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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.

SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the postconviction court properly determine that a mistrial due to the jury accidentally hearing about Madeiros's prior OWIs was unnecessary?

The record shows that the circuit court properly determined that a mistrial was unwarranted, but even if that decision was in error, the error was harmless.

This Court should affirm the circuit court.

2. Did the circuit court properly exercise its discretion to admit statements between Madeiros and the deputies about his previous hit and run incident?

The circuit court determined that the hit and run was proper other acts evidence under *Sullivan*.

This Court should affirm the circuit court.

3. Was defense counsel ineffective for failing to object to Laufer's testimony about her observations at the scene on expert testimony grounds?

The circuit court determined that Madeiros could not show prejudice.

This Court should affirm the circuit court.

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 the 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.) Madeiros'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, including by failing to move for a mistrial after bodycam video where an officer mentioned that Madeiros had four prior OWIs was accidentally played for the jury. (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 appealed, and this Court remanded to the circuit court for further factfinding about which portions of the bodycam video were heard by the jury, because it was not clear from the transcripts. (R. 177.) The court held a hearing at which the body cam video was re-played and both the prosecutor and defense counsel testified to reconstruct what the jury heard. (R. 200.) The prosecutor also submitted two exhibits consisting of planning materials he had made for the video before trial: one consisting of timestamps and short descriptions of which portions of the video he intended to play and which portions he intended to mute, and a page transcribing the portion of the video with the statement about Madeiros's four prior OWIs on it. (R. 180; 181.)

The prosecutor testified that he started the video recording at 00:09:27, the mention of the four OWIs was between 00:09:35 and 00:09:45 which he had marked to mute, and that after that portion was inadvertently played for the jury, he let the video keep running for another 3 minutes and 29 seconds to 00:12:37. (R. 200:44–45.)

The exhibit showed that the prosecution intended to mute the portion of the video between seconds 9:35 and 9:45. (R. 181:1.) This was the portion of the discussion where

Deputy Jackson said, "based on that you are on probation, you're revoked, you have 4 OWI's already, you're supposed to be absolute sobriety, per your probation." (R. 180:1.) The jury trial transcript reflected that the prosecutor stopped the video at 9:27, immediately before this snippet, and asked the deputy a few questions about the clip the jury had just heard. (R. 170:210–11; 200:13.) The prosecutor then explained that he'd planned to mute the problematic section and hit play, but they were using a new video system and he was unable to mute it in time so the jury "heard the language that, you know, you see in Exhibit 2 about the Deputy saying you are on probation, you are revoked, you have four OWI's already, you are supposed to have absolute sobriety." (R. 200:10–11, 14–15.) The prosecutor said he then let the video keep playing for well beyond that snippet to 12:56 because he "didn't want to draw attention to it." (R. 200:15.) The court also recalled thinking about how to minimize the prejudice of the statement "without creating a big scene right at the moment." (R. 200:15.)

Madeiros's trial counsel also testified regarding some of the strategic decisions he made in the case. (R. 200:18–43.) He testified that he'd been practicing for 31 years with about a third to half of his practice consisting of criminal defense. (R. 200:18.) He said the theory of defense he and Madeiros pursued was that he did not consume any alcohol until he was walking up the trail for help after leaving the car. (R. 200:20–21.) The parties had agreed that Madeiros's four prior convictions could be introduced as long as there were no details about them discussed. (R. 200:23.) Counsel said he recognized that the prohibited portion of the video stating that the four prior convictions were OWIs was heard by the jury and discussed what to do about it with Madeiros when it happened. (R. 200:29.)

Counsel testified that he brought the issue up with the court during a break in the proceedings after the jury was

removed and off the record. (R. 200:29–31.) He said he told the judge it was a serious matter and wanted to discuss "whether it would amount to a mistrial or what we could do to correct it." (R. 200:30.) The court decided to draft a curative instruction instead of declaring a mistrial. (R. 200:31–32.) Counsel said this was not his preference or suggestion, but it was what the court decided to do "so that's what I had to deal with." (R. 200:32.) The prosecutor agreed with counsel's recollection on how the matter was handled, including discussing whether the court would grant a motion for a mistrial and the court stating that it intended to provide a curative instruction instead. (R. 200:44–48.)

