STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2022 AP 446 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JULIE A. MINNEMA,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED
ON FEBRUARY 8, 2022, IN THE CIRCUIT COURT
FOR WAUPACA COUNTY, THE HONORABLE
RAYMOND HUBER, PRESIDING

Respectfully Submitted,

JULIE A. MINNEMA,
Defendant-Appellant.

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II. Whether trial counsel was ineffective for failing to object to the untimely and prejudicial filings.

The circuit court held that he was not.

III. Whether trial counsel was ineffective for failing investigate critical evidence to Minnema's defense.

The circuit court held that he was not.

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The circuit court held that he was not.

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The circuit court held that it was not.

STATEMENT ON PUBLICATION

Defendant-appellant does not request publication.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issue on appeal.

STATEMENT OF THE CASE

This is an appeal from the circuit court's denial of Minnema's post-conviction motion alleging ineffective assistance of trial counsel.

On September 17, 2019, Minnema was found guilty of operating a motor vehicle while under the influence, as a second offense, bail jumping, and resisting an officer.[1] Deputy Patrick Gorchals alleges he was at home during lunch when he saw Minnema pull into her driveway.[2] He claims his home had a direct line of sight to Minnema's driveway.[3] Deputy Gorchals asserts an altercation occurred between Minnema and D.N., Minnema's boyfriend, shortly after.[4] He then reportedly got into his squad car, drove around the block to Minnema's driveway, and responded to the incident.[5] Minnema was eventually arrested for operating while under the influence.[6] Minnema continuously expressed to Deputy Gorchals that he was hurting her as she was placed in handcuffs.[7] She subsequently agreed to a blood test and was alleged to have a BAC above the legal limit.[8]

A criminal complaint was filed on July 10, 2017, alleging two counts: (1) operating while under the influence and (2) operating with a prohibited alcohol concentration.[9] Minnema's case was set for trial multiple times. The State did not attempt to amend the criminal complaint at any point during this time. However, almost two years later, the State

[1] R.126 at 248.
[2] *Id.* at 6-9.
[3] *Id.* at 75.
[4] *Id.* at 76.
[5] *Id.* at 81:10-21.
[6] *Id.* at 92.
[7] *Id.* at 178:19-179:10.
[8] R.1 at 2.
[9] *Id.*

filed an amended criminal complaint alleging two more charges: (3) resisting arrest and (4) bail jumping.[10]

Before the trial, counsel failed to hire an investigator or go investigate the scene himself to determine if Deputy Gorchals' assertions about an altercation were viable. In fact, trial counsel never even went to the actual location of the incident.[11] Actually, trial counsel never filed a formal demand for discovery, which he acknowledged as, "negligent in my duties."[12] Trial counsel admitted to not being sure if he ever reviewed the complete discovery because he never received a copy of the discovery from the prosecutor. Minnema protested that the State presented exhibits and discovery at trial that she had neither seen nor knew existed.[13]

During trial, the State insisted on asking D.N. about Minnema's other bad acts.[14] The State failed to file an other acts motion to request admission of such evidence. The State explicitly asked, "you had a domestic abuse restraining order against her, didn't you?"[15] Mr. Noffke eventually responded, "the restraining order was from the first domestic we had."[16] The State then asked Mr. Noffke directly about his involvement in Minnema's previous cases. Trial counsel failed to object to this line of questioning. The State continued by questioning Mr. Noffke about their divorce action.

[10] R.50 at 2.
[11] R.187 at 33:5-6.
[12] R.167 at 13:8.
[13] *Id.* at 9:12-19.
[14] R.26 at 160-161.
[15] *Id.* at 161:22-23.
[16] *Id.* at 162:10-11.

Trial counsel again did not object to this. Even the court mentioned its concern with this testimony.

> "I don't know if counsel are asking for any more instructions. I will specifically note that I have some concerns, and I wanted to raise it with counsel, that especially through Mr. Noffke's testimony there may have been an indication of lots of other bad acts.
>
> We didn't have other -- we didn't have any other bad act hearings or we don't know the nature. He said she was in lots of trouble and she wanted to help her out.
>
> I don't know if there's any curative instruction that anyone's asking for under those circumstances?"[17]

Despite this acknowledgement from the court, trial counsel declined to request a curative instruction.[18] The State continued to highlight previous bad acts unopposed when questioning Minnema.

Trial counsel also failed to object to the State's expert witness during trial. The witness testified that she was unaware of the guaranty date on the vial used to collect and store Minnema's blood.[19] After this admission, she contended, "The guaranty, if I may, refers to the date until which the manufacturer guaranties that it will pull sufficient volume to fill that specimen tube. That's what that date refers to."[20]

A jury convicted Minnema of all four counts at trial.[21] She filed a postconviction motion *pro se* seeking a new trial on grounds of ineffective assistance of counsel. The circuit court granted multiple evidentiary hearings pursuant to ***State v. Machner***,[22] but

[17] *Id.* at 195:2-15.
[18] *Id.*
[19] *Id.* at 129:15-130:1.
[20] *Id.* at 130:7-10.
[21] *Id.* at 248.
[22] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

denied the motion on April 13, 2021.[23] Afterwards, Minnema retained current postconviction counsel. Current counsel filed a supplemental postconviction motion reasserting ineffective assistance of counsel claims citing five deficiencies: (1) trial counsel's failure to object to other bad acts evidence, (2) trial counsel's failure to object to an untimely and prejudicial filing of an amended complaint, (3) trial counsel's failure to investigate readily available facts, (4) trial counsel's failure to obtain and review discovery, and (5) trial counsel's failure to consult or obtain an expert.[24]

