STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2021AP405-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARTY S. MADEIROS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE DODGE COUNTY CIRCUIT COURT, THE HONORABLE MARTIN J. DEVRIES, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the circuit court properly permit the State to introduce statements defendant-appellant Marty S. Madeiros gave during his interview with police in this case related to Madeiros's prior hit-and-run conviction to prove a charge of obstructing a police officer?

This Court should affirm the circuit court. The information about the hit and run was properly admitted pursuant to *Sullivan* to give context to Madeiros's statements during his police interview and as evidence of his intent to lie to the police.

2. Did the circuit court properly deny, without holding a *Machner* hearing, Madeiros's postconviction motion alleging his trial counsel was ineffective in the following ways:

A. Failing to "make sure the trial court conducted a *Sullivan* [other acts] analysis" regarding Madeiros's prior hit-and-run conviction;

B. Failing to move for a mistrial when the jury inadvertently heard that Madeiros had four prior OWI convictions during a video clip;

C. Failing to object to eyewitness Emily Laufer's testimony—that she thought Madeiros was likely intoxicated based on his car being left on the highway with its lights on, his footprints in the snow weaving back and forth, and the below-zero temperature—as an improper expert opinion.

This court should affirm the circuit court. Madeiros's motion failed to allege any facts that would establish deficient performance or prejudice even if true.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case deals only with the application of settled law to the facts, which can be adequately addressed on briefs.

STATEMENT OF THE FACTS

The State charged Marty S. Madeiros with one count of operating while intoxicated as a fifth offense, one count of operating with a prohibited alcohol concentration, and one count of obstructing an officer after a December 30, 2017 incident where Dodge County Sheriff's officers found him highly intoxicated and stumbling down Wild Goose Trail after abandoning his vehicle with a flat tire on a highway. (R. 13:1; 169:70.)

The officers testified that they responded to several citizen reports around 1:00 a.m. that an abandoned vehicle with its headlights on was obstructing a lane of traffic on Highway 60 near the Wild Goose Trail. (R. 170:105–08, 169, 178–79.) One of those citizens, Emily Laufer, was a retired police officer who was returning from a family Christmas party. (R. 170:125–28.) Laufer testified that because it was below freezing, she stopped and assisted the officers in trying to find the person so the person would not die of exposure. (R. 170:137–38.) Her recorded phone calls with dispatch, including her suspicion that the person they were looking for was drunk because the footprints she was following in the snow were weaving all over the trail, were read for the jury. (R. 170:139–45.)

A deputy finally caught up with Madeiros on the trail about three miles from the car. (R. 170:78, 180.) He testified that Madeiros was heavily intoxicated. (R. 170:188.) He took Madeiros to the sheriff's office to speak with him out of the

cold. (R. 170:190.) The jury was shown video of this interview, which included some discussion about a hit and run offense Madeiros had committed a few months earlier, for which his license was revoked and for which he was on probation at the time he committed this offense. (R. 170:205–14.) Maderios's ever-changing story that he gave police during this interview trying to distinguish this incident from the hit and run and claiming he had not committed any crime before abandoning the car was the basis for the obstruction charge. (R. 170:79.)

The jury found Madeiros guilty of the OWI and PAC charges but acquitted him on the obstruction charge. (R. 169:185–86.) The court sentenced him to three years of initial confinement and five years of extended supervision, consecutive to any other sentence. (R. 107.) Madeiros moved for a new trial, alleging that the circuit court erroneously admitted the information about his hit and run conviction and alleging that counsel was ineffective in several ways. (R. 149.) The State responded and argued that the court should deny a hearing because the motion was insufficiently pleaded. (R. 153.) The circuit court entered an order summarily denying Madeiros's motion without a written opinion on it after the statutory sixty-day time limit for a decision elapsed. (R. 157.) Madeiros appeals.

ARGUMENT

I. The circuit court properly admitted the State's evidence that Madeiros had been involved in a hit-and-run roughly six months before this incident.

A. Standard of review

This Court reviews a circuit court's decision to admit other acts evidence for an erroneous exercise of discretion. *State v. Hurley*, 2015 WI 35, ¶ 28, 361 Wis. 2d 529, 861 N.W.2d 174. "A reviewing court will uphold a circuit court's

evidentiary ruling if it 'examined the relevant facts, applied a proper standard of law, used a demonstrated rational process and reached a conclusion that a reasonable judge could reach.'" *Id.* (citation omitted).

If the circuit court fails to sufficiently set forth its reasoning, however, that does not mandate reversal. *State v. Sullivan*, 216 Wis. 2d 768, 781, 576 N.W.2d 30 (1998). In that instance, "appellate courts independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion." *Id*.

B. The portions of Madeiros's interview with police discussing his previous hit and run conviction were not other acts evidence; they were part of the crime of obstructing police with which Madeiros was charged.

Here, the State contended that Madeiros committed the crime of obstructing an officer by lying to them about his reasons for leaving the car. (R. 171:26–27, 31.) One of the elements the State had to prove to satisfy its burden on that charge was that Madeiros knew that Deputies Jackson and Oblinski were officers acting in an official capacity and with lawful authority and Madeiros knew his conduct would make it more difficult for them to perform their duties. Wis. JI–Criminal 1766 (2010). And as the totality of Madeiros's statement to police shows, the information about his hit and run was not "other acts" evidence; it was a substantive part of his lie to police, making it part of the crime of obstruction and not an "other act" at all.