Trial counsel also recalled contesting, pretrial, the State's introducing the hit-and-run as other acts evidence and arguing that he did not believe it was relevant, and at any rate was highly prejudicial. (R. 200:24–25.) When asked if he considered "asking the court to specifically conduct a *Sullivan* type hearing," counsel responded, "[w]e were there for that specific reason. . . . generally all of us I believe knew that we needed to go through the 3-step analysis for a *Sullivan* hearing. And I believe we did that." (R. 200:25.) He said that after the court ruled that the hit-and-run evidence was admissible, he reached a stipulation with the State about it. (R. 200:26.)

Counsel discussed Laufer's testimony and said he "suppose[d] it could have been" characterized as expert testimony, but he was not sure given that "[s]he testified to what she personally observed and then made her opinions on it." (R. 200:33–34.) He said he did not consider objecting to it as inappropriate expert testimony. (R. 200:33–34.) On cross-examination he reiterated that Laufer was not on active duty as a police officer, was not called as any kind of expert by the State, and had simply stopped on the scene essentially as a Good Samaritan. (R. 200:35.) Finally, counsel confirmed that the overall theory of defense was to assert that Madeiros did

not drink anything until he left the car to walk up the trail, and therefore had not operated the vehicle while intoxicated. (R. 200:37.)

The circuit court then made the following findings. First, it found that the problematic portion of the video that the jury heard was Deputy Jackson saying, "you have four OWIs already." (R. 200:52–53.) Second, it found that defense counsel had requested a mistrial after the jury left for the day. (R. 200:53.) Third, it found that defense counsel sufficiently objected to issuing a special instruction by requesting a mistrial instead, and then "participated in fashioning this instruction because it was the best he could do under the circumstances" after the court denied his request for a mistrial. (R. 200:53.) Fourth, the court found that it had denied the request for a mistrial because it believed any potential prejudice could be cured by a special jury instruction, given the overwhelming evidence of Madeiros's guilt. (R. 200:53–54.) The court explained that the evidence that had already been introduced showing that Madeiros drove the vehicle while intoxicated by the time the jury heard the errant clip was very strong: Madeiros was out on the Wild Goose Trail in the middle of the night in a snowstorm, there were no bottles found along the way, and his story that he didn't drink until he got on the trail and simply left his car on the road "clearly didn't make any sense at all that someone would be doing that." (R. 200:54.)

The court found that there was no ineffective assistance and that "everything [defense counsel] did was reasonable under the totality of the circumstances. He responded to difficult evidence in a thoughtful manner. When the issue of the four OWIs came up, . . . he did indeed address that and he did what he could with it." (R. 200:57.)

The original court reporter was not available for the February 25, 2022, hearing but checked her notes and realized that she had indeed recorded a portion of the parties'

discussion with the court regarding the four-OWIs statement after the jury was released that day and inadvertently failed to transcribe it. (R. 177:2.) The court reporter transcribed the missing portion, and it was filed as an amendment on March 4, 2022. (R. 177:2 n.1; 199.) The amendment showed that as soon as the jury was excused and the court was back on the record, defense counsel pointed out that the jury heard the officer say Madeiros had four OWIs. (R. 199:2.) The prosecutor said he thought the best options were to either do nothing so as not to call attention to the clip, "because it was pretty quick," and he was "not sure all of [the jurors] may have even caught that," or to give a curative instruction. (R. 199:3.) Defense counsel agreed that the clip was not testimony, was very brief, and it was not clear whether the jurors noticed it. (R. 199:3.) The court therefore offered to give an instruction simply telling the jury that it "may have heard some comments about possible prior convictions of Mr. Madeiros. You must not consider any of these convictions as proof of guilt in this case," without going into further detail. (R. 199:4.) Defense counsel agreed that was an appropriate way to handle it. (R. 199:4.)

The circuit court entered a written order on March 7, 2022, explaining its findings above. (R. 177.) Madeiros appeals.

