence defendant had four prior convictions for operating while intoxicated.

In the event this court is unable to so find from this record, defendant asks that the matter be remanded so a *Machner* hearing can be held, with strict time limits placed on the trial court to conduct the *Machner* hearing and to issue a ruling.

I. THE TRIAL COURT'S FAILURE TO HOLD A *MACHNER* HEARING WAS AN ERRONEOUS EXERCISE OF DISCRETION.

A. Standard of review.

1. Sufficiency of pleading of ineffective assistance of counsel.

The standard of review is set forth in *State v. Sholar,* 2018 WI 53, ¶¶50-51, 381 Wis.2d 560, 912 N.W.2d 89:

> A court properly exercises its discretion if it relies on the relevant facts in the record and applies the proper legal standard to reach a reasonable decision. A *Machner* hearing is a prerequisite for consideration of an ineffective assistance claim. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979); *see also State v. Curtis*, 218 Wis. 2d 550, 554, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998) ("assuming there are factual allegations which, if found to be true, might warrant a finding of ineffective assistance of counsel, an evidentiary hearing is a prerequisite to appellate review of an ineffective assistance of counsel issue"). A defendant is entitled to a *Machner* hearing only when his motion alleges sufficient facts, which if true, would entitle him to relief. *State v. Allen*, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. If a defendant's motion asserting ineffective assistance "does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *Sulla*, 369 Wis. 2d 225, ¶23, 880 N.W.2d 659 (citations omitted).
>
> When a circuit court summarily denies a postconviction motion alleging ineffective assistance of counsel without holding a *Machner* hearing, the issue for the court of appeals reviewing an ineffective assistance claim is whether the defendant's motion alleged sufficient facts entitling him to a hearing. *See, e.g., State v. Love*, 2005 WI 116, ¶2, 284 Wis. 2d 111, 700 N.W.2d 62.

2. Law/standard of review regarding ineffective assistance of counsel.

In *State v. Thiel*, 2003 WI 111, 264 Wis.2d 571, 665 N.W.2d 305, the Wisconsin Supreme Court discussed ineffective assistance of counsel:

> In order to find that counsel rendered ineffective assistance, the defendant must show that trial counsel's representation was deficient. (citation omitted). The defendant must show that he or she was prejudiced by deficient performance. Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. (citation omitted). When evaluating counsel's performance, courts are to be "highly deferential" and must avoid the "distorting effects of hindsight." (citation omitted). Counsel need not be perfect, indeed not even very good, to be constitutionally adequate. (citation omitted). In order to demonstrate that counsel's deficient performance is constitutionally prejudicial, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (citation omitted). *Id.* at ¶¶18-20.

B. Defendant's postconviction motion alleges sufficient facts to entitle him to a *Machner* hearing.

On 8/20/20, an 11-page postconviction motion was filed on defendant's behalf (153). It is not a bare-bones document filled with conclusory allegations. The theories of ineffective assistance of counsel are articulated. Facts already in the record are alleged in support of each motion. Law is cited in the support of the motions. Counsel for defendant does not know how the issues could have been presented any clearer.

Defendant has alleged trial counsel made three substantial errors. He did not make sure the trial court conducted a *Sullivan* analysis about facts surround a prior hit and run accident resulting in defendant's conviction before authorizing its admission. He did nothing when evidence was inadvertently introduced evidence defendant had four prior

convictions for operating while intoxicated. He did not object to expert evidence from witness Laufer of dubious legitimacy.

During the postconviction proceedings, the State wrote a brief in opposition to holding a *Machner* hearing (153). The State argued there was no evidence of ineffective assistance of counsel (153:1).

Regarding the *Sullivan* issue, it is obvious the trial court did not do a proper evidentiary analysis. There was no weighing of the probative value of the evidence versus the danger of unfair prejudice, the last step of a *Sullivan* analysis. The other acts evidence admitted at trial was devastating and extremely prejudicial to the defendant. It included:

> 1. Defendant fled the scene of an accident involving another occupied vehicle on 6/27/17.
> 2. As a result of the accident, defendant's operating privileges were revoked.
> 3. As a result of the accident, defendant was placed on probation.
> 4. A condition of that probation was that defendant not drink alcohol (170:101-02)

There was an obvious danger that a jury hearing this evidence would have concluded that defendant may have been intoxicated when he left the scene of the 6/17/17 incident. As will be argued in more detail below, the State's reason for wanting the evidence admitted was specious. A fair analysis of the probative value of the evidence versus the danger of unfair prejudice to the defense militated against its admission. In its argument, the State argues defendant's attorney wanted this horrible evidence admitted (153:4)! Really? Would that have been a good idea? Isn't that why a *Machner* hearings is necessary on this issue?