The court held another ***Machner*** hearing on December 20, 2021. Subsequently, the circuit court denied the supplemental postconviction motion on February 28, 2022.[25] The court held that trial counsel had adequate time to prepare for trial with the amended complaint .[26] Furthermore, the court said that the amended complaint contained only one new allegation of fact in the bail jumping charge.[27] Therefore, the court argued, there was nothing particularly prejudicial or that needed additional discovery.[28] The court then found that the question about the blood vial's expiration date was not significantly developed.[29] Next, the court was not able to tell what trial counsel had in terms of discovery.[30] The court eventually ruled that there was nothing presented that would show obstructions to Deputy Gorchal's view which would have discredited his testimony.[31] Finally, the court said the

[23] R.187 at 71:21-24.
[24] R.195; R.214.
[25] R.237 at 32:10-12.
[26] *Id.* at 22:9-13.
[27] *Id.* at 22:14-18.
[28] *Id.* at 22:21-23.
[29] *Id.* at 24:4-10.
[30] *Id.*at 25:13-15.
[31] *Id.* at 30:1-6.

majority of other bad acts testimony was presented by Minnema as part of the defense's theory.[32] The court stated that there was a logical explanation for defense counsel to bring in other bad acts.[33] The court concluded that there was nothing trial counsel did so sufficiently deficient to warrant a new trial.[34]

Minnema now appeals.

[32] *Id.* at 30:15-31:2.
[33] *Id.* at 31:12-18.
[34] *Id.* at 32:19-21.

ARGUMENT

Ineffective Assistance of Counsel

Standard of Review

Whether a defendant's trial counsel provided ineffective assistance of counsel is a mixed question of law and fact.[35] Unless they are clearly erroneous, a reviewing courts will not generally disturb the circuit court's factual findings.[36] Ultimately, whether trial counsel's performance was deficient and prejudicial are questions of law that the court reviews *de novo.*[37]

Both the United States Constitution and the Wisconsin Constitution guarantee criminal defendants the right to counsel. [38] However, simply having an attorney is not sufficient. The attorney's counsel must be effective. [39] An ineffective assistance claim will be successful when defense counsel made errors that upset the adversarial balance between the defense and prosecution to the point that the trial, and therefore its verdict, was rendered unfair.[40] The determination of whether a convicted defendant received ineffective assistance of counsel hinges on a two-prong test. [41] First, the defendant must prove counsel's performance was deficient.[42] If the performance was deficient, the defendant

[35] ***Strickland v. Washington,*** 466 U.S. 668, 698 (1984); ***State v. Franklin***, 2001 WI 104, 12, 245 Wis. 2d 582, 629 N.W.2d 289.
[36] ***Franklin,*** 245 Wis. 2d 582, 12.
[37] *Id.*
[38] U.S. Constitution; Wisconsin State Constitution.
[39] ***Strickland v. Washington,*** 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).
[40] ***Kimmelman v. Morrison,*** 477 U.S. 365, 375, 106 S.Ct 2574, 91 L. Ed. 2d 305 (1986).
[41] ***State v. Carter***, 2010 WI 40, ¶21, 324 Wis. 2d 640, 782 N.W.2d 695.
[42] *Id.*

must then prove that the deficiency prejudiced his or her defense.[43] Put more simply, if counsel's representation had not been deficient, there is a reasonable probability that the result of the proceeding would have been different.[44]

To prove deficient performance and satisfy the first prong, the defendant must establish that counsel's representation "fell below an objective standard of reasonableness considering all the circumstances."[45] In its evaluation of counsel's performance, the court will make every effort to reconstruct the circumstances of the case and counsel's performance to evaluate his conduct and decisions from his perspective at the time, being highly deferential to counsel's judgment.[46]

A reviewing court will not second guess strategic decisions made with the benefit of hindsight, nor will it construct a strategic defense that was not offered by counsel.[47]

Next, a defendant must prove their counsel's deficiency prejudiced their defense and undermined confidence in the outcome of the trial. Though it is not enough for the defendant to prove that counsel's errors had some conceivable effect on the outcome of the proceeding, the defendant is not required to show that counsel's conduct more likely than not altered the outcome in the case.[48] The court's analysis does not focus on a simplistic, "outcome-determinative standard", but on the reliability of the proceedings.[49] The result of

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[43] *Id.*
[44] ***Kimmelman,*** 477 U.S. 365, 375.
[45] ***Carter,*** 2010 WI 40, ¶22.
[46] *Id.*
[47] ***Davis v. Lambert,*** 388 F.3d 1052, 1064 (7th Cir. 2004) (quoting ***Harris v. Reed***, 894 F.2d 871, 878 (7th Cir. 1990)).
[48] ***State v. Moffett,*** 147 Wis.2d 343, 354, 433 N.W.2d 572 (1989).
[49] *Id.*

a proceeding can be rendered unreliable by counsel's conduct even if the conduct cannot be proven by a preponderance of the evidence to have determined the outcome.[50]

I. Trial counsel was ineffective for failing to file a discovery demand, obtain and review complete discovery which resulted in Minnema's conviction.

Wisconsin Stat. § 971.23(1) provides that *upon demand*, the district attorney must, within a reasonable time before trial, disclose to the defendant or their attorney all of the information they intend to offer at trial.[51] If counsel does not demand discovery, prosecutors are not required to provide it. Trial counsel never attempted to file a discovery demand in Minnema's case.[52] Instead he relied on a file provided to him by his client.[53] As a result, exhibits and other evidence was presented at trial that Minnema, and by extension trial counsel, had never seen.