ARGUMENT

I. The circuit court appropriately denied Madeiros's motion for a mistrial, trial counsel strategically handled the mishap, and any error surrounding the jury hearing the clip stating that he had four prior OWIs was harmless.

The court and all of the parties agreed that the jury should not have heard about the nature of Madeiros's four prior OWI convictions. However, the record shows that the jury's having been exposed to this brief video clip was

appropriately addressed, and that it was nevertheless harmless.

Defense counsel appropriately handled this error. The circuit court found that he did move for a mistrial, which both parties recalled and the circuit court recalled denying. Even if he did not, though, he could not be deficient for failing to move for a mistrial because the record shows he made a reasonable strategic decision about how to deal with the remark through a curative instruction. *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 court and the parties recognized the potential for the jury to improperly use the information that Madeiros had four previous OWIs and discussed how to remedy the situation after the jury was excused the previous day. (R. 169:76–77.) But both parties recognized that it was a short, passing statement on a video exhibit and not witness testimony, and that the jurors may not have even noticed it. (R. 199:3–4.) Accordingly, the parties wanted to find a way to ensure that the jurors didn't improperly base their decision on that fact without alerting them to it or highlighting it in the event that it had gone unnoticed. (R. 199:3–4.) The court agreed to give a general 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 without explicitly repeating the statement on the video. (R. 169:76–77, 89–91; 199:4–5.) 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.)

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 from the jury's collective mind." *State v. Bowie*, 92 Wis. 2d 192, 210, 284 N.W.2d 613 (1979). Madeiros has not offered any explanation why this curative instruction was insufficient to alleviate any prejudice nor anything suggesting that the jury did not follow it. (Madeiros's Br. 19–21.) And in fact, 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 about the events occurring during the offense and did not simply convict Madeiros because he was convicted of similar offenses in the past. (R. 169:185.)

It was reasonable for counsel to conclude that curing this error that may not have even registered with the jurors with an instruction vaguely referring to prior convictions, 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. Additionally, 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). This curative instruction was an available, practical, and reasonable way to handle the error.

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 cites does not support his argument. (Madeiros's Br. 18–23.)

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 with an instruction; it was whether counsel was ineffective for failing to object to the prosecutor's irrelevant questioning of a police officer and the defendant about Diehl having a lower PAC limit than "normal." *Id.* ¶¶ 17–20. In other words, in *Diehl* the prosecutor was essentially able to "backdoor" in the information to the jury that Diehl was a repeat offender with multiple OWIs with this questioning, which invited the jurors to conclude that the defendant had a propensity for driving while intoxicated. Nothing akin to that happened in this case.

And though *State v. Alexander*, 214 Wis. 2d 628, 571 N.W.2d 662 (1997) established that evidence of prior offenses as a status element is inadmissible when the defendant stipulates to that element of a PAC violation, the supreme court conducted a harmless error analysis in *Alexander* and concluded the error in allowing the jury to hear that the defendant had two or more prior convictions, suspensions, or revocations after the defendant stipulated to that element was harmless. *Id.* at 653. If this type of error can be harmless even when the evidence of the nature of the prior convictions is directly submitted to the jury as a substantive element of the offense, a brief, accidental, passing statement inadvertently played on a video like what happened here is certainly capable of being remedied through a curative instruction.

Madeiros discusses *Alexander*, but fails to mention that the court there found harmless the error of the jury learning of the defendant's prior OWIs. (Madeiros's Br. 21.) Instead, he claims that *Alexander* and *Diehl* stand for the proposition that a jury learning about prior OWI convictions can never be properly addressed with a curative instruction and that a

mistrial must be granted whenever a jury learns such information. (Madeiros's Br. 21–22.) That is completely unsupported by law. Again, mistrials are disfavored, and less drastic alternatives are preferred. *Givens*, 217 Wis. 2d at 191. Here, the mention of Madeiros's prior OWI offenses was brief, it did not occur during witness testimony, and it was unclear whether any of the jurors even noticed it. The court instructed the jurors in general terms that any prior offenses could only be used to judge Madeiros's credibility on the stand and not for any other purpose. (R. 169:119–20.) Jurors are presumed to follow the instructions given to them. *Truax*, 151 Wis. 2d at 362. The mention of Maderios's prior convictions was not emphasized and it was not submitted to the jury as one of the elements of the offense, like it was in *Alexander*. And the fact that the court found a more direct submission of evidence to the jury about the defendant's prior convictions harmless in *Alexander* means that Madeiros's argument must fail.

