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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2022AP0952-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TODD ALLEN KENDHAMMER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE LA CROSSE COUNTY CIRCUIT COURT, THE HONORABLE TODD W. BJERKE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

On September 16, 2016, Todd Kendhammer killed his wife, Barbara. Kendhammer said that Barbara died when a pipe flew off a passing truck and struck Barbara in the passenger seat of the car. But Kendhammer's story did not match the evidence.

Barbara had numerous injuries to her face, head, neck, arms, hands, and legs that could not be explained by a single blow from a pipe. And Kendhammer himself had unexplained injuries to his neck, chest, and hands. The blood evidence in the car showed that Barbara had been bleeding for a long time. Barbara's blood and DNA found on the back tire rim was evidence that at least one of Barbara's injuries happened outside the car.

An eyewitness drove past the car after it was stopped in the ditch, and the windshield was not yet broken. That witness did not see or hear anyone asking for help. Someone or something later struck the windshield at least four separate times, and the glass-shatter evidence showed that no one was seated in the passenger seat when the windshield was penetrated. The evidence showed that Kendhammer had opened the trunk of the car after driving into the ditch. The pipe found at the scene had Barbara's DNA on both ends, and officers never found any truck hauling scrap metal that matched Kendhammer's description.

Importantly, Kendhammer could never explain *why* he and Barbara were travelling on the road, *where* they were going, *why* Barbara was not at work, and *why* Barbara failed to call her mom or her employer that morning as she did every other morning. He told three different stories for where they were going and why they were on the road. He never explained why Barbara was not at work or called to say she would be late.

After a two-week trial, a jury convicted Kendhammer of first-degree intentional homicide. Now, Kendhammer claims his due process rights were violated by the circuit court's pretrial order protecting the identities of the jurors. He also argues that his trial attorneys were ineffective for many different reasons.

The circuit court held an evidentiary hearing and heard testimony from both of Kendhammer's trial attorneys, as well as expert and lay witnesses he argues should have been called to testify at trial. After the hearing and briefing, the circuit court denied each of Kendhammer's claims.

Kendhammer failed to prove any due process violation related to the circuit court's pretrial order. He failed to demonstrate that his attorneys were deficient. He wholly failed to prove that he suffered prejudice at trial. This Court should refuse his invitation to reverse in the interest of justice, and it should affirm.

ISSUES PRESENTED[1]

1. Did the circuit court properly exercise its discretion when it ordered the parties to refrain from referring to the jurors' last names?

The circuit court answered yes.

This Court should affirm.

2. Did Kendhammer fail to meet his burden to prove that trial counsel provided ineffective assistance?

Following a *Machner*[2] hearing, the circuit court answered yes.

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[1] The State reframes Kendhammer's issues to respond to the numerous claims of ineffective assistance within the same issue.

[2] *State v. Machner*, 101 Wis. 2d 79, 303 N.W.2d 633 (1981).

This Court should affirm.

3. Is Kendhammer entitled to a new trial in the interest of justice?

The circuit court did not answer this question.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

The Charges Against Kendhammer

On September 16, 2016, at 8:09 a.m., officers were dispatched to a reported car accident. (R. 1:1.) Kendhammer had called 911 and stated that a pipe fell off a flatbed truck and hit the windshield of his car, striking his wife Barbara. (R. 1:1–2.) Barbara died as a result of blunt force trauma to the head and neck, with skull fractures, traumatic subdural and subarachnoid hemorrhage, marked brain swelling, cricoid cartilage fracturs, neck muscle hemorrhage, diffuse anoxic-ischemic encephalopathy and myelopathy, and ultimately brain death. (R. 1:2.)

After an investigation, the State charged Kendhammer with first-degree intentional homicide for Barbara's death. (R. 1:1.)

Pretrial Proceedings

Pretrial, officers conducted a series of pipe drop videos to determine whether a pipe dropped from a truck could even stay in the air long enough to clear the height of the hood and move laterally to hit a passenger in an oncoming car. (R. 241:6–7.) None of the tests replicated the conditions

Kendhammer described. (R. 241:7.) The parties agreed before trial that the videos were inadmissible. (R. 123:14.)

Before the trial began, the court sent the potential jurors a questionnaire. (R. 34.) Based on the responses, the parties agreed to strike a number of jurors for cause. (R. 48.)

The circuit court set forth rules regarding courtroom seating during the trial. (R. 123:4.) It also ordered the parties to refer to the jurors by their first name only. (R. 123:5.) It did so to protect the anonymity of the jurors from the media. (R. 123:5.) Neither party objected to these orders.

Kendhammer's Trial

A. At trial, the State described the scene after Kendhammer called 911 and officers arrived.

When officers arrived at the scene, the Kendhammer car's rear wheels were in the ditch and the front wheels were on the shoulder. (R. 124:101; 193:1–3.) The car appeared stuck in the ditch because of a steep embankment. (R. 124:101.)