When confronted by police about why he had abandoned his car halfway off the road in the middle of a below-freezing night, Madeiros continually tried to convince the officers that he left the car six hours earlier, that he was walking to the nearest town for help because the car "stopped operating" and he forgot his cell phone at home, and that he did not drink

anything until he left the car. (*See, e.g.*, R. 50 Ex. 2 00:26–09:40.) The deputies pointed out to Madeiros that he had committed very similar conduct in the hit and run case in abandoning the car, taking off running on foot, and then telling an unbelievable story about what happened. (R. 50 Ex. 2 10:15–11:00.) In an effort to try to convince the deputies of the truth of his story, Madeiros himself repeatedly insisted that unlike in the hit and run he did not hit anything in this incident, implying (falsely, in the State's view) that he had no reason to abandon the vehicle this time for any reason other than to find help because he had not committed any crime (though he did admit that merely possessing alcohol violated his probation for the hit and run). (R. 50 Ex. 2 11:00–19:54.)

In other words, Madeiros lied to police about his reason for abandoning his vehicle (that he was attempting to avoid arrest for driving while intoxicated and possible probation revocation for being intoxicated and driving without a license), and instead tried to convince them that he forgot his phone, the car became disabled, he left the car to get help and not to run away (unlike in the hit and run), and that he only drank after he left the car. He repeatedly tried to sell this story by referring to his hit and run and pointing out that unlike in that incident, in this one, he hadn't committed any crime before he left the car on foot to find help. So the information about the hit and run wasn't "other acts" evidence. It was part of the lie that Madeiros told police that was the basis for the obstruction charge. Accordingly, the circuit court could not have erred in admitting this evidence because it was direct, relevant evidence of Madeiros's obstructing the deputies. Wis. Stat. § 904.02 ("All relevant evidence is admissible.")

C. Other acts evidence is admissible under the three-pronged *Sullivan* test.

Madeiros's argument that this evidence was improperly admitted under *Sullivan* fails on its own terms, however. Even if this Court agrees with Madeiros that evidence of his prior hit and run was other acts evidence, the record shows that the circuit court conducted the correct analysis and properly exercised its discretion to admit this evidence.

Other acts evidence is admissible if it is offered for a permissible purpose, if it is relevant, and if its probative value is not substantially outweighed by the risk of unfair prejudice or confusing the jury. Wis. Stat. § 904.04(2); *Sullivan*, 216 Wis. 2d at 772–73. The proponent bears the burden on the permissible-purpose and relevance prongs; the opponent bears the burden to establish unfair prejudice. *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399.

Permissible purposes include "establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *State v. Hammer*, 2000 WI 92, ¶ 22, 236 Wis. 2d 686, 613 N.W.2d 629 (citation omitted). The statute "favors admissibility in the sense that it mandates the exclusion of other crimes evidence in only one instance: when it is offered to prove the propensity of the defendant to commit similar crimes." *State v. Speer*, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993); *State v. Grande*, 169 Wis. 2d 422, 434, 485 N.W.2d 282 (Ct. App. 1992) (noting that the rules "favor admissibility").

D. The circuit court reasonably concluded at the pretrial motion hearing that the evidence that Madeiros was on probation for a hit-and-run that occurred roughly six months before this incident was admissible pursuant to *Sullivan*.

1. The evidence was submitted for the proper purpose of showing the context of Madeiros's statements to the officers, his modus operandi of abandoning the sites where he commits traffic crimes, and his intent to lie to the police which was the basis for the obstruction charge.

The first step of the *Sullivan* test required the State to show that the evidence was offered for a permissible purpose. This step is "not demanding" and "is largely meant to develop the framework for the relevancy determination." *Marinez*, 331 Wis. 2d 568, ¶ 25. Additionally, "[t]he purposes for which other-acts evidence may be admitted are 'almost infinite[;]'" the only impermissible purpose is to show propensity to commit the crime. *Id.* (citation omitted).

Here, the State offered the evidence that Madeiros committed a hit-and-run roughly six months earlier for three permissible purposes: to give context to his statements to police that he "didn't hit anything tonight" during his interview (R. 171:20–22); to show that Madeiros's modus operandi when he commits a traffic crime is to abandon the scene and lie to police about what happened (R. 171:20–23); and to show his intent to lie to police about why he abandoned the car, which was required to prove the obstructing an officer charge. (R. 171:22.) Those are all permissible purposes for offering this evidence, as the circuit court recognized. (R. 171:22–26.) The court correctly concluded that the State met the first prong of the test.

2. The hit and run was relevant to show context, modus operandi, and intent to lie to the police.

The next step in the *Sullivan* test required the State to show that the prior hit and run conviction and surrounding circumstances were "relevant under the two relevancy requirements in Wis. Stat. § 904.01." *Marinez*, 331 Wis. 2d 568, ¶ 19. The first of these requirements is that "the evidence relates to a fact or proposition that is of consequence to the determination of the action." *Id.* ¶ 33 (citation omitted). The second requirement is that "the evidence has a tendency to make a consequential fact more probable or less probable than it would be without the evidence." *Id.* (citation omitted).