> Q: Okay. Prior to meeting with Ms. Minnema for the first time, did you read all of the police reports that had been provided to you?
> A: No. Because she had a lot of the discovery in her possession.
> Q: So what you're telling me then is that when you received the file – when you were appointed on this case by the public defender and you received the file you didn't receive the entire file from them?
> A: I don't believe I did. I -- I had some misconceptions on -- on how the file would have or should have been transferred. So I've learned since then to ask the DA's office for a new fresh file if there were questions on if I had everything.
> Q: And after you -- well, let's say that after the first time you met with Ms. Minnema and you learned that you didn't have all the discovery, was it provided to you then by Ms. Minnema?
> A: It -- it would be speculation if I had all the discovery. Because I would need to cross-reference that against what the DA's file is. And I never did that.[54]

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[50] *Id.*
[51] Wis. Stat. § 971.23(1).
[52] R.211 at 7:4-7.
[53] R.187 at 7.
[54] *Id.* at 20:5-25.

Not only does counsel have the duty to demand discovery, they also have a responsibility to read all portions of discovery that have the potential to benefit or damage their client's case.[55] Wisconsin courts have held there is no strategic or tactical advantage for a criminal defense attorney to neglect reviewing discovery, especially if it may yield exculpatory evidence.[56] Even trial counsel described this failure to demand discovery as being "negligent in [his] duties."[57] Trial counsel's failure to demand and review the discovery in this case is *prima facie* deficient performance.[58] In addressing this critical misstep, the circuit court seemingly suggests that there was no prejudice in trial counsel failure to demand discovery.[59] The circuit court quotes excerpt of trial counsel's *Machner* hearing testimony do not tell the full story. In these excerpts trial counsel acknowledged that at the time of the trial he believed he had complete discovery.[60] Even if that was completely true, it is not dispositive. That is, if trial counsel suspected he had incomplete discovery, then why would he proceed to trial? Notably, the circuit court gives little credence to trial counsel's testimony of what he felt was missing. Trial counsel testified: "what I didn't know or that wasn't clear was when Officer Gorchals got to his residence."[61] More critically, circuit court ignores the testimony regarding what trial counsel does not dispute was missing. As memorialized in the transcript, trial counsel received the file from Minnema and only had the discovery she provided. Minnema clarified that there were

[55] ***State v. Thiel***, 2003 WI 111, ¶37, 264 Wis. 2d 571, 665 N.W.2d 305.
[56] *Id.* at ¶38.
[57] R.167 at 13:4-10.
[58] ***Thiel,*** 264 Wis.2d 571, ¶37.
[59] R.237 at 25:11-25.
[60] R.237 at 25:24-28:25 (*quoting,* R.187 at 23:6-25:24.).
[61] R.187 at 23:6-7.

items presented at trial that were not in the discovery, including the four exhibits.[62] This point, trial counsel did not dispute.

> Q: Okay. And if there were – so she reports that – if she reports that there were instances or evidence presented at trial that she had not been – had not been previously discussed or she had not previously seen, would you object to that as – or dispute that fact?
> A: No. I think that's possible, very probable.[63]

Counsel's failure to demand a complete discovery file from the State resulted in Minnema being uninformed about the case against her or determine the best course of action. This point he implicitly concedes when he testified that "[he] wasn't prepared to understand the strength of the cases or the case from the State to cross or to discredit those other witnesses as well as, you know, having an expert for the DUI testing. That would have been something else that I thought was necessary."[64]

II. Trial counsel was ineffective for failing to object to the untimely and prejudicial filings.

a. Trial counsel was ineffective for failing to object to the untimely and prejudicial filing of an amended criminal complaint.

When reviewing the sufficiency of a criminal complaint, the court will consider whether, under the totality of the circumstances, the complaint and information allege facts such that the defendant can plead and prepare a defense.[65] The criminal complaint is intended to provide the defendant with notice of the charges being brought against them, as well as the evidence the State possesses.[66] The original criminal complaint was filed on

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[62] *Id.* at 62:8-17.
[63] R.211 at 21:23-22:4.
[64] R.211 at 14:19-24.
[65] ***State v. Hurley***, 2015 WI 35, ¶32, 361 Wis.2d 529, 861 N.W.2d 174.
[66] *Id.*

July 10, 2017, alleging two counts: (1) operating while under the influence of an intoxicant; and (2) operating with a prohibited alcohol concentration.[67] Minnema and her trial attorney began to prepare a defense for those two charges. Subsequent to her initial appearance, Minnema's case was set for trial on those two charges multiple times. At no point before these scheduled trials did the State attempt to amend the criminal complaint. However, nearly two years later, on April 15, 2019, the State filed an amended criminal complaint that alleged two additional misdemeanor counts: (3) resisting arrest, and (4) bail jumping.[68] The criminal complaint was not amended due to discovery of additional evidence, nor did trial counsel request or receive additional discovery upon the filing of the amended complaint.[69] No reason was provided for the filing of the amended complaint to add two new charges. The State had over two years to amend the complaint but waited to do so until shortly before trial. Trial counsel should have objected to this amended filing, as it prejudiced Minnema ability to prepare a defense for the additional charges.

At the ***Machner*** hearing, trial counsel testified that he met with the State before the amended complaint was filed and that he was not given additional discovery that would relate to the amended charges.[70] Despite the amended complaint's filing over two years after the alleged offense not being offered any additional discovery, counsel did not object. The delay of the amended complaint undoubtedly prejudiced Minnema; no one from the neighborhood who may have witnessed the incident was available or could remember what

[67] R.1.
[68] R.50.
[69] R.187 at 20:5-25.
[70] R.211 at 43:8-11.

they would have observed that day. Without these witnesses, Minnema's ability to challenge the deputy's narrative and impeach his credibility was severely limited.

