STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2022 AP 446 – CR

CIRCUIT COURT CASE NO.: 17CT180

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JULIE A. MINNEMA,

Defendant-Appellant.

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

PLAINTIFF-RESPONDENT'S BRIEF

Veronica Isherwood
Waupaca County District Attorney

Electronically signed by:

Kat R. Turner
KAT R. TURNER
Assistant District Attorney
State Bar #1084328

Attorneys for Plaintiff-Respondent

Waupaca County District Attorney
811 Harding St.
Waupaca, WI 54981
715.258.6444
715.258.6436(fax)
Kat.Turner@da.wi.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Regulations

Rules:

Wis. Stat. (Rule) § 907.01:1

ISSUES PRESENTED

On December 9, 2016 Minnema was observed by Deputy Gorchals, who was at home eating his lunch, pull into the shared driveway of her apartment home and get into a physical altercation with her (now) ex-husband. Deputy Gorchals left his lunch, drove his squad car to where Minnema was, separated Minnema from the altercation, and arrested her for OWI. A criminal complaint followed on July 10, 2017 alleging two counts: (1) operating while under the influence and (2) operating with a prohibited alcohol concentration. Prior to jury trial the complaint was amended to add counts: (3) resisting arrest and (4) bail jumping, which had not originally been charged but, for which there was ample notice as the facts underlying these counts were alleged in the original complaint. A jury found Minnema guilty on September 17, 2019. After a *Machner*[1] hearing, the court denied Minnema's postconviction motion alleging several ineffective assistance of counsel claims on April 13, 2021.

Minnema raises five claims related to ineffective assistance of counsel on appeal.

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

The circuit court held that he was not.

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

---

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

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.

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

The circuit court held that he was not.

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

The circuit court held that it was not.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request publication as this case involves the application of settled legal principles. The State welcomes oral argument if it will assist the Court.

STATEMENT OF THE CASE

INEFFECTIVE ASSISTANCE OF COUNSEL

Standard of Review

To prevail on a claim of ineffective assistance of counsel, the defendant must show that the attorney's performance was deficient and that this deficiency prejudiced the defense. *See, e.g., State v. Evans,* 187 Wis. 2d 66, 93-94, 522 N.W.2d 554 (Ct. App. 1994) (citing *Strickland v. Washington,* 466 U.S. 668 (1984)). The burden is on the defendant to prove both deficiency and prejudice. *See State v. Sanchez,* 201 Wis. 2d 219, 232, 548 N.W.2d 69 (1996); *State v. Johnson,* 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). If the defendant fails on one prong, the court need not address the other. *See Evans,* 187 Wis. 2d at 93-94.

A defendant who asserts ineffective assistance of counsel must show that (1) counsel performed deficiently and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 688. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." Id. at 689. "Judicial scrutiny of counsel's performance must be highly deferential." Id. A court

judges an attorney's performance based on "an objective test, not a subjective one." *State v. Jackson*, 2011 WI App 63, ¶ 9, 333 Wis. 2d 665, 799 N.W.2d 461. "So, regardless of defense counsel's thought process, if counsel's conduct falls within what a reasonably competent defense attorney could have done, then it was not deficient performance." Id.

To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a defendant fails to prove one prong of the Strickland test, a court need not consider the other prong. Id. at 697.

"A claim of ineffective assistance of counsel is a mixed question of fact and law." *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695. A reviewing court "will uphold the circuit court's findings of fact unless they are clearly erroneous." Id. "However, the ultimate determination of whether counsel's assistance was ineffective is a question of law, which [this Court] review[s] de novo." Id.

ARGUMENT

I. Trial counsel was not ineffective for failure to file a discovery demand.

Minnema argues that she is entitled to an evidentiary hearing on her claim that counsel was ineffective for failing to make a formal discovery demand. Wisconsin Stat. § 971.23(1)(d) provides that "[u]pon demand, the district

attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney ... [a] list of all witnesses and their addresses whom the district attorney intends to call at the trial..." The State has a continuing duty to disclose if it "discovers additional material or the names of additional witnesses" at any point "prior to or during trial." Wis. Stat. § 971.23(7). If there is a violation of Wis. Stat. § 971.23, the remedy is exclusion of the testimony of any witness "not listed" or evidence not presented "unless good cause is shown for failure to comply," or "in appropriate cases," the court may grant a "recess or a continuance" to the opposing party. Wis. Stat. § 971.23(7m)(a). A defendant, however, must show prejudice or surprise to warrant a recess or continuance. See *Kutchera v. State*, 69 Wis. 2d 534, 543, 230 N.W.2d 750 (1975).

