

**FILED**  
**11-23-2022**  
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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

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Appeal No. 2022 AP 446 - CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JULIE A. MINNEMA,

Defendant–Appellant.

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REPLY BRIEF OF DEFENDANT–APPELLANT

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

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Respectfully submitted,

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Defendant-Appellant

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## ARGUMENT

### **I. Trial counsel was ineffective for failing to file a discovery demand because he did not review and obtain all materials.**

In failing to address the substance of the argument, Respondent tacitly agrees with Minnema's claim that trial counsel was ineffective for failing to review the complete discovery. This itself is enough to show ineffective claims as there is no strategic or tactical advantage to neglect reviewing discovery.<sup>1</sup> The State claims there is no assertion that Minnema's trial counsel did not have all the discovery. This completely misstates the assertions in Minnema's brief. Respondent acknowledges trial counsel received only the discovery material that Minnema had in her possession. Minnema said there were items presented at trial that were not in the discovery, including four exhibits.<sup>2</sup> This plainly shows that trial counsel did not possess all the discovery materials. Trial counsel should have filed a discovery demand because he did not have all the materials. His failure to do so constitutes deficient performance below a reasonable level.

Respondent also makes an irrelevant argument regarding the remedy for a violation of Wis. Stat. § 971.23(7). Minnema does not assert the State violated this rule, but rather that her counsel was

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<sup>1</sup> *State v. Thiel*, 2003 WI 111, ¶ 37, 264 Wis. 2d 571, 665 N.W.2d 305.

<sup>2</sup> R. at 62:8-17.

ineffective for not even filing a discovery demand. By failing to do this preliminary step, trial counsel was ineffective.

**II. Trial counsel was ineffective for failing to investigate obstructions to Deputy Gorschal's view and failing to consult or retain an expert to evaluate the testimony of reliability of an expired vial.**

**A. Failure to investigate obstruction of Deputy Gorschal's view was ineffective**

Respondent ignores the record by claiming that Minnema's brief does not do any more than speculate what additional evidence could have been found in this case. However, trial counsel stated that he did an investigation after the case and found that Deputy Gorschal's view to Minnema's driveway was obstructed by foliage.<sup>3</sup> It would be difficult to find more concrete, non-speculative evidence than this. Had trial counsel done this investigation before trial, the reliability of Deputy Gorschal's entire testimony could have been called into question. If the State's key witness had been deemed unreliable, the jury certainly could have had a reasonable doubt.

**B. Failure to consult or retain an expert was ineffective**

Respondent does not dispute that the analyst's testimony was inaccurate. Rather, it misstates the issue claiming that Minnema conceded her blood alcohol level was above the legal limit. Strategic

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<sup>3</sup> R. 211 at 52.

choices made by counsel after incomplete investigations are reasonable “precisely to the extent that reasonable professional judgments support the limitations on investigation”.<sup>4</sup> Errors made due to oversight or inattention rather than reasonable defense strategy are sufficient to satisfy the first prong of the test.<sup>5</sup> Counsel has a duty to make all reasonable investigations or reasonable strategic decisions that makes a particular investigation unnecessary.<sup>6</sup> In this case, trial counsel’s errors resulted from poor investigation, inattention, and oversight. These cannot serve as a basis for reasonable trial defense.

Respondent assertion that “the strategic decision not to retain an expert, or investigate the vial further was a reasonable one” is nothing more than a barebones conclusion. This erroneous statement cannot be true, as the vial represented the only evidence the State had to prove Minnema operated a motor vehicle while under the influence. The incomplete investigation done by counsel precluded Minnema from presenting a reasonable defense. Had a proper investigation been done, an expert could have been retained to cast doubt on the validity of the blood results. There was no strategic reason for failing to investigate a possible defense. Rather, trial counsel simply failed his

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<sup>4</sup> *Strickland*, 466 U.S. 668, 689.

<sup>5</sup> *Id.* at 691.

<sup>6</sup> *Id.*

legal duty to Minnema. Clearly, the failure to do so represents deficient performance. Moreover, the prejudice of the inaccurate testimony that was given is apparent by the State's use of it in closing arguments. The State found this point important enough to reiterate the uncontested testimony. Had trial counsel properly consulted with and retained an expert witness, this important point could have been contradicted.