There is no conceivable strategy trial counsel could have been employing that would benefit from the additional charges, especially additional charges two years later. Further, the two additional charges widely broadened the evidence that would be permitted at trial. The addition of these charges would require an entirely different defense and would permit admission of evidence that would have been irrelevant, and thus inadmissible, in a simple OWI trial. While acknowledging the possible need for development of facts as it related to at least one of the additional charges, the circuit court nonetheless found that trial counsel was effective. There the court focused entirely on the five months between the time of the filing of the amended criminal complaint and the jury trial. The circuit court's narrow focus misses the prejudice that resulted in the prosecutor's delay. Namely, because these charges were not presented initially, Minnema missed the opportunity to develop her defense with witnesses and evidence that would have been available contemporaneously. The juxtaposition of this with the fact that the prosecutor offers no reason for its delay lends credence to Minnema's concern.

Minnema was eventually convicted of these two additional charges, resulting in patent prejudice to her and her case.[71] Trial counsel's performance was deficient for his acceptance of the untimely amended criminal complaint. In his ***Machner*** testimony, counsel admitted to essentially conceding the issue, basically arguing that Minnema

[71] R.84.

resisted because she was hurting.[72] Tacitly, trial counsel admitted that there were arguments to be made relating her injuries to the resisting arrest charge that he "didn't know how to effectively bring those into the trial."[73] This deficiency prejudiced Minnema by resulting in the ultimate conviction of two additional charges first alleged against her more than two years after the incident occurred.

b. Trial counsel was ineffective for failing to object to the untimely and prejudicial filing of the witness list.

Trial counsel failed to address the timing of the filing of the witness list and the apparent lack of preparedness to proceed with trial. Notably, the State's witness list was filed on September 16, 2019, the day before trial.[74] The prosecutor does not even file a notice of expert testimony, which is required under Wis. Stat. § 971.23(e). Trial counsel testified:

> Q: And had you had an opportunity to discuss the strength of the State's case as it relates to the particular witnesses with Ms. Minnema and advise her an honest appraisal of the case prior to trial?
> A: She was very nervous. And I – and I think there was a lot of opportunity that we missed by having such a late – such a late witness list.
> Q: Did you object to the witness list? The timing –
> A: I did not.
> Q: The timing of the witness list?
> A: I did not.[75]

This testimony makes clear trial counsel was unprepared and failed to properly advise Minnema as required by the Constitution. The circuit court conceded that the witness could have been produce earlier but decided that none of the four witnesses should

[72] R.211 at 53:23-25.
[73] *Id.* at 53:8-12.
[74] *Id.* at 15: 6-11.
[75] *Id.* at 15:13-23.

have been surprising.[76] Here, circuit court misunderstands the contexts that underscores trial counsel deficient performance and its resultant prejudice. That is, circuit court presumed that trial counsel would have been aware of anticipated prosecution's witness prior to trial. For context, trial counsel was new to legal practice and denoted himself as a general practitioner; his practice consisted of contract law, probate, and criminal law.[77] While there were some discrepancies between previous testimony, it appears at the time of Minnema's trial he only had one other jury trial. That trial was defending against a Chapter 51 commitment.[78] So he had never tried a criminal case, much less an OWI case. Actually, trial counsel was under a diversion agreement through the Office of Lawyer Regulation (OLR) to avoid public reprimand and was having family issues, which he obviously shared with Minnema and she believed was impacting his representation.[79] It was his lack of experience that further emphasized the need for a timely filing of the state's witness list. His testimony about the missed opportunity with the late filing of the witness list implies as much. Even his discussions with Minnema on trial proceedings were lacking; he never bothered to explain the *voir dire* preemptory challenge process precluding her from meaningfully participating in her own defense.[80]

III. Trial counsel was ineffective for failing investigate critical evidence to Minnema's defense.

a. Trial counsel was ineffective for failing investigate the officer's timeline and plausibility of officer's observations.

[76]R.237 at. 23:2-24.
[77] R.211 at 43:12-19.
[78] *Id.* at 28:18-19.
[79] *Id.* at 22:5-24:16; R.187 at 51:8-18.
[80] R.187 at 49:2-50:4.

Defense attorneys have a duty to "conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits".[81] A defendant who alleges a failure to investigate on the part of counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case.[82] This allegation must be based on more than speculation.[83] Though defense counsel is not expected to use a "scorch-the-earth" strategy, they must look into readily available sources of evidence.[84]

Minnema's trial counsel admitted he did not conduct an independent investigation of the case, including whether Deputy Gorschal had a direct line of sight to Minnema's driveway though Minnema asserted concerns that there were obstructions between Deputy Gorschal's window and Minnema's driveway. [85] He failed his duty to conduct a prompt investigation.

> Q: You also did—prior or post trial you did…a pictorial examination of the area via Google; is that correct?
> A: ….In terms of the timeliness of when he saw it or where he saw it, you know, I wasn't able to get the voracity (sic) around what and where and how and different angles that probably would have been important to have known.[86]

When questioned about this at the ***Machner*** hearing, trial counsel stated that after the trial he had done a pictorial examination of the area in question via Google maps and observed foliage obstructing the view from Deputy Gorschal's home to Minnema's driveway.[87] This

[81] ***State v. Mayo,*** 2007 WI 78, ¶59, 301 Wis.2d 642, 734 N.W.2d 115.
[82] ***State v. Leighton,*** 2000 WI App 156, ¶38, 237 Wis.2d 709, 616 N.W.2d 126.
[83] *Id.*
[84] ***Brown v. Sternes,*** 304 F.3d 677, 692 (7th Cir. 2002).
[85] R.211 at 14-15, 50:16-51:19.
[86] *Id.* at 51:4-8.
[87] *Id.* at 52.

observation clearly calls into question the plausibility of Deputy Gorschal's narrative of the events that day. Introduction of evidence of an obstruction to Deputy Gorschal's view could easily have provided the jury with reasonable doubt. As Deputy Gorschal was the State's key witness against Minnema, any effort to impeach his testimony would have been extremely helpful to the defense's case. This evidence would have been relatively easy for counsel to procure, but he did not attempt until after his client was convicted. Circuit court appears to dismiss the evidence by asserting that nothing was presented showing obstructions to Deputy Gorschal's view. Trial counsel testified: "…There were obstructions in the way possibly of the house towards the driveway."[88]

b. Trial counsel was ineffective for failing to consult or obtain an expert to evaluate the testimony of reliability of an expired vial.