Barbara was outside the car on the ground. (R. 123:81.) Kendhammer was not performing CPR when Brandon Hauser, a first responder, arrived. (R. 123:81.) Hauser and Kendhammer moved Barbara's body and were able to find a pulse. (R. 123:82.)

B. The jury heard Kendhammer's explanations of the incident.

At the scene, Kendhammer said he was driving to Holmen to put a windshield in a truck for Justin Heim. (R. 259:5, 7.) Barbara was planning to drop him off at Heim's and then drive herself to work. (R. 259:5–6.)

Kendhammer explained that while driving to Holmen, a pipe flew off an oncoming truck at a place where the speed limit was 55 mph. (R. 124:90; 254:4.[3]) Kendhammer said that the truck was an older flatbed (R. 245:5), that was dark green or dark blue (R. 259:2), and that had metal sides on the flatbed (R. 259:3).

Kendhammer saw the pipe roll off the flatbed and head right for him. (R. 259:3.) He looked up and saw something flying at his car, and his reflex was to try to stop the object. (R. 259:2.) Kendhammer tried to catch the pipe and hit the windshield with his left hand, but he did not hit the brakes. (R. 254:4; 259:2–3.) Officer Lance Loeffelholz testified that both of Kendhammer's hands were scratched up. (R. 123:72.)

Kendhammer said that the car ended up in the ditch because he was trying to put the car in park, but accidentally put it in reverse. (R. 124:91.) He stopped the car and pulled the pipe out. (R. 259:2.) The pipe was in Barbara's throat, chest, or head. (R. 259:10.) He had to pull Barbara out of the car while she was thrashing around. (R. 259:9–10.) Barbara started bleeding from her mouth, and he gave her CPR. (R. 254:4.)

C. Barbara had numerous injuries at the scene, and she was uninjured on the day before.

Barbara died from blunt impact injuries to her head and neck. (R. 125:17.) She had numerous injuries. (R. 125:19.) She had a cut on the left side of her neck, a bruise on her cheek, and an abrasion on her upper chest. (R. 125:19.) She also had a bruise on her butt, another on her lower back, and a contusion on her groin. (R. 125:20.) She had a cluster of

[3] Throughout the trial, the jury viewed and listened to many audio-visual exhibits. Transcripts from these exhibits are also in the record. In this brief, the State cites to the transcripts rather than the actual exhibits.

bruises on her right arm and additional bruises on her left arm. (R. 125:20.) She had bruises on her thighs and injuries to her hands, including a broken fingernail. (R. 125:21–23.) On her face, Barbara had bruises, cuts, raccoon eyes, a broken nose, and bruises on her neck and lips. (R. 125:24.) She had three cuts on the back of her skull and a skull fracture. (R. 125:26.) She had a cricoid cartilage fracture in her neck. (R. 125:40.)

Dr. Kathleen McCubbin concluded that none of Barbara's many facial injuries came from a pipe. (R. 125:34.) She also concluded that the neck injury was not from a seatbelt. (R. 125:39.) Barbara's injuries were instead consistent with a beating and strangulation. (R. 125:93.) Some of her wounds were defensive wounds. (R. 125:93.)

A coworker, Cynthia Larson, testified that Barbara did not have any bruises on her hands on September 15, 2016, the day before the incident. (R. 125:156.) Nor did she have any bruises on her face or arms. (R. 125:157.) Barbara took care in her appearance, and if she broke a fingernail, she would take care of it immediately. (R. 125:157.)

D. The State exploited holes in Kendhammer's explanation for why they were traveling on the road that morning.

The trip made Barbara late for work and caused her to skip her routine morning phone call with her mother. Barbara was scheduled to be at work at 8:00 a.m. (R. 125:166.) Barbara's boss, Cheryl Elliott, testified that Barbara would always call if she was going to be late to work. (R. 125:166.) At 8:02 a.m., Elliott attempted to call Barbara because it was so unusual for her to be late but did not reach her. (R. 125:166–67.) Barbara had called her mother every weekday morning before work that September. (R. 126:84.) But she did not call her mother that morning. (R. 126:84.)

Kendhammer's explanation for their trip did not have support. Justin Heim testified that he did not expect Kendhammer to visit that morning. (R. 125:136.) He had not had any contact with Kendhammer about a windshield and did not even have a windshield that needed to be replaced. (R. 125:136.) Heim said that months earlier, he had discussed a windshield for a friend, Benjamin Pfaff, with Kendhammer, but that Pfaff did not want Kendhammer to replace the windshield. (R. 125:137–38.) Pfaff also testified that he did not want to pay for a windshield. (R. 125:9.)