As to the issue of the admission of defendant's four prior convictions, the State made this argument:

> During Deputy Ryan Jackson's testimony the jury watched a bodycam video of his interaction with defendant. Certain audio portions of the video were muted, however, to prevent the jury from hearing irrelevant information. At one point in the playing of the bodycam video, however, a certain portion of the video that was to be muted was in fact audible. During these few seconds the jury may have heard a statement from a police officer concerning the defendant having prior OWI convictions. The audio portion of the video was not

> taken down by the Court Reporter and, thus is not contained in the transcript. There was no objection and no motion for a mistrial made by Trial Counsel. The parties did nothing to draw the jury's attention to the content of those few seconds so it is possible that some or all of the jury may not have heard or given any consideration to the officer's statement about prior OWI convictions (153:7).

The State's argument amplifies why, at a minimum, a postconviction motion hearing is necessary. The State, in a rather understated fashion argues that evidence about defendant's prior OWI convictions "may have been heard" by the jury. Actually, it was that defendant had **four** prior OWI convictions (50:Exhibit 2 at 9:39). The State suggests the jury may not have heard it. Maybe the jurors were all sleeping. Maybe a huge truck roared by at that time it was played and muffled this portion of the tape, making it impossible for the jury to hear it. A more reasonable inference is that when a recording is played for a jury, most or all of them hear it and determine the weight to put on it. The record is not crystal clear on this point. Defendant does not have to accept this gap in the record. Defendant has an absolute right to develop the record as to what actually happened in this regard for appeal.

Prior to trial, the State recognized the portion of the relevant recording about prior OWIs could not be played at trial (171:33, App. at 107). The record is also vague on how the curative instruction came to be. The court referenced a discussion about "what we talked about yesterday" during the instruction conference (169:77). That discussion does not appear to be on the record. What happened during this discussion? Trial counsel can testify about this. Again, this is why a postconviction motion hearing is necessary.

The State admits defense counsel did not object to the evidence and did not ask for a mistrial. The obvious question is why not? In his postconviction motion, defendant has alleged trial counsel's failure to act in these regards constitute ineffective assistance of counsel. Again, this is why postconviction motion hearings are necessary. The record does not conclusively demonstrate trial counsel's actions were reasonable.

This error was not harmless for the reasons argued later in this brief.

For the reasons set forth below, defendant asserts on this issue alone, he is entitled to a new trial, regardless of whether the matter is remanded for a *Machner* hearing.

Finally, as to the testimony of witness Laufer, this evidence was expert testimony. She testified she could tell whether someone was intoxicated by footprints in the snow and possibly through the way a vehicle was parked along the roadway. Other than the anecdotal experiences, there are no experts in footprint patterns or car parking techniques as proof someone was operating while intoxicated. This expert testimony would have been inadmissible under *Daubert.* Defense counsel did not object to the testimony. Why did he not object? These are fair and appropriate questions to pose to counsel during a *Machner* hearing.

As argued above, there are sufficient allegations to trigger the necessity for a *Machner* hearing. If a new trial is not ordered for the reasons set forth below, remand for a *Machner* hearing would be appropriate.

II. DEFENDANT IS ENTITLED TO A NEW TRIAL BASED ON ERRORS COMMITTED AT TRIAL.

E. *Sullivan* issue.

In *State v. Sullivan*, 216 Wis.2d 768, 771, 576 N.W.2d 30, 32-33 (1998), the court set forth the framework for analyzing the admissibility of other acts evidence:

> The first issue, the admissibility of other acts evidence, is addressed by using the three-step analysis set forth below. This analytical framework (or one substantially similar) has been spelled out in prior cases, in Wis. JI Criminal No. 275 Comment at 2 (Rel. No. 28- 12/91) and in Wis. JI Criminal No. 275.1 Comment: Other Acts Evidence (Rel. No. 24- 1/90).
>
> The three-step analytical framework is as follows:
>
> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?

> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? See Wis. Stat. § (Rule) 904.03.
>
> If the other acts evidence was erroneously admitted in this case, the second issue presented is whether the error is harmless or prejudicial.

The *Sullivan* court also set forth the standard of review:

> The applicable standard for reviewing a circuit court's admission of other acts evidence is whether the court exercised appropriate discretion. *See State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498 (1983). An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. See *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175 (1982)(citing *McCleary v. State*, 49 Wis.2d 263, 182 N.W.2d 512 (1971)). A circuit court's failure to delineate the factors that influenced its decision constitutes an erroneous exercise of discretion. *See McCleary*, 49 Wis.2d at 282, 182 N.W.2d 512. When a circuit court fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion. *See Pharr*, 115 Wis.2d at 343, 340 N.W.2d 498. Id. at 780-81, 576 N.W.2d 36.

F. Analysis of *Sullivan* issue.

When one applies the *Sullivan* framework to the proffered evidence, it is readily apparent evidence related to what happened in 2017 CT 280 was not appropriately admissible. A great deal of other acts evidence related to this case was admitted, including:

> a. Defendant fled the scene of an accident involving another occupied vehicle on 6/22/17.
> b. As a result of the accident, defendant's operating privileges were revoked.
> c. As a result of the accident, defendant was placed on probation.
> d. A condition of that probation was that defendant not drink alcohol (170:101-02).

The evidence in question does not fit squarely within any of the acceptable purposes set forth in Wis. Stat. §904.04(2). It was not evidence tending to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. The burden of demonstrating a permissible purpose for admitting other acts evidence exists is borne by the proponent, in this case, the State. *See State v. Payona*, 2009 WI 86, ¶¶63, 68 n. 14, 320 Wis.2d 348, 768 N.W.2d 832.

It appears the State's theory was that because the defendant mentioned the prior crime when discussing the crimes in this case, it was relevant to providing context to his entire story. The State argued:

> You know, you know, so he's actually, the defendant is bringing up the fact he's trying to distinguish the crash six months ago from what happened tonight. So he's like, hey tonight's different. I didn't hit anybody. We'll have to watch the video to see his exact words. And I think that's a very important thing for the jury to learn that, you know, he's acknowledging that six months earlier there was this incident. He's convicted. He's been convicted for hit and run. He was on probation for the hit and run with this happened. His license had been taken away for hit and run, you know, because this happened. So it really gives the jury the, puts things into perspective. But it also, judge, supports the element of intent, you know. I have a charge Count 3, obstructing an officer, by giving false information (171:21-22).

Counsel for defendant is unaware of any specific case law that supports the State's cited purpose for introducing the evidence. For that reason alone, the other acts evidence should have been excluded.

Additionally, the evidence was not relevant under the two relevance prongs of the *Sullivan* analysis:

> The first consideration in assessing relevance is whether the evidence relates to a fact or proposition that is of consequence to the determination of the action. The substantive law determines the elements of the crime charged and the ultimate facts and links in the chain of inferences that are of consequence to the case. Thus the proponent of the evidence, here the State, must articulate the fact or proposition that the evidence is offered to prove. The second consideration in assessing relevance is probative value, that is, whether the evidence has a tendency to make a consequential fact more probable or less probable than it would without the evidence. Id. at 785-86.

This case is easy to boil down as to what facts were in contention. Was defendant Madeiros intoxicated when he abandoned his vehicle? Did defendant Madeiros lie to police about why he left the vehicle? The State contended he left because he was operating while intoxicated. Defendant's position was he left because of mechanical trouble. Whether defendant had previously left the scene of an accident where he struck an occupied vehicle several months earlier, where he was legally required to stay, would not tend to prove any fact in contention in this case. How does it prove he was operating while intoxicated in this case? How does the mere mention of it in his interaction with police tend to prove he was intoxicated? How does his truthful admission about that incident to police prove he was obstructing the officers? The same is true about the facts he was on probation and had a no drink condition. How does that prove he was operating while intoxicated? How does that prove he lied to police? The same is true about his license being revoked. How does that prove he was operating while intoxicated? How does prove he lied to police? He wasn't even on trial for operating while revoked. He was not in a probation revocation hearing. There was no real relevance to any of this evidence.