In order for a jury to have found Minnema guilty of operating while intoxicated, they would have to believe she had a blood alcohol content of .08 or above while she was operating her vehicle. To be clear, there was no observation by Deputy Gorschal, or anyone else, of poor driving on the day in question. The State relied solely on blood alcohol testing to convict Minnema of operating while intoxicated. This test's reliability should have been contested at trial due to the State's use of a potentially expired testing vial. Trial counsel failed to contest the test's reliability. The State's blood analyst testified at trial that she was unaware of an expiration date, or the guaranteed date, of the vial used to collect and store Minnema's blood for testing. After this admission, she proclaimed:

> Q: Okay. So there's no real way for you to know if it was a good vial or a bad vial?

[88] R.211 at 51:18-19.

> A: Well, so I guess I don't know what you mean by good or bad?
> Q: In terms of is it guaranteed by a specific date?
> A: So the guaranty, if I may, refers to the date until which the manufacturer guaranties that it will pull sufficient volume to fill that specimen tube. That's what that date refers to.
> Q: And you were not able to observe that or did not know it?
> A: No.[89]

Her testimony, taken on its face, suggests the guaranteed date has little to no consequence on the results of the testing. This is inaccurate. However, this inference went unchallenged by defense counsel at trial and was reinforced by the State during closing statements:

> There was one question about was one of the vials expired … all that expiration date means is that it's guaranteed to hold a certain amount of liquid, that it's somehow tainted or somehow shouldn't be used or somehow can't be used or somehow affected this. And I don't even think he's going to suggest that.[90]

Had trial counsel consulted an expert witness, he would have been better prepared and equipped to cross-examine the State's witness on an issue critical to proving an element Minnema's ultimate conviction. Because there was no evidence of poor driving by Minnema on the day in question, the blood alcohol testing was the principal evidence that supported the State's allegation that she had operated a vehicle while being under the influence. Trial counsel admitted his failure to conduct his own research about the testing vials or consult a witness resulted in an ineffective defense to Minnema.

> Q: On cross examination, your testimony was that…nothing had been brought to your attention regarding items to investigate that would have potentially provided additional information that would impact the outcome…is that correct?
> A: I haven't seen specific evidence in terms of something similar to like facts. But in terms of facts that I either misinterpreted or facts that I did

[89] R.126 at 130:2-13.
[90] *Id.*

> not effectively defend such as the expiration date on the test tube or other things along those lines. So there are—there are matters that I was not effectively defending her on for the purpose of raising reasonable doubt in my mind from the post-conviction appeal motion.
> Q: That evidence from an expert would have impacted or provided some additional information regarding the testimony?
> A: It would have because it would have given substantially more reasonable doubt to the defendant as to whether even if—even if—maybe she didn't drink as much as she might have stated she did. And if you could extrapolate the absorption curve, so to speak, you know, maybe she wouldn't have been drunk or maybe the test was inaccurate. So, you know, you could throw the test out. There could have been different angles that were unexplored as well as just with the jury in general about the robustness of the case.
> Q: And wouldn't you say that it is always relevant, the integrity of the test to an OWI case?
> A: It is.[91]

He also would have been made aware of the potential for contamination when a lab uses expired vials for testing. An expert would have informed him that the manufacturers of vials such as these does not guarantee the seal of the vial or its vacuum pressure, both critical to the veracity of the testing vial, after the guaranteed date.[92] The State's expert testified about the vacuum pressure of the vial when it is actually the breakdown of the septa seal that results in the potential for contamination of the sample.[93]

Specifically, if the seal's integrity is compromised, *Candida Albicans,* along with a variety of other contaminants, could be introduced to the blood in the testing vial. These contaminants can cause exogenous alcohol production and falsely elevate the blood alcohol test results.[94] An expert testifying to these facts after the State's expert admitting she was unaware of the vials' expiration or guarantee dates could have provided further reasonable

[91] R.211 at 48.
[92] R.195 (Justin McShane, Chemistry, Forensics Discipline, Laboratory Procedure, October 12, 2010).
[93] *Id.*
[94] *Id.*

doubt to a jury. However, an expert was not consulted, and trial counsel did not perform any research about this issue.

Had he consulted an expert to counter the State's witness, it would have undermined the only evidence the State possessed to prove Minnema had operated a vehicle while under the influence. Without credible blood alcohol testing, it is reasonably likely that Minnema would not have been convicted. The circuit court asserts that the record is not developed as to the blood vial but summarily concludes that it did not matter because defense's theory of defense renders it meaningless.[95] Firstly, the circuit court ignores that the vial expiration date is part of the trial testimony; the analyst not knowing whether the vial used had expired but asserting that it would not make a difference to the integrity of the test was presented to the jury. That testimony undoubtedly had an impact, which resulted in a conviction.