The State charged Madeiros with three crimes: operating a motor vehicle while intoxicated, operating a motor vehicle with a prohibited alcohol concentration, and obstructing an officer. So to prove these crimes, the State had to prove the following elements:

For count one, the State had to prove that Madeiros physically manipulated or activated any components of the car necessary to put it in motion, and that at the time he did so his "ability to operate a vehicle was impaired because of consumption of an alcoholic beverage." Wis. JI–Criminal 2663 (2020).

For count two, the State had to prove that Madeiros physically manipulated or activated any components of the car necessary to put it in motion, and that at the time he did so his blood alcohol concentration was more than .02 grams of alcohol per 100 milliliters of blood. Wis. JI–Criminal 2660C (2007).

Finally, for count three, again, the State had to prove that Madieros's conduct prevented or made more difficult the performance of the deputies' duties; the deputies were acting in an official capacity, meaning they were performing duties

that they are employed to perform; the deputies were acting in conformance with the law; and that Madeiros knew that Deputies Jackson and Oblinski were officers acting in an official capacity and with lawful authority and Madeiros knew his conduct would obstruct them. Wis. JI–Criminal 1766.

"The measure of probative value in assessing relevance is the similarity between the charged offense and the other act." *State v. Hunt*, 2003 WI 81, ¶ 64, 263 Wis. 2d 1, 666 N.W.2d 771. "Similarity is demonstrated by showing the 'nearness of time, place, and circumstance' between the other act and the alleged crime." *Id.* (citation omitted).

Here, the circuit court properly determined that all of these criteria are met. (R. 171:25–43.) Madeiros's prior hit and run conviction was relevant "to show the context of [these] crime[s] and to provide a complete explanation of the case." *Hunt*, 263 Wis. 2d 1, ¶ 58. Madeiros made numerous statements referring to his previous hit and run and his probation during his interview with the deputies. The deputies did as well, because Deputy Oblinski had been involved in the investigation of the hit and run. Omitting all of these references from the interview would have left the jury with isolated snippets of the conversation that likely would have appeared disconnected and made little sense. It was also relevant to show that Madeiros had a particular modus operandi of how he behaves when he has committed a traffic crime: he flees the scene, abandons the car, and then tries to make up implausible excuses for it when police finally reach him.

And the hit and run was extremely similar to the crimes with which Madeiros was charged in this case. First, it was near in time: it occurred only six months before this incident. (R. 171:24.) Second, it was near in place: the hit and run took place while Madeiros was driving down a highway in Dodge County late at night near Beaver Dam. (R. 171:19.)

Finally, the hit and run was exceptionally similar in circumstances to the charges in this case. Madeiros crashed into the back of the car in front of him while driving late at night. (R. 171:19.) Madeiros sped away instead of stopping, and when his car became disabled before he made it home, he abandoned it on the side of the road and took off on foot. (R. 171:19–20.) After they ran the license plate on Madeiros's abandoned car, police—one of whom was Deputy Oblinski, the same deputy investigating this case—went to Maderios's house trying to find out what happened, but his wife refused to provide any information. (R. 171:20.) Police finally spoke to Madeiros three days later and he changed his story multiple times about what happened and why he fled the scene, and implausibly claimed he walked home three hours in the dark from Beaver Dam to Fox Lake. (R. 171:20.)

Here, Madeiros abandoned his car on the side of a highway in Dodge County late at night after it became disabled. It was seven below zero outside and instead of staying with his car, Madeiros fled the scene. When officers caught up with him he was visibly, demonstrably intoxicated. He then gave them multiple shifting implausible stories claiming he was not drinking until he began walking down the trail and trying to convince them that he abandoned the car six hours previously. He referenced the hit and run multiple times during his interview with police about this incident, trying to claim he had no reason to flee this time because he didn't hit anything. The circumstances of the prior hit and run were nearly identical to this incident and easily meet the test for relevance to show context and that this is Madeiros's modus operandi: he commits a traffic crime, abandons his car so he won't get caught, and then tries to talk his way out of it by lying repeatedly to see if he can fool the police into believing his story.

For these reasons, the hit and run was relevant to all of the charges and gave context to Madeiros's and the deputies'

conversation once they located him and showed that he behaves a certain way to try to absolve himself of a traffic crime. This conduct made it substantially more likely that Maderios was guilty of the crimes charged in this case, because he behaved the same way here that he did when trying to escape responsibility for the hit and run.

The prior hit and run was also particularly relevant to show motive and intent for Madeiros to lie to the deputies, which was one of the elements of the obstructing charge. Motive is "the reason which leads the mind to desire the result of an act. In other words, a defendant's motive may show the reason why a defendant desired the result of the crime charged." *State v. Fishnick*, 127 Wis. 2d 247, 260, 378 N.W.2d 272 (1985) (citation omitted). Intent means the person did something knowingly and purposefully. Madeiros repeatedly tried to convince the police that he had not driven drunk by referring to his prior hit and run conviction, noting that he had a reason to run away then because he had hit something and suggesting, therefore, that he had no reason to intentionally flee the scene because he had not committed any crime this time. This explanation made no sense and made it more probable that Madeiros was intentionally trying to mislead the police about whether he was driving while intoxicated.