The final prong of *Sullivan* requires the court to balance the probative value of the proffered evidence with the danger of unfair prejudice. Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case. *Id*. at 789-90. The trial court simply did not do this step (171:36-37, App. at 110-11). For the reasons previously stated, the proffered evidence had no real relevance to the issues in contention at trial. None of the evidence was closely tied to the facts of this case. Was there a danger of unfair prejudice to the defense? The answer to that question is obvious. The other acts evidence allowed the jury to infer that the incident in June of 2017 was an alcohol-related offense and that defendant avoided conviction for operating while intoxicated on this occasion by leaving the scene of the accident. It allowed the jury to conclude he was a criminal that was unwilling to follow his rules of probation. It allowed the jury to conclude he drove while revoked even though he was not charged with the offense. The other acts evidence was exactly the type of evidence that would tend to cause a jury to base its decision on something other than the established propositions in the case. The State argued that defendant wanted to avoid contact with others and to get away from the car because he was intoxicated when he left the vehicle (159:129). The State quoted the Bible for the phrase that the wicked flee when no man pursueth (159:129). The fact defendant was on probation, that he had a no drink rule related to that probation, that he had been in a prior accident or that he had his license revoked enhanced the State's argument only by improperly damaging defendant's credibility in the eyes of the jury with other bad acts. To ensure defendant his right to a fair trial, this other acts should not have been admitted. The reference to the prior case could have easily been excised from the portion of the video played for the jury without denying the State a full and fair opportunity to present its case.

Finally, defendant takes issue with the State's contention the defense wanted this evidence introduced into trial (153:5). While the defense used the fact defendant was on probation and had a no drink rule of that probation in its trial strategy, it presumably did so only after the court told the defense the other acts evidence was coming in during the pretrial motion hearing. Presumably, the defense at this point was making the best of a bad situation.

The erroneous authorization of the evidence of the other acts evidence was horrifically prejudicial and of marginal if any relevance. The trial court's error deprived defendant of his right to a fair trial because this evidence had a tendency to influence the outcome by improper means, to arouse the jury's sense of horror, to provoke the jury's instinct to punish and to base its decision on something other than the established propositions in the case. At a minimum, it allowed the jury to infer defendant was a criminal who had previously avoided an OWI conviction by fleeing the scene of an accident on a prior occasion. A new trial is warranted on this issue alone.

G. Improper introduction of prior OWI convictions.

1. Relevant case law.

Case law replete with law recognizes the damages caused by informing a jury about prior operating while intoxicated convictions at a trial on an operating while intoxicated trial. In *State v. Alexander*, 214 Wis.2d 628, 571 N.W.2d 662 (1997), the defendant faced a charge of operating while intoxicated as a third offense. Prior to trial, the defendant offered to stipulate to the prior convictions to avoid the jury hearing about them. Because the trial court held they were part of the State's proof, the trial court allowed the prior convictions in. Defendant was convicted and appealed. On appeal, the *Alexander* court recognized:

> The Wisconsin Criminal Jury Instructions Committee (Committee) recognized the inherent danger of unfair prejudice to a defendant of admitting any evidence of the defendant's prior convictions, suspensions or revocations under Wis. Stat. § 343.307(1) and submitting the element to the jury. See Wis. JI Criminal 2660-2665 Introductory Comment at 7. The Committee suggested

> that at the defendant's request the court give a cautionary instruction to the jury explaining that evidence of the prior offenses is relevant only as to the status of the defendant's driving record and should not be used for any other purpose. See Wis. JI Criminal 2660B. The Committee recognized, however, that "the potential prejudice to the defendant may be significant and may not be adequately cured by a limiting instruction." Wis. JI Criminal 2660-2665 Introductory Comment at 7. We agree with the Committee's concerns. Evidence of prior convictions may lead a jury to convict a defendant for crimes other than the charged crime, convict because a bad person deserves punishment rather than based on the evidence presented, or convict thinking that an erroneous conviction is not so serious because the defendant already has a criminal record. *See Old Chief*, 519 U.S. at ---- - ----, 117 S.Ct. at 650-651 (citations omitted); see also *Whitty v. State*, 34 Wis.2d 278, 292, 149 N.W.2d 557 (1967); *State v. Landrum*, 191 Wis.2d 107, 122, 528 N.W.2d 36 (Ct.App.1995). A jury is likely to rely on the prior convictions as evidence of a defendant's bad character so as to "deny him a fair opportunity to defend against a particular charge." *Old Chief*, 519 U.S. at ----, 117 S.Ct. at 651 (quoting *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S.Ct. 213, 218, 93 L.Ed. 168 (1948)). Id. at 643- 44, 571 N.W.2d at 668.