Secondly, trial counsel's negligence in investigating these issues serves as a basis for the deficient, and ultimately prejudicial, performance. A court is subject to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance that, under all the circumstances, might be considered part of a sound trial strategy.[96] Strategic choices made after incomplete investigations are reasonable "precisely to the extent that reasonable professional judgments support the limitations on investigation".[97] However, errors made due to oversight or inattention rather than reasonable defense strategy may be sufficient to satisfy the first prong of the test. Counsel

[95] R.237 at 24:10-25:3.
[96] ***Strickland,*** 466 U.S. 668, 689.
[97] *Id.* at 691.

has a duty to make all reasonable investigations or reasonable strategic decisions that makes a particular investigation unnecessary.[98] Trial counsel's errors resulted from poor investigation, inattention, and oversight, none of which can serve as a basis for reasonable trial defense. Actually, requesting the blood alcohol analysis is reasonable due diligence when defending against operating under the influence or an intoxicant or operating with a prohibited alcohol content. The record indicates trial counsel failed to make such a request.[99] By failing to properly obtain pertinent discovery, trial counsel was deficient in due diligence in developing any trial theory. At a minimum confirming the integrity of the test results, is as basic in OWI defense as determining that there was a death in homicide cases (without either, there is likely no case). Trial counsel arguably concedes as much in acknowledging that the integrity of the blood test is always relevant in developing an OWI theory of defense.[100]

IV. Trial counsel was ineffective for failing object to the admission of other acts testimony.

Normally, when a piece of evidence is disputed under Wis. Stat. § 904.04(2), the trial court must decide whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant, confusion of the issues, or misleading the jury.[101] The Wisconsin Supreme Court has held that the admissibility of

[98] *Id.*
[99] R.211 at 16:16-25; 17:6-8.
[100] *See generally,* R.211 at 48:10-12.
[101] *Id.*

prior bad acts under § 904.04(2) is controlled by a two-prong test.[102] First, the court must determine whether the evidence is being offered to prove the character of the person, as is prohibited by statute. If the court finds it is being offered for a permissible purpose, it must then consider whether the probative value of the evidence is substantially outweighed by the prejudicial value of the evidence. [103]

The exclusion of such evidence is intended to dispel the fear that evidence of other bad acts invites the jury to focus on the accused's character. This magnifies the risk that the jury will punish the accused for being an unlikeable person, regardless of the accused's guilt of the charged crime.[104]

The Wisconsin Supreme Court has outlined a three-step analysis for counsel and courts to determine whether to admit other acts evidence: first, determine whether the other acts evidence is offered for a permissible purpose under Wis. Stat. § 904.04(2); second, determine whether the other acts evidence is relevant under Wis. Stat. § 904.01; and lastly, determine whether the circuit court erroneously exercised its discretion in weighing the probative value of the other acts evidence against the danger of unfair prejudice, confusion of the issues, or misleading the jury.[105] The *Sullivan* analysis was not performed on the evidence at issue in Minnema's case before it was admitted against her at trial.

If evidence does carry the danger of unfair prejudice, the court may make efforts to mitigate that danger and lessen the prejudicial effect by utilizing a variety of methods such

[102] ***State v. Kuntz,*** 160 Wis.2d 722, 746, 467 N.W.2d 531 (1991).
[103] Wis. Stat. § 904.03.
[104] ***State v. Sullivan,*** 216 Wis.2d 768, 783, 576 N.W.2d 30 (1998).
[105] *Id.*

as stipulations, editing evidence, limiting instructions, and restricting argument.[106] Cautionary jury instructions can go a long way in limiting unfair prejudice that may result from the admission of other acts evidence.[107] Further, the Wisconsin Supreme Court has held:

> Although cautionary jury instructions are preferred AND SHOULD NORMALLY BE provided when admitting other acts evidence, they are not required unless requested.[108]

This would indicate that when other acts evidence is admitted, it is trial counsel's responsibility to request some form of curative jury instruction and that such requests should normally be granted. No such jury instruction was requested at Minnema's trial, so none was provided by the court.

The other acts evidence presented at Minnema's trial should have been subjected to *Sullivan* analysis and would have failed. Here, the State questioned D.N. about Minnema having been in trouble before, including questions about a domestic abuse restraining order placed against her, as an attempt to explore prior bad acts in front of the jury with no objection by Minnema's counsel.[109] The State continued to question Mr. Noffke about previous cases, the details of their divorce, and evoked comments about several domestic abuse instances. [110] The State questioned Mr. Noffke at length about him helping Minnema

[106] ***State v. Payano,*** 2009 WI 86, ¶100, 320 Wis.2d 348, 768 N.W.2d 832.
[107] *Id.*
[108] *Id.* ¶100.
[109] R.126 at 160-161.
[110] *Id.*

out of trouble, more than once.[111] Throughout this line of questioning, trial counsel failed to object.

The State similarly questioned Minnema, including the State highlighting Minnema's drinking at times when she was prohibited from consuming alcohol.[112] Trial counsel did not object.