At the Machner hearing, trial counsel for Minnema stated that he received the discovery from a file maintained by Minnema. While trial counsel stated that it would be speculation if he had all the discovery there is no assertion that trial counsel did not have all of the discovery.[2] Accordingly, there is no assertion of unfair prejudice or surprise. Neither ineffectiveness nor prejudice can be determined.

II. Trial counsel was not ineffective for failure to investigate evidence to Minnema's potential defenses or for failing to object to filings by the State which she claims were untimely.

Minnema claims trial counsel was ineffective for failure to investigate the plausibility of Deputy Gorshal's observations – specifically, the view of Minnema's driveway from the deputy's window. While Minnema notes that a

---

[2] Transcript of Machner hearing 12/20/2021 7 at 8-14

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. This allegation must be based on more than speculation. Citing, *State v. Leighton*, 2000 WI App 156, ¶38, 237 Wis.2d 709, 616 N.W.2d 126. Minnema, nonetheless, goes on a belabored speculative exploration of what evidence additional investigation might have uncovered regarding potential obstructions to the deputy's view.

Additional grand speculation was raised regarding the guarantee date of the vial used to collect Minnema's blood for testing. Minnema states that the testimony of the analyst regarding the vial was inaccurate (brief of appellant p. 22). However, the theory of defense was that Minnema was intoxicated, but that her alcohol consumption occurred after she drove to her residence, rather than before. Because the strategy conceded a blood alcohol level above the legal limit to drive the blood alcohol test was not prejudicial. Likewise, the strategic decision not to retain an expert, or investigate the vial further was a reasonable one.[3] No actual prejudice to Minnema has been established.

Minnema next asserts a claim akin to an allegation that the prosecutor violated Wis. Stat. § 971.29(1), which provides that "A complaint or information may be amended at any time prior to arraignment without leave of the court." Even if the prosecutor violated § 971.29(1), Minnema did not preserve the issue with a timely objection, and has therefore waived the issue. See *Webster*, 196 Wis. 2d at 319 ("alleged trial court errors resulting from non-jurisdictional procedural defects are waived by a defendant if not properly preserved with a timely and specific objection.").

---

[3] Transcript of Machner hearing 12/20/2021 19 at 5-8

Additionally, Minnema attempts to establish that trial counsel was ineffective for failing to object to the filing of a witness list by the prosecutor the day prior to the start of the jury trial. The trial court correctly noted that none of the four witnesses should have been a surprise to trial counsel. Despite not having filed a list of witnesses, the prosecutor did provide notice of the witnesses through discovery materials. Minnema does not assert that trial counsel was unaware of any of the four witnesses prior to the filing of the witness list, nor does she identify any actual prejudice.

III. Trial counsel was not ineffective for failing to object to filings by the State or admissions of Other-Acts evidence.

Courts will apply a three-step analysis to determine the admissibility of challenged other acts evidence. *State v. Sullivan*, 216 Wis.2d 768, 771–73, 576 N.W.2d 30 (1998).

First, the evidence must be offered for an admissible purpose under Wis. Stat. § 904.04(2)(a), such as to establish motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, although this list is not exhaustive or exclusive. *Sullivan*, 216 Wis.2d at 772. Other acts evidence is also admissible to show a crime's context, to provide a complete explanation of the case, and to establish witness credibility. *State v. Hunt*, 2003 WI 81, ¶¶ 58–59, 263 Wis.2d 1, 666 N.W.2d 771. Second, the evidence must be relevant, which means it must both be of consequence to the determination of the action and tend to make a consequential fact or proposition more probable or less probable than it would be without the evidence. *Sullivan*, 216 Wis.2d at 772. Third, the probative value of the evidence must not be substantially outweighed by the considerations set forth in section 904.03, including the danger of unfair prejudice. *Id.* at 772–73.