The circuit court properly determined that Madeiros's prior hit and run was relevant to this offense.

3. The probative value of bringing in Madeiros's prior hit and run conviction was not substantially outweighed by the danger of unfair prejudice.

"The probative value of evidence 'is a function of its relevance under Wis. Stat. § 904.01.'" *Hurley*, 361 Wis. 2d 529, ¶ 87 (citation omitted). "Essentially, probative value reflects

the evidence's degree of relevance. Evidence that is highly relevant has great probative value, whereas evidence that is only slightly relevant has low probative value." *Id.*

In the other acts context, "[p]rejudice is not based on simple harm to the opposing party's case, but rather 'whether the evidence tends to influence the outcome of the case by improper means,'" making it "unfair" prejudice. *Id.* ¶ 87 (citation omitted). Unfair prejudice results "when the proffered evidence . . . 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.* ¶ 88 (citation omitted). "If the probative value [of the evidence] is close to or equal to its unfair prejudicial effect, the evidence must be admitted." *Id.* ¶ 87.

Here, the probative value of the details of Madeiros's hit and run conviction was very high. As explained above, the facts in the hit and run were nearly identical to the facts here. That made the hit and run highly relevant to whether Madeiros committed the conduct charged in this case, because it showed that he took very similar steps to try to absolve himself of any criminal activity in the hit and run. It further showed that this was not an isolated instance and that Madeiros had a particular method of attempting to deflect responsibility for criminal conduct that he had, in fact, committed.

And while the evidence regarding Madeiros's prior hit and run was of course prejudicial, it was not at all likely to influence the jury to base its verdict on improper considerations—meaning it was not *unfairly* prejudicial, as required for evidence to be excluded under *Sullivan*. *Hurley*, 361 Wis. 2d 529, ¶ 87. Nothing about Madeiros's committing a hit and run, particularly one that did not cause anyone any physical injury, was likely to arouse the jury's sense of horror or provoke its instinct to punish because it is not an overly

vile or despicable crime and it resulted only in property damage. Moreover, due to the police's delay in locating Madeiros after the hit and run, there was no evidence he was driving while intoxicated when it occurred, making the details about this incident less prejudicial than it otherwise could have been.

In sum, evidence about Madeiros's prior hit and run satisfied all three prongs of *Sullivan* even if it is considered "other acts" evidence and not a part of the obstruction crime itself. Accordingly, Madeiros cannot overcome the high degree of deference afforded to a circuit court's decision to admit or exclude evidence, *see State v. Dobbs*, 2020 WI 64, ¶ 48, 392 Wis. 2d 505, 945 N.W.2d 609, and cannot show that the circuit court erroneously exercised its discretion in admitting it.

II. The circuit court properly denied Madeiros's ineffective assistance of counsel claims without holding an evidentiary hearing.

A. Standard of review

"'Whether a defendant's [postconviction motion] "on its face alleges facts which would entitle the defendant to relief" and whether the record conclusively demonstrates that the defendant is entitled to no relief' are questions of law that [an appellate court] review[s] de novo." *State v. Sulla*, 2016 WI 46, ¶ 23, 369 Wis. 2d 225, 880 N.W.2d 659 (citation omitted).

If the defendant's motion does not contain the requisite material facts, "presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," then this Court reviews the circuit court's decision to grant or deny a hearing "under the deferential erroneous exercise of discretion standard." *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433); *see also State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

B. Defendants must raise sufficient material facts in their motion that would establish both deficient performance and prejudice before they are entitled to an evidentiary hearing on an ineffective assistance of counsel claim.

A defendant who asserts ineffective assistance of counsel must demonstrate that counsel performed deficiently and the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "The defendant has the burden of proof on both components" of the *Strickland* test. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citing *Strickland*, 466 U.S. at 688).

To prove deficient performance, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

"The defendant may not presume the second element, prejudice to the defense, simply because certain decisions or actions of counsel were made in error." *Balliette*, 336 Wis. 2d 358, ¶ 24. Rather, to prove prejudice, "the defendant must show that [counsel's deficient performance] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. This requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694.

A hearing is a prerequisite to reviewing an ineffective assistance of counsel claim on the merits. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). But a defendant is not entitled to a hearing unless he sufficiently pleads his postconviction motion, as explained above.

Accordingly, when the circuit court denies an ineffective assistance claim without holding a hearing, the only issue for this Court is whether the defendant sufficiently pled his motion in the circuit court to entitle him to a hearing. *State v. Sholar*, 2018 WI 53, ¶¶ 53–54, 381 Wis. 2d 560, 912 N.W.2d 89.

"[T]o adequately raise a claim for relief, a defendant must allege 'sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle the defendant to the relief he seeks.'" *State v. Romero-Georgana*, 2014 WI 83, ¶ 37, 360 Wis. 2d 522, 849 N.W.2d 668 (citing *Allen*, 274 Wis. 2d 568, ¶ 23). Conclusory statements that do not contain these key facts are insufficient to entitle the defendant to a hearing. *Allen*, 274 Wis. 2d 568, ¶ 12. When assessing whether a defendant's motion was sufficiently pled, this Court reviews "only the allegations contained in the four corners of [the defendant's] motion, and not any additional allegations that are contained in [the defendant's] brief." *Id.* ¶ 27.