The *Alexander* case specifically addressed prior OWI convictions:

> Proof of a status element goes to an element entirely outside the gravamen of the offense: operating a motor vehicle with a prohibited alcohol concentration. The evidence has no place in the State's story, other than to lead the jurors to think that because the defendant has two prior convictions, suspensions or revocations, he was probably driving while intoxicated on the date in question. We conclude that introducing evidence of the defendant's prior convictions, suspensions or revocations served no purpose other than to prove the status element of the charged offense. Admitting this evidence to prove this status element, and submitting the status element to the jury adds nothing to the State's evidentiary depth or descriptive narrative. It does nothing to fulfill a juror's expectations. This evidence and element does, however, tell a juror that the defendant has had a problem in the past, probably with drinking and driving. It raises an inference that the defendant has a bad character and a propensity to drink and drive, and that is the very result

> prohibited by the rules of evidence. Id. at 649- 50, 571 N.W.2d at 671.

In the recent case, of *State v. Diehls*, 2020 WI App 16, 391 Wis.2d 353, 941 N.W.2d 272, the court reaffirmed the law from *Alexander*:

> When it comes to the danger of unfair prejudice, the "nature of the drunk driving offense and the social stigma attached to it" makes repeat OWI prosecutions "unique." *State v. Warbelton*, 2009 WI 6, ¶¶45, 46, 315 Wis. 2d 253, 759 N.W.2d 557. In these cases, if the jury infers that a defendant has multiple prior OWI convictions, this presents an "extremely high" risk of unfair prejudice for three reasons: First, upon learning that the defendant has prior convictions, suspensions, or revocations, jurors are likely to infer that these prior offenses were also for drunk driving-precisely the same offense the defendant is charged with now. Second, upon learning that the defendant had multiple prior offenses, jurors are likely to infer that the current charge is part of a pattern of behavior-that is, that the defendant habitually drives while intoxicated. Third, given the defendant's probable habit of driving while intoxicated, jurors might conclude that even if the defendant is not guilty on the particular occasion charged, the defendant likely committed the same offense on many other occasions without being caught. As a result of the propensity inferences that the jury is likely to make, "the jury is likely [to] convict, even if there is not persuasive proof that the defendant is guilty of the instant charge." *Id*. at ¶47.

2. Analysis.

There is no question the jury erroneously heard that defendant had been convicted of operating while intoxicated on four occasions. The State essentially admitted that in its response to the postconviction motion (153:7). The State argues because a cautionary instruction was given and cautionary instruction “completely cure evidentiary errors,” there was no damage to the defense (153:7). However, as recognized in *Alexander, supra,* case law supports the conclusion that a cautionary instruction cannot cure this type of error in an OWI trial. This type of evidence tends to cause a jury to convict for an improper reason. Trial counsel did not immediately move for a mistrial. Based on the law from

Alexander and now *Diehl*, this would seem to have been the best course for defense counsel to take. It is difficult to imagine why defense counsel, instead of moving for a mistrial, would have thought it was strategically sound to instead rely on a cautionary instruction, notwithstanding the law from *Alexander*. This evidence was highly prejudicial by definition. The issue in this case was whether defendant had consumed alcohol to the point of legal intoxication after he last operated his motor vehicle. His defense was that he had consumed a substantial amount of alcohol after he last drove, suggesting he was not legally intoxicated at the time of his last operation of the vehicle. There was evidence to support this defense including evidence that when Officer Olbinski had contact with defendant well over an hour after defendant had last driven, that he had a strong odor of intoxicants on his person, allowing the jurors to infer he had consumed intoxicants after he had driven the vehicle (170:194). There was no direct evidence defendant had consumed alcohol prior to his last operation of the vehicle. The facts supporting the defense meshed the majority of the State's evidence. Evidence of defendant's other four prior OWI convictions would have almost certainly caused the jury to be very skeptical of his defense for the reasons cited in *Alexander* and *Diehl*. Again, this is the type of evidence that would have a tendency to influence the outcome by improper means, to arouse the jury's sense of horror, to provoke the jury's instinct to punish and to base its decision on something other than the established propositions in the case. There is a reasonable likelihood the result of the trial would have been different but for this error. Regardless of trial counsel's decisions or strategy, this court should order a new trial based on this error.