**III. 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**

Respondent misinterprets Minnema's argument citing a Wisconsin Court of Appeals case that held, "trial court errors resulting from non-jurisdictional procedural defects are waived by defendant if not properly preserved with timely and specific objection."<sup>7</sup> This may be a convincing argument when a defendant is trying to directly object to the filing of an amended criminal complaint on appeal. However, Minnema is not objecting to the amended criminal complaint. Rather, Minnema asserts that counsel was ineffective for not doing so, because the filing prejudiced her. Consequentially, Minnema was

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<sup>7</sup> *State v. Webster*, 196 Wis. 2d 308, 319, 538 N.W.2d 810 (Ct. App. 1995).



unable to develop her defense with witnesses and evidence that would have been available had the original complaint contained the charges. Instead, trial counsel allowed two additional charges to be filed more than two years after the incident had occurred. Respondent does not address the substance of this issue. Rather, it relies on a misinterpretation of the law.

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

Instead of engaging with Minnema's assertions in her brief, Respondent merely restates the circuit court's findings in this matter. Minnema contends that the circuit court failed to consider the context surrounding trial counsel when deciding if there was prejudice. At this time, trial counsel had no criminal trial experience, a diversion agreement to avoid public reprimand, and ongoing family issues.<sup>8</sup> Trial counsel needed the timely filing of the witness list to properly inform Minnema of the developments in her case. He admitted as much by testifying, "there was a lot of opportunity that we missed by having such a late – such a late witness list."<sup>9</sup> Instead, trial counsel failed to object to the untimely witness list and was unable to

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<sup>8</sup> R. 237 at 23:2-24; R.211 at 22:5-24:16, 28:18-19; 43:12-19; R.187 at 51:8-18, 49:2-50:4.

<sup>9</sup> R. 211 at 15:13-23.

communicate the implications to Minnema. This prejudiced her because she could not meaningfully participate in her defense.

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

**A. The other acts testimony was not a strategic decision by counsel.**

Respondent provides no evidence to bolster its claim that allowing other bad acts testimony was a strategic decision. At trial, the State questioned D.N. and Minnema about previous bad acts. Trial counsel failed to object to this prejudicial questioning. His stated reasoning was “complicated.”<sup>10</sup> However, at the *Machner* hearing, trial counsel admitted that he should have objected multiple times during trial. Trial counsel also stated that allowing this information was not consistent with their theory of the case.<sup>11</sup>

Respondent also claims that allowing bad acts evidence was a strategic decision because the defense witnesses testified to them. However, the State omits the fact that the information was elicited by the State under cross-examination. Defense counsel still has the duty to object to prejudicial questions asked to its own witnesses. Respondent seems to suggest that no prejudicial testimony can come from a person’s own witnesses. Clearly this is untrue, and Minnema’s

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<sup>10</sup> R.211 at 12:23.

<sup>11</sup> *Id.*

counsel had a duty to object to testimony about her past bad acts. By failing to do so, counsel was ineffective and prejudiced Minnema.

**B. The admission of other acts evidence prejudiced Minnema.**

Firstly, whether the error was harmless presents a question of law that the appellate court reviews *de novo*.<sup>12</sup> The harmless error analysis requires an examination of the error upon the jury's verdict.<sup>13</sup> Several factors are relevant to the analysis, including the importance of the admitted evidence and presence of corroborating or contradicting evidence.<sup>14</sup> Respondent fails to engage in any substantive analysis before making another barebones assertion concluding that there was no harmless error in this case. Respondent again misstates counsel's lack of objection as a strategic decision. However, this evidence let the jury infer she was constantly involved in criminal conduct and alcohol abuse. These are precisely the impermissible inferences we want to shield the jury from. Clearly, admitting this evidence and trial counsel's failure to object allowed the jury to make assumptions about Minnema and use those as a basis of her conviction.

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<sup>12</sup> *State v. Jackson*, 2014 WI 4, 44, 352 Wis.2d 249, 841 N.W.2d 791.

<sup>13</sup> *State v. Hunt*, 2014 WI 102, 26, 360 Wis.2d 576, 851 N.W.2d 434.

<sup>14</sup> *Id.* at 27-28.

CONCLUSION

For the reasons stated above and in Minnema's original brief, 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, November 23, 2022.

Respectfully submitted,

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CERTIFICATION

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

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 1,733 words.

Dated at Middleton, Wisconsin, November 23, 2022.

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