This evidence was prejudicial to Minnema as it painted a picture of chronic criminal conduct, domestic violence, alcohol abuse, and continued need for restraining orders. Nonetheless, trial counsel failed to object. This failure resulted in the State exploring prior bad acts in the presence of the jury in the absence of the requisite analysis set forth by *Sullivan* that is intended to prevent inappropriate, and sometimes inadvertent, inferences that affect a jury's verdict. Even the trial court noted its concern about the other bad acts testimony that had been introduced through Mr. Noffke's testimony:

> Court: I don't know if counsel are asking for any more instructions. I will specifically note that I have some concerns, and I wanted to raise it with counsel, that especially through Mr. Noffke's testimony there may have been an indication of lots of other bad acts.
>
> We didn't have other – we didn't' have any other bad act hearings or we don't know the nature. He said she was in lots of trouble and she wanted to help her out.
>
> I don't know if there's any curative instruction that anyone's asking for under those circumstances.[113]

Despite the court's acknowledgement of the evidence's potential effect on the jury, trial counsel declined to request any form of curative jury instruction or move to strike the

[111] *Id.*
[112] *Id.* at 183:13-21.
[113] *Id.* at 295:2-15.

other acts evidence from the record.[114] Trial counsel stated that reason for not objecting or requesting a curative instruction was "complicated."[115] Trial counsel stated that the strategy included wanting some information to be disclosed to portray Minnema as somebody who was afflicted by domestic violence.[116] Noting "there were certain aspects that [they] wanted to have the jury be aware of, so to speak."[117] He admitted that he never had a conversation about those specific acts with Minnema.[118]

The circuit court was persuaded by these statements of purported strategy; however, further inquiry revealed that the failure to object, in addition to the failure to request a curative instruction of the other bad acts testimony, was not a strategic decision at all.

> Q: Okay. So to go back to the testimony that was provided, so the testimony about David being involved in her hiring previous attorney, that was something that you wanted – that was consistent with your theory of the case?
> A: That – that is something I should have objected to and I did not.
> Q: Okay.
> A: And I don't have a – I don't have a rational reason for it. I think the question caught me off guard, and I wasn't prepared for that question for the client.
> Q: In addition to the question of Ms. Minnema specifically about her drinking many times when she wasn't supposed to, was that consistent with your theory of the case?
> A: I believe I didn't have that in my scope of what I would have done possibly to the jury in a negative fashion.
>
> You know, in our mind I think it was the medicating reason why she or how she dealt with the abuse. I don't – I struggle – I struggle to weigh that with the propensity or how that might be prejudicial to a jury that would have suggested that, you know, she drank 40 miles away and then drove to a residence. Where she came from there was no domestic violence. Where she arrived at there was domestic violence.

[114] *Id.*
[115] R.211 at 12:23.
[116] *Id.*
[117] *Id.*
[118] *Id.*

> Q: I'm sorry. I didn't get the answer to the question. Was that consistent or inconsistent with your theory of the case that the many times you (sic) drank when you were not or weren't supposed to?
> A: I would – generally, I would say that's inconsistent with the case.
> Q: Okay. And you did not object to that other act testimony?
> A: I did not.[119]

Counsel's failure to mitigate damage done by admission of other bad acts testimony was a grave error that prejudiced Minnema. Notably, trial counsel stipulated to the admission of Minnema's prior OWI convictions to avoid evidence of prior misconduct at trial. If he had been aware of the similar effect Mr. Noffke's testimony, logic would indicate he would have attempted to mitigate its prejudicial effect as well.

a. The other acts testimony presented at Minnema's trial would not have survived *Sullivan* analysis.

As noted above, the Wisconsin Supreme court permits admission of "other acts" evidence if it passes a three-part test. The evidence provided by D.N. at Minnema's trial does not pass this test and, therefore, was inadmissible.

First, the evidence was not offered for a permissible purpose under Wis. Stat. §904.04(2)(a). There was no clarity or specificity provided with Mr. Noffke's multiple references to Minnema's prior bad acts that would indicate they were being offered for a permissible purpose. From the testimony offered, it can be deduced that the evidence of Minnema's previous encounters with law enforcement for domestic violence related incidents was introduced by the State to bolster the claim that she was the aggressor of the domestic violence altercation on the day of her arrest, as well as to demonstrate a history

[119] *Id*. at 12-14:24-8.

of violent behavior that she acted in accordance with when she resisted Deputy Gorschal's efforts to arrest her. The evidence that she had consumed alcohol when she was prohibited from doing so was offered to prove that she had done so before and was therefore more likely to have done so on the day in question. This is precisely the type of situation *Sullivan* seeks to prevent. Though the list of acceptable statutory purposes to introduce other acts evidence is non-exhaustive, simple references to Minnema being in trouble a lot, needing an attorney for several cases, and restraining orders cannot credibly be held to have been offered for a permissible purpose. Because this evidence fails on the first part of a three-part test, a court would likely not proceed with the analysis. For thoroughness, this brief will perform continued analysis.

Second, the other acts evidence was not relevant under Wis. Stat. § 904.01. The statute defines relevance as something to make any fact of consequence more or less likely to be true. Because Minnema was not charged with a domestic violence related crime, testimony of her prior domestic violence incidents is simply irrelevant. The fact she and D.N. had been involved in such incidents before did not make any fact of the charged crimes more or less likely. Therefore, the testimony of the domestic violence incidents fails on the second prong as well as the first. The testimony about Minnema drinking when she was prohibited from doing so is similarly irrelevant. Because it referenced drinking perhaps reflexively one might consider them relevant to current case. However, the assertions elicited during trial were not used to establish a fact of consequence in the case. That is, the testimony only served to prove Minnema has behaved poorly in the past so she

likely behaved poorly on the day in question. Wisconsin statutes and case law have repeatedly held this to be impermissible.