Finally, here, like in *Alexander*, the record conclusively demonstrates that the erroneous admission of these statements was harmless because the evidence against Madeiros was overwhelming.

Madeiros's car was abandoned halfway off the road late at night on a heavily-travelled highway and during a snowstorm. (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 instead of waiting for help. (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.) As the circuit court noted, his story about what happened was nonsensical and contradictory. (R. 50 Ex. 2; 169:31–76; 200:53–54.) There is no reasonable chance the jury would not have convicted Madeiros of OWI but for its having heard the statements from either deputy referencing the prior convictions.

Madeiros's claim that he did not start drinking until after he abandoned his car was absurd in light of all the circumstances. The brief nature of the deputy's statement about Madeiros's four prior OWIs, which was inadvertently played for the jury but may not have even been noticed, the cautionary instruction, and the overwhelming evidence against Madeiros eliminate any possibility that the jury's having heard the statement about his previous OWIs contributed to the verdict here. This error was harmless.

II. The circuit court properly exercised its discretion to admit the statements discussing his hit and run conviction.

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 that 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, Ih 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 that 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—thirty-nine degrees below freezing—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.

III. Counsel was not deficient for failing to object to Laufer's testimony on expert witness grounds, because it was not expert testimony, but even if it could be viewed that way, Madeiros cannot show prejudice.

A. It is the defendant's burden to establish deficient performance by counsel and prejudice as a result.

A defendant who asserts ineffective assistance of counsel must demonstrate that counsel performed deficiently and that 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." *State v. Balliette*, 2011 WI 79, ¶ 24, 336 Wis. 2d 358, 805 N.W.2d 334.. 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.

B. Reasonable counsel would not have objected to Laufer's testimony as improper expert testimony because it was not expert testimony.

Madeiros's final claim is that defense counsel 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. (Madeiros's Br. 31–34.) But Madeiros has not shown that counsel was deficient, because Laufer's testimony was not subject to *Daubert*.

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 counsel 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 the 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 counsel 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.) Counsel later 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 counsel chose one and appropriately pursued it. He was not deficient for failing to mount a *Daubert* challenge to Laufer's testimony.

C. Madeiros cannot show prejudice, because even if an objection were made and upheld on expert testimony grounds, the State simply would have qualified her as an expert.

Madeiros additionally cannot establish prejudice. 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 likely 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 defense counsel 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.

And finally, as explained above, the evidence against Madeiros was overwhelming. Even if Laufer's testimony would have been objected to and excluded entirely, the jury still would have been presented with the testimony and body cam video from the multiple deputies who arrived in response to the calls about Madeiros's abandoned vehicle. This included video showing where and when Madeiros's car was, the terrible weather conditions, the zigzag trail of Madeiros's footprints, and his strange behavior and speech when talking to the officers. (R. 169:70; 170:78, 105–08, 169, 178–88.) They

also still would have seen the deputies' interview with a drunken Madeiros at the sheriff's office and heard the same implausible defense that Madeiros had only begun drinking after abandoning his car—which failed to explain why his trail in the snow leaving the car was so erratic. (R. 51; 52; 53; 170:205–14.)

There is no reasonable probability that the outcome of this trial would have been different even if Laufer would not have testified at all. There is certainly no reasonable probability that the outcome would have been different had counsel made a meritless objection to her testimony on expert grounds.

CONCLUSION

This Court should affirm the decision of the circuit court.

Dated this 13th day of July 2022.

Respectfully submitted,

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FORM AND LENGTH 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 8,061 words.

Dated this 13th day of July 2022.

Electronically signed by:

Lisa E.F. Kumfer
LISA E.F. KUMFER

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 July 2022.

Electronically signed by:

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