H. Expert testimony from witness Laufer.

1. Applicable law.

In order for expert testimony to be admitted, it must be able to pass the *Daubert* standard. That standard is discussed in *State v. Giese*, 2014 WI 92, 356 Wis.2d 796, 854 N.W.2d 687:

> The admissibility of expert testimony is governed by WIS. STAT. §907.02. Prior to 2011, that statute made expert testimony admissible "if the witness is qualified to testify and the testimony would help the trier of fact understand the evidence or determine a fact at issue." *State v. Kandutsch*, 2011 WI 78, ¶26, 336 Wis.2d 478, 799 N.W.2d 865; 2011 Wis. Act 2. In January 2011, the legislature amended §907.02 to make Wisconsin law on the admissibility of expert testimony consistent with "the *Daubert* reliability standard embodied in Federal Rule of Evidence 702." *Kandutsch*, 336 Wis.2d 478, ¶ 26 n. 7, 799 N.W.2d 865. The amended rule provides as follows:
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. Sec. 902.07(1).
>
> The court's gate-keeper function under the *Daubert* standard is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 n. 7, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The court is to focus on the principles and methodology the expert relies upon, not on the conclusion generated. *Id.* at 595, 113 S.Ct. 2786. The question is whether the scientific principles and methods that the expert relies upon have a reliable foundation "in the knowledge and experience of [the expert's] discipline." *Id.* at 592, 113 S.Ct. 2786. Relevant factors include whether the scientific approach can be objectively tested, whether it has been subject to peer review and publication, and whether it is generally accepted in the scientific community. Id. at 593-94, 113 S.Ct. 2786.

2. Analysis.

Witness Laufer testified to her 20 years of experience as a police officer. She testified about her areas of expertise. During the course of her testimony, she provided the jury with two areas of expert testimony of dubious foundation. First, she testified that she could tell whether someone was intoxicated by the way the person parked his or her vehicle. Second, she testified she could tell whether someone was intoxicated by the nature of his or her footprints in the snow. With regard to this opinion, she followed the testimony up with the "proof" that every time she saw footprints like this, it ended with the discovery of an intoxicated driver. There are no such studies that equate intoxication with the way a vehicle is parked. There are no studies that equate the pattern of footprints in the snow with intoxication. It is anecdotal evidence, not expert testimony based on empirical data. Coming through the prism of the retired officer's experiences, there is a reasonable likelihood it would be misused by the jury. That is not to say witness Laufer could not testify about what she observed about the odd pattern of footprints, leaving the State with an avenue of commonsense argument. Trial counsel did not object to this expert evidence. Had he done so, the trial court would have had to exclude it under a *Daubert* analysis. In failing to object to the evidence, trial counsel's performance was deficient. During closing argument, the State exploited this expert testimony to argue defendant was drunk before he abandoned his car (169:126-28). While this error in itself would be insufficient justify a new trial, coupled with the other errors in the case, the cumulative effect of the errors[3] denied defendant his right to a fair trial.

[3] The cumulative effect of errors by counsel can be considered in determining ineffective assistance of counsel. *See State v. Thiel* at ¶¶61-63.

CONCLUSION

For the reasons set forth above, defendant should be granted a new trial based on ineffective assistance of counsel. In the alternative, the matter should be remanded with instructions for the trial court to hold a *Machner* hearing and to decide the motion within time limits set by this court.

Dated: May 29, 2021

_____
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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of this brief is 7996 words.

Dated: May 29, 2021

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Philip J. Brehm

APPENDIX CERTIFICATION

I certify that filed with this brief, as part of this brief, an appendix complying with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court entries; (3) the findings or opinions of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning related to those issues.

I further certify if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: May 29, 2021

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Philip J. Brehm

CERTIFICATE OF COMPLIANCE
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I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 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 and that 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: May 29, 2021

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Philip J. Brehm

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