Lastly, the probative value of this testimony was not substantially outweighed by the risk of unfair prejudice under § 904.03. Wisconsin courts have held:

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.[120]

The specific danger of unfair prejudice is the potential that the jury could conclude because a defendant committed one bad act, they necessarily committed the charged crime.[121] There is very little probative value held in the testimony offered by D.N. There is undoubtedly a social stigma placed upon those who commit domestic violence, especially if there is an ongoing pattern of such behavior. There is additional stigma assigned to those who abuse alcohol, especially if this abuse contributes to their domestic violence tendencies, or if they choose to drive drunk. These stigmas, in addition to others, would be reasonably expected to provoke a jury's instinct to punish by leading them to believe Minnema exhibited a pattern of bad behavior and she therefore must have committed the offenses she was charged with. Testimony that Minnema had participated in the socially unacceptable behaviors she was accused of would be extremely likely to cause prejudice in the eyes of the jury. The potential for this unfair prejudice far outweighs the minimal probative value the accusations hold. Because of the nature in which the other acts

[120] ***Payano,*** 2009 WI 86, ¶89.
[121] *Id.*

testimony was elicited, an objection and curative jury instruction would have been the best recourse to minimize the possibility of undue prejudice. However, trial counsel declined to request a curative jury instruction despite the trial judge explicitly expressing his concern about the evidence and offering a curative jury instruction to help minimize its effect. Further, counsel did not request any alternate mitigating method such as striking the testimony from the record. No curative jury instruction was given, the bad acts testimony remained on the record, and Minnema was left to deal with whatever undue prejudice resulted from its admission.

V. The cumulative effect of trial counsel's deficient performance necessitates new trial.

The Sixth Amendment guarantees the "fundamental and essential" right of the defendant in a criminal case to be represented by counsel.[122] "That a person who happens to be a lawyer is present at the trial alongside the accused, however, is not enough to satisfy the constitutional command."[123] Thus, the right to counsel encompasses the right to the effective assistance of counsel.[124]

A claim of ineffective assistance of counsel is typically analyzed under the two-part ***Strickland*** test, which requires showing both that counsel performed deficiently and that his or her performance prejudiced the defense.[125] However, some circumstances "are so

[122] ***Gideon v. Wainwright***, 372 U.S. 335, 344 (1963).
[123] ***Strickland v. Washington***, 466 U.S. 668, 685 (1984).
[124] ***McMann v. Richardson***, 397 U.S. 759, 771 n.14 (1970).
[125] ***Strickland v. Washington***, 466 U.S. at 687.

likely to prejudice the accused" that specific prejudice need not be litigated.[126] For example, prejudice may be presumed when the accused is denied counsel entirely, when counsel fails to subject the prosecution's case to meaningful adversarial testing, or on occasions when even a competent advocate could not be expected to provide effective assistance of counsel under the circumstances.[127] "If it appears from the record that the real controversy has not been fully tried, or it is probable that justice has for any reason miscarried" Wis. Stat. § 751.06 recognizes the authority of the court to reverse a judgement or order appealed.[128]

A single unreasonable deficiency may be sufficiently prejudicial on its own. However, when there are several, the court need not rely on the prejudicial effect of one deficiency, but rather analyze whether all the deficiencies establish a cumulative prejudice to the defendant.[129] Post-conviction counsel has identified numerous deficiencies in trial counsel's representation. The court must not evaluate each deficiency in isolation, but rather based on the cumulative effect of these deficiencies.[130] This cumulative effect analysis ensures the focus of the court's inquiry is not on the outcome of the trial, but on the reliability of the proceedings.[131]

Trial counsel's failure to object to evidence pertaining to Minnema's prior bad acts resulted in bias to the jury. The evidence would not have survived *Sullivan* analysis and

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[126] ***United States v. Cronic***, 466 U.S. 648, 658 (1984).
[127] *Id.* at 659-60.
[128] ***State v. Watkins***, 2002 WI 101, ¶ 79, 255 Wis. 2d 265, 647 N.W.2d 244.
[129] ***State v. Thiel,*** 2003 WI 111, ¶59, 264 Wis.2d 571, 665 N.W.2d 305.
[130] ***State v. Coleman***, 2015 WI App 38, 362 Wis. 2d 447, 865 N.W.2d 190 (*citing* ***State v. Thiel***, 264 Wis. 2d 571, 665 N.W.2d 305).
[131] *Id.* ¶ 41.

counsel should have ensured it was subjected to such analysis. Trial counsel's failure to object to an untimely and prejudicial filing of an amended complaint resulted in Minnema's ultimate conviction of the two additional charges that she never should have been charged with in the first place, and likely wouldn't have been had counsel objected. Trial counsel's failure to conduct any investigation of facts that were readily available to him resulted in evidence undermining the State's key witness never making it in front of the jury. Such evidence could have resulted in Minnema's acquittal. Lastly, trial counsel's failure to demand and review a complete discovery file resulted in Minnema going to trial entirely uninformed about the State's case against her. Had she been aware of all the evidence, she may have decided to pursue a different defense and potentially secure a better outcome. Further, trial counsel could have called the blood test performed on Minnema into question with a simple consultation with an expert in the field. He did not attempt to secure an expert, nor did he perform research into this issue himself. Evidence undermining the blood test results could easily have provided Minnema's jury with reasonable doubt.

The cumulative effect of trial counsel's deficiencies deprived Minnema of her constitutional right to counsel. It is not enough that a defendant has access to someone licensed as an attorney, they are guaranteed *effective* representation.[132] Trial counsel's multiple errors in Minnema's case both individually and in the aggregate result in a reasonable probability that, but for these unprofessional errors, the result of her trial would

[132] *Id.* ¶ 21.

have been different.[133] Accordingly, Minnema respectfully requests this Court grant her the remedy of a new trial.

[133] ***Strickland***, 466 U.S. 668, 694 (1984).

CONCLUSION

For the reasons stated above, the accompanying caselaw and admissions of counsel, this Court should reverse the circuit court's order denying Minnema's postconviction motion, find that Minnema was denied effective assistance of counsel, vacate Minnema's conviction, and order a new trial.

Dated at Middleton, Wisconsin, August 11, 2022.

Respectfully submitted,

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I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum:

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