The sufficiency of the allegations in the motion, however, is not the end of the inquiry. "[A] circuit court has the discretion to deny a defendant's motion—even a properly pled motion . . . without holding an evidentiary hearing if the record conclusively demonstrates that the defendant is not entitled to relief." *Sulla*, 369 Wis. 2d 225, ¶ 30.

Typically, "[a] court properly exercises its discretion if it uses the correct legal standard and, using a demonstrated rational process, reaches a reasonable conclusion." *Pierce v. American Family Mut. Ins. Co.*, 2007 WI App 152, ¶ 5, 303 Wis. 2d 726, 736 N.W.2d 247. "It is well established that a decision which requires the exercise of discretion and which on its face demonstrates no consideration of any of the factors on which the decision should be properly based constitutes an [erroneous exercise of] discretion as a matter of law." *S.P.A. ex rel. Ball v. Grinnell Mut. Reinsurance Co.*, 2011 WI App 31,

¶ 14, 332 Wis. 2d 134, 796 N.W.2d 874 (alteration in original) (citation omitted).

However, the independent review doctrine is well established law in Wisconsin. Under the independent review doctrine, "[i]f the trial court failed to articulate its reasoning, an appellate court will review the record independently to determine whether there is any reasonable basis for the trial court's discretionary decision." *State v. Davidson*, 2000 WI 91, ¶ 53, 236 Wis. 2d 537, 613 N.W.2d 606. If there is such a basis in the record, the reviewing court should affirm the circuit court's ruling. *See Hunt*, 263 Wis. 2d 1, ¶¶ 4, 34, 45.

C. None of Madeiros's claims about trial counsel's ineffectiveness warranted an evidentiary hearing.

The circuit court summarily denied Madeiros's postconviction motion without articulating its reasons for doing so. But an independent review of the record shows that there was ample basis for the court's decision. This Court should therefore affirm.

1. Trial counsel did object to the admission of the statements about Madeiros's hit and run conviction, so the record conclusively demonstrates he did not perform deficiently.

Madeiros contended that trial counsel, Karl Green, was ineffective for "fail[ing] to demand a *Sullivan*" analysis by the court when admitting this evidence. (R. 149:17.) But Madeiros's motion was insufficiently pled on this point for two reasons: (1) the court did conduct a *Sullivan* analysis and (2) Green thoroughly contested admission of the hit and run at the pretrial motion conference, and Madeiros fails to suggest what counsel should have done differently to get the court to change its mind. Madeiros further cannot show prejudice because the court conducted the relevant analysis, meaning

there is no likelihood of a different result if Green did something differently.

First, the circuit court conducted a *Sullivan* analysis about this evidence, so Madeiros's claim that Green was somehow deficient in failing to request one must fail. (R. 171:23–46.) The court recognized that "this action with the hit and run cannot be admitted to show character. . . . Or to show that he acted in conformity therewith." (R. 171:23–24.) The State said it was offering the hit and run for context, state of mind, and intent to lie to the police. (R. 171:24–26.) The court then recognized that intent was an actual element of the crime for count three, and examined the parties' arguments about relevance of the hit and run to show all of these things. (R. 171:26–36.) Green argued that lies Madeiros told about the hit and run were being introduced to show a character flaw and that the evidence was unfairly prejudicial, but the court clearly disagreed. (R. 171:34–35.) After hearing this argument, it determined that it was "going to allow this evidence because it basically it's part of the whole context of what Mr. Madeiros is talking about here [during the interview]. And it does relate to his intent to lie to the police." (R. 171:36.)

The court did, however, recognize that there was some danger of prejudice in bringing this evidence in, and accordingly limited what Deputy Oblinski could say about it. (R. 171:38–39.) So, while the court did not make explicit findings about the third prong, it clearly considered the third prong and determined that the evidence's probative value was not outweighed by the danger of unfair prejudice and that the prejudicial effect could be mitigated. (R. 171:34–39.) That was sufficient to properly exercise its discretion under *Sullivan*. *See Movrich v. Lobermeier*, 2016 WI App 90, ¶ 11, 372 Wis. 2d 724, 889 N.W.2d 454 (holding that the court of appeals assumes that the trial court made the findings of fact

necessary to support its decision and accepts such implicit findings if supported by the record.).

Second, the record conclusively demonstrates that Green objected to the introduction of statements about Madeiros's hit and run conviction and argued extensively against their admission at the pretrial motion hearing. (R. 38:2; 171:27–39.) This was sufficient to preserve the objection for appeal. *State v. Wright*, 2003 WI App 252, ¶ 40, 268 Wis. 2d 694, 673 N.W.2d 386. Having made and preserved the objection, counsel cannot have been deficient.