When the party seeking to admit other acts evidence establishes the first two prongs by a preponderance of the evidence, the burden shifts to the opposing party to demonstrate that any unfair prejudice substantially outweighs its probative value. *State v. Marinez*, 2011 WI 12, ¶¶ 18–19, 331 Wis.2d 568, 797 N.W.2d 399. Bias "is squarely on the side of admissibility. Close cases should be resolved in favor of admission.'" *Id.* ¶ 41 (citation omitted). Because juries are presumed to follow instructions, a cautionary instruction reduces the risk of unfair prejudice, i.e., that the jury will conviction based on an "improper means." *Id.*

Even if "an act can be factually classified as 'different'—in time, place and, perhaps, manner than the act complained of—that different act is not necessarily 'other acts' evidence." *State v. Bauer*, 2000 WI App 206, ¶ 7 n.2, 238 Wis.2d 687, 617 N.W.2d 902. "Evidence is not 'other acts' evidence if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime." *State v. Dukes*, 2007 WI App 175, ¶ 28, 303 Wis.2d 208, 736 N.W.2d 515.

A. Evidence of Minnema's other domestic violence conduct towards her ex-husband was admissible.

In the instant case, the *Sullivan* analysis was never applied because there was no objection to the testimony regarding prior incidents of drinking while on bond and prior incidents of domestic violence by Minnema against DN. When a piece of evidence is not disputed no decision regarding the prejudicial effect is required. Here, trial counsel characterized the lack of objection and the lack of request for curative instruction as strategic to the defense.

Furthermore, it was the defense witnesses – DN and Minnema herself – who testified regarding the prior instances of abuse. It was a clear part of defense strategy to assert that Minnema drank after she drove because she feared DN and

his alleged violent tendencies. DN testified non-responsively to the prosecutor's questions stating that "[Minnema] was also my wife and was in a lot of trouble already."[4] This statement by DN, which was not in response to any question soliciting such a response by the prosecutor, led to additional clarifying questions and DN's statement that he "...didn't want to start any trouble between us again because that's why she took off."[5] DN, by his non-responsive answers, opened the door to further exploration of the history of domestic violence between he and Minnema. Even if trial counsel had objected, it is likely that the trial court would have determined the door to have been opened.[6]

B. The admission of the other acts evidence was harmless.

"An error affects the substantial rights of a party if there is a reasonable probability of a different outcome, meaning a 'probability sufficient to undermine confidence in the outcome.'" *State v. Kleser*, 2010 WI 88, ¶ 94, 328 Wis.2d 42, 786 N.W.2d 144 (citation omitted). There is no reasonable probability that the jury would have acquitted Bayerl had it not heard the other acts evidence.

Minnema's trial counsel asserted that the decision to not object to the evidence of other incidents of domestic violence between Minnema and DN was a strategic one. Counsel is not obligated to lodge every possible objection. State v. Jacobs, 2012 WI App 104, ¶ 30, 344 Wis. 2d 142, 822 N.W.2d 885 ("counsel must weigh the worth of the objection").

---

[4] Trial Transcript 160 at 19-20

[5] Trial Transcript 161 at 17-18

[6] Transcript of Machner Hearing 12/20/2021 37 at 1-6

Even if the court erred in admitting the other acts evidence, the error was harmless.

IV. There was no cumulative prejudice and Minnema is not entitled to a new trial.

Even aggregating her deficient performance claims, Minnema has not shown cumulative prejudice. *State v. Thiel*, 2003 WI 111, ¶¶ 59–60, 264 Wis.2d 571, 665 N.W.2d 305. "[I]n most cases errors, even unreasonable errors, will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if the evidence against the defendant remains compelling." *Id.* ¶ 61. The evidence, as outlined, undermines Minnema's claim that counsel's alleged errors undermine confidence in the jury's verdict.

CONCLUSION

This Court should affirm Minnema's judgment and the order denying postconviction relief.

Dated this 28th day of February 2022.

Respectfully submitted,

VERONICA ISHERWOOD
Waupaca County District Attorney

Electronically signed by:

/s/Kat R. Turner
KAT R. TURNER
Assistant District Attorney
State Bar No.: 1084328

Attorneys for Plaintiff-Respondent

Waupaca County District Attorney
811 Harding St.
Waupaca, Wisconsin 54981

715.258.6444
715.258.6436(fax)
Kat.Turner@da.wi.gov

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 2,948 words.

Dated this 24th day of October 2022.

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 24th day of October 2022.