Madeiros therefore failed to plead any facts to show he could prove that Green performed deficiently or that any alleged error could have possibly prejudiced him. Green, the State, and the circuit court clearly undertook a *Sullivan* analysis, so Madeiros cannot possibly show that Green's "failure" to request one was unreasonably deficient, because the alleged failure did not occur. (R. 149:17–18.) Nor did Madeiros plead any facts about what Green should have done differently at the hearing; he just made conclusory allegations that counsel was deficient and prejudiced the defense. (R. 147:17–18.) He did not offer any facts showing that if Green had done something differently at the hearing, the court would have refused to admit this evidence. (R. 147:17.) Accordingly, Madeiros's claim that trial counsel was ineffective for failing to somehow preclude this evidence from being admitted was appropriately denied without a hearing. (R. 149:12–18; Madeiros's Br. 13–14.)

2. Madeiros did not plead sufficient facts to establish deficient performance nor prejudice regarding the jury's hearing that he had four prior convictions.

Madeiros next claimed that Green was ineffective for purportedly failing to "immediately move for a mistrial" when the jury heard a snippet from the video showing Madeiros's

interview with police where one of the deputies referred to Madeiros's four prior OWIs. (R. 149:20.) But his motion was properly denied without a hearing because the record shows that Green reasonably asked for a curative instruction instead, and that Madeiros could not have been prejudiced by Green's failure to request a mistrial because the jury received the curative instruction and there was overwhelming evidence of Madeiros's guilt.

First, it is important to note that the jury was always going to learn that Madeiros had four prior convictions for something on his record because he decided to testify. (R. 169:54.) It was also going to learn that Madeiros was subject to a .02 blood-alcohol prohibition because the State charged him with a PAC violation. (R. 37:1–2.) It is common knowledge that the legal blood alcohol limit to drive is usually .08. The jury was likely already going to recognize that at least one of those convictions was probably an OWI.

Second, it is not clear that the jury actually heard that Madeiros had four prior OWI convictions. Deputy Jackson does mention it on the video at minute 9:41. (R. 50 Ex. 2 09:41.) However, the transcript suggests that the prosecutor muted that portion of the video. (R. 170:210–11 (showing that the video was paused at 09:27, resumed but muted a portion, then stopped again at minute 12:56).) The transcript says the tape was then played again from minute 12:56 and then stopped, but does not say when it was stopped. (R. 170:211–12.) Assuming the jury saw the rest of the video from 12:56 on, though, Madeiros's prior convictions were only mentioned again twice, and then not in any specific manner. What was said was this:

> Deputy Jackson: Okay, are you willing to go through my tests, yes or no?
>
> Madeiros: No, I…mean. I wasn't with my car. I wasn't even close to my car.

> Jackson: Okay that's fine. You told me you were driving, I thought?
>
> Madeiros: I was driving my car. But I had . . .
>
> Deputy Oblinski: Now you said you weren't even close to your car?
>
> Madeiros: But I wasn't.
>
> Oblinski: The thing is you have been through this four other times. You know the right answers to give us, and you're trying to get those answers out, but you can't keep that story straight, unfortunately. Alright. And that is why he was trying to talk to you and you're not giving us straight answers. Okay, so like he said. Are you going to take any of these tests? We know you were driving at the time. And you were drinking at the time you were driving.

(R. 50 Ex. 2 17:18–17:44.) Then, after Madeiros tries to convince the officers for about a minute that he only drank while walking, Deputy Oblinski says "[t]he thing is you weren't otherwise you would have stayed with your vehicle. You have a long history of this." (R. 50 Ex. 2 18:39.) It is not clear the jury heard Deputy Jackson's specific statement that Madeiros had four OWIs.

However, even assuming the jury did hear Deputy Jackson mention that Madeiros had four OWI convictions, Madeiros's motion was inadequately pled on both prongs of *Strickland*, and that the record conclusively demonstrates he could not prevail on either prong even if his motion were sufficiently pled.

3. Green was not deficient for failing to move for a mistrial based on a novel argument that a jury hearing about prior OWIs is uncurable.

Green was not deficient in failing to move for a mistrial because even assuming the jury inadvertently heard Deputy Jackson's statement that Madeiros had four previous OWI

convictions, because the record shows Green made a reasonable strategic decision about how to deal with the remark. *State v. Breitzman*, 2017 WI 100, ¶ 65, 378 Wis. 2d 431, 466, 904 N.W.2d 93 ("Trial strategy is afforded the presumption of constitutional adequacy.")

The transcript of the second day of jury trial shows that the court and the parties recognized the potential for the jury to improperly use these statements and discussed how to remedy the situation after the jury was excused the previous day.[1] (R. 169:76–77.) The court agreed to give a curative instruction that the jury could only use Madeiros's prior convictions as evidence of his credibility as a witness and not for any other purpose. (R. 169:76–77, 89–91.) The court instructed the jury,

> 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 upon 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.

(R. 169:119–20.)

The request for a curative instruction rather than a mistrial was a reasonable way to deal with the jury potentially hearing about Madeiros's four previous OWIs. Juries are presumed to follow the instructions given to them. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). And if a curative instruction is given to a jury, any "possible prejudice to a defendant is presumptively erased

[1] Unfortunately, it appears that this discussion took place off the record. (R. 170:231–32.)

from the jury's collective mind." *State v. Bowie*, 92 Wis. 2d 192, 210, 284 N.W.2d 613 (1979). It was reasonable for Green to conclude that curing this error with an instruction rather than giving the State a second chance to prove its case at a new trial was a better course of action for Madeiros to take.

There is no law that states that a cautionary instruction cannot cure the error of a jury learning someone has prior OWIs, as Madeiros implied. (R. 149:18–21.) The case law the defendant cited did not support his argument. In *State v. Diehl*, 2020 WI App 16, 391 Wis. 2d 353, 941 N.W.2d 272, the question was not whether the jury learning of prior OWI convictions could be cured; it was whether counsel was ineffective for failing to object to the prosecutor's irrelevant questioning of a police officer about the reasons someone might have a low prohibited alcohol concentration. And though *State v. Alexander*, 214 Wis. 2d 628, 571 N.W.2d 662 (1997), established that evidence of prior OWIs is inadmissible when the defendant stipulates to that element, the court conducted a harmless error analysis in *Alexander* and concluded the error in allowing the jury to hear about the prior OWIs was harmless. *Id.* at 653. That shows that this type of error can be harmless even if it goes unremedied in any way—meaning it is also certainly capable of being cured through a curative instruction.

In essence, Madeiros claimed Green performed deficiently for failing to advance a novel argument that a jury's learning of prior OWI convictions can never be harmless nor are they curable. (R. 149:18–21.) But settled law is just the opposite: cautionary instructions are presumed to completely cure evidentiary errors absent evidence that the jury did not follow the instructions, and the jury learning about prior OWIs can indeed be harmless. *State v. Mink*, 146 Wis. 2d 1, 17, 429 N.W.2d 99 (Ct. App. 1988); *Alexander*, 214 Wis. 2d at 653. Caselaw is very clear that counsel cannot be found deficient for failing to raise novel arguments.

Breitzman, 378 Wis. 2d 431, ¶ 49. Madeiros did not plead sufficient facts to establish that Green was deficient for failing to ask for a mistrial instead of a curative instruction.

4. The record conclusively demonstrates that Madeiros could not prove prejudice from Green's failure to move for a mistrial.

Madeiros also failed to show that he could prove prejudice at a hearing. Given the availability of the chosen route of giving a curative instruction and the brevity of the statements, it is not reasonably probable that the circuit court would have granted a motion for a mistrial had Green made one. Again, juries are presumed to follow the instructions given to them. *Truax*, 151 Wis. 2d at 362. And if a curative instruction is given to a jury, any "possible prejudice to a defendant is presumptively erased from the jury's collective mind." *Bowie*, 92 Wis. 2d at 210. Madeiros has not offered any explanation why this curative instruction was insufficient nor anything suggesting that the jury did not follow it. (Madeiros's Br. 27–29.) Indeed, the jury acquitted Madeiros of the obstruction charge, showing that the jurors followed the instructions and based their decision on their evaluation of the facts presented, and did not simply convict Madeiros after concluding he was a bad person. (R. 169:185.)

And using a curative instruction in lieu of a mistrial is the favored approach to dealing with evidentiary errors. "[N]ot all errors warrant a mistrial and 'the law prefers less drastic alternatives, if available and practical." *State v. Givens*, 217 Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998) (citation omitted). Thus, Madeiros cannot demonstrate that the court would have granted a motion for a mistrial, had Green made one.

Finally, the record conclusively demonstrates that even the erroneous admission of these statements was harmless because the evidence against Madeiros was overwhelming.

Madeiros's car was abandoned with a flat tire halfway off the road on a heavily-travelled highway. (R. 56; 170:126–27.) Three citizens called to report this to police. (R. 170:106–08.) The calls were all made between 1:02 a.m. and 1:18 a.m., which strongly suggested that the car was not abandoned there until shortly before the calls were made or else other travelers would almost certainly have called it in before then. (R. 170:106–08.) It was negative seven degrees outside and snowing, and yet Madeiros decided to leave the car and walk into the woods. (R. 170:179–81.)

Deputy Oblinski found Madeiros one hour after the phone calls came in by following his footprints in the snow away from the car. (R. 170:183.) The prints leading from the car immediately veered into the ditch, zigzagged all over the trail, and meandered through the yard of a private residence. (R. 51; 52; 53; 170:130, 183.) Laufer testified there was no snow accumulated in the footprints leading from the car, meaning they could not have been there very long. (R. 170:158.) The officers saw beer bottles in the car and Madeiros admitted that he had also been drinking Schnapps. (R. 170:203, 210.) And the jury saw the bodycam and squad car videos on which Madeiros's severe intoxication was obvious. (R. 50 Ex. 2, Ex.3.) He was falling asleep, slurring his words, weaving on his feet, giving incomprehensible answers to questions, and took a long time to process his answers. (R. 50 Ex. 2, Ex.3.) His story about what happened was nonsensical and contradictory. (R. 50 Ex. 2; 169:31–76.) There is no reasonable possibility the jury would not have convicted Madeiros of OWI but for its having heard the statements from either deputy referencing the prior convictions.

The brief nature of what the jury may or may not have heard, the cautionary instruction, and the overwhelming

evidence against him eliminate any possibility that Madeiros could prove prejudice from Green's failure to request a mistrial even if everything Madeiros alleged in his motion was true. Accordingly, Madeiros failed to show that he was entitled to a hearing on his ineffective assistance of counsel claim. *Allen*, 274 Wis. 2d 568, ¶ 9.

5. Madeiros did not plead sufficient facts to establish counsel was deficient for failing to challenge Laufer's testimony as expert testimony nor prejudice from this alleged failure.

Madeiros's final claim was that Green was ineffective for failing to object on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993) and Wis. Stat. § 907.07 grounds to allegedly "improper expert testimony by witness Laufer" about what conclusions she drew from her observations of the car and the footprints. (R. 149:21–23.) But his motion did not plead sufficient facts to establish that Green was deficient because Laufer's testimony was not subject to *Daubert*. It further did not sufficiently establish prejudice because had Green made such an objection, the court would have either denied the motion or simply expressly qualified Laufer as a lay expert based on her police training and experience.

Preliminarily, Madeiros's argument on this point was and is based on a mischaracterization of Laufer's testimony, and thus his claims fail on that ground at the outset. Laufer did not testify as an expert nor was she an officer who investigated the scene. She was a passing Good Samaritan who stopped to help fearing that someone was going to freeze to death, and she just happened to be a retired police officer. (R. 170:125–39.) Laufer was not testifying as an expert, she was merely relaying what she thought according to her own observations, so Green cannot have been deficient for failing

to challenge her as an expert. *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

Laufer testified that during her 20-year career she had seen many situations similar to the one she encountered that night and given the totality of the circumstances—the car parked partially on the roadway, the car not having any brake lights or taillights on, the weaving footprints, and the fact that it was exceptionally cold outside—she suspected that the person who left the car was "drunk, disoriented or having a medical condition." (R. 170:140–56.) That is not "expert" testimony; it is an articulation of what Laufer's common sense suspicion was after evaluating the situation in light of her personal experiences.

Indeed, Wis. Stat. § 907.01 expressly permits a lay witness to testify "in the form of opinions or inferences" so long as "those opinions or inferences . . . are [r]ationally based on the perception of the witness and [h]elpful to a clear understanding of the witness's testimony." That is precisely what occurred here. Laufer testified why she proceeded down Wild Goose Trail to search for the driver—she was concerned that the driver would be suffering a medical emergency based on the extreme cold temperature and her past experience that led her to believe the driver was intoxicated. Accordingly, because her testimony was properly admitted under section 907.01, any objection to Laufer's testimony under section 907.02 as improper "expert" testimony would have been meritless. And counsel is not deficient for failing to bring meritless motions. *Toliver*, 187 Wis. 2d at 360.

And the record shows that Green made a reasonable strategic decision with how to deal with Laufer's testimony. He split these observations into pieces and attacked them individually in an attempt to damage Laufer's credibility. (R. 170:156–58.) Laufer then qualified her testimony on these points by explaining that given the confluence of the skewed abandoned car, the footprints not going in a straight line, and

the person's strange decision to wander away in below freezing temperatures, she believed he was intoxicated. (R. 170:56–57.) However, she admitted that she never saw Madeiros at any point and could not say whether or not he was intoxicated, let alone that he had been intoxicated while driving. (R. 170:157–59.) Green exploited these inconsistencies and challenged Laufer's ability to make such a judgment based on the circumstantial evidence alone in closing argument in order to attack her credibility. (R. 169:147–51.) "There are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689. The record shows Green chose one and appropriately pursued it. He was not deficient for failing to mount a *Daubert* challenge to Laufer's testimony.

Nor did Madeiros plead sufficient facts to establish prejudice from this alleged "failure." First, as just discussed, trial counsel effectively cross-examined Laufer and was able to have her admit that she did not know for a fact whether he was intoxicated.

Second, there is no possibility that the circuit court would have granted a motion to suppress Laufer's testimony; it simply would have qualified her as an experienced-based expert.

Laufer testified that she was a retired police officer with 20 years of service. (R. 170:125.) She said traffic enforcement and investigating drunk driving cases were "part of our everyday duties" when she was on the force. (R. 170:125–26.) She testified on cross-examination that she was trained to identify whether someone was drunk by evaluating the totality of the circumstances. (R. 170:157.) It is black-letter law that police officers are qualified to testify about what they know about certain scenarios—such as the indications that someone may be driving while intoxicated—based on their training and experience, and that "these observations . . . need not be tested or subject to peer review in order to be deemed

reliable and admissible." *State v. Chitwood*, 2016 WI App 36, ¶ 48, 369 Wis. 2d 132, 879 N.W.2d 786. Had Green challenged Laufer's testimony about her observations on *Daubert* grounds, the circuit court simply would have qualified her as an expert. Counsel's failure to make such a motion or objection cannot be either deficient or prejudicial because the record conclusively demonstrates that such an objection would have accomplished nothing. *State v. Ziebart*, 2003 WI App 258, ¶ 14, 268 Wis. 2d 468, 673 N.W.2d 369.

CONCLUSION

The circuit court appropriately denied Madeiros's motion without a *Machner* hearing because he did not plead sufficient facts to be able to prove deficient performance or prejudice in light of the record. This Court should affirm the decision of the circuit court.

Dated this 13th day of August 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,128 words.

Dated this 13th day of August 2021.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 13th day of August 2021.

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