E. The State presented evidence that the windshield was broken after the car went into the ditch, not before.

Randy Erler told officers that he drove by the Kendhammer car just before 8:00 a.m. on September 16, 2016, and it was already in the ditch. (R. 125:143.) Erler slowed down when he spotted the car in the ditch, but he did not see anyone near the car. (R. 125:143.) The windshield was not damaged. (R. 125:145.) Erler arrived at work between 8:02 and 8:04 that morning. (R. 125:144.)

F. The alleged truck Kendhammer described could not be found.

Captain John Zimmerman tried and failed to confirm Kendhammer's story. First, Zimmerman examined the location where Kendhammer said the pipe entered his windshield. (R. 124:99.) The road was flat and straight. (R. 124:99.) On the morning of September 16, 2016, the roads were wet because it was drizzling. (R. 124:70.) Kendhammer said that he drove from the place where the pipe entered his windshield to where the car was in the ditch. (R. 124:100.) Zimmerman measured that distance as 300 feet. (R. 124:100.)

Next, Zimmerman began collecting surveillance video from surrounding buildings to locate the truck Kendhammer described. He reviewed surveillance footage from Wild Winds Ranch nearby. (R. 124:120.) In the video, Zimmerman saw the Kendhammer car drive past at 7:57 a.m. (R. 124:119.) No flatbed truck drove past during the relevant period. (R. 124:122.) Richard Amundson collected video from Union State Bank and Kwik Trip, and his review of those videos did not show a truck matching Kendhammer's description traveling in the correct direction. (R. 125:59–62.) None of the videos provided any possible support for Kendhammer's version of the incident.

G. The State demonstrated that even if the truck existed and even if it dropped the pipe, the accident could not have happened the way that Kendhammer described.

If it happened the way Kendhammer described, he would not have had time to react and punch the windshield with both hands, while driving. Trooper Michael Marquardt testified that based on Kendhammer's description of the truck, the pipe would have fallen from six feet off the ground. (R. 127:10.) The damage to the Kendhammer windshield was four feet off the ground. (R. 127:9.) Given earth's gravity, the amount of time from the pipe falling to impaling the windshield would have been 0.352 seconds. (R. 127:11.)

H. The physical evidence left near the car did not support Kendhammer's statements.

Neither the DNA evidence, nor the blood spatter evidence, nor the physical location of the glass in the car, nor the glass-shatter pattern supported Kendhammer's story.

A DNA analyst, Kevin Scott, determined Barbara's blood was found on the rear tire of the car. (R. 127:38.) A test for blood presence on Barbara's fingernails was presumptive for blood. (R. 127:31.) Kendhammer's DNA was on Barbara's fingernails. (R. 127:32.) Barbara's blood was found in multiple places in the car, including the passenger seatbelt, passenger front door, gear shift, center of the dash, steering wheel, driver's door, the interior side of the windshield, and a folded paper found in the console. (R. 127:37.) Kendhammer's and Barbara's DNA were found near the hole in the windshield. (R. 127:39.)

The pipe recovered at the scene had both Kendhammer's and Barbara's DNA on it. (R. 127:42.) Both ends of the pipe had Barbara's DNA on it. (R. 127:46–48.) Dirt and grass were found in the trunk, indicating that the trunk was opened while the car was in the ditch. (R. 127:116.)

A forensic scientist, Nick Stahlke, analyzed the crime scene to look for patterns in the blood stains and the fractured glass. As for the blood stains, Stahlke determined that Barbara transferred blood onto the seat belt from passively bleeding. (R. 127:126.) Her blood was pooling on the floor mat of the passenger seat. (R. 127:132.) Her blood was cast-off into the console area. (R. 127:127.) There were impact stains in the console area, on the driver's door, and on the inside of the windshield. (R. 127:128–29.) Stahlke observed a large amount of blood on the passenger side. (R. 127:137.) There was no blood on the passenger's head rest. (R. 127:138.) There was too little blood on the back tire to determine how the blood was transferred. (R. 127:133.)

As for the glass fracture, Stahlke concluded that the windshield was shattered when no one was sitting in the passenger seat. (R. 127:124.) He based his conclusion on the dirt and glass on the passenger seat and the fact that no glass or dirt was in the passenger side door pocket. (R. 127:124.)

Stahlke also examined the fracture pattern in the windshield. (R. 127:145.) He determined that there were at least four separate impact points in the glass. (R. 127:145.) The impact on the outside of the passenger side windshield was caused by two separate impacts. (R. 127:142–43.) Based on the fracture pattern, the impact by the midline of the car was also caused by at least two impacts. (R. 127:145.)

Stahlke determined that the impact near the midline happened first. (R. 127:145.) The first impact by the passenger side did not perforate the windshield, the second impact did. (R. 127:150.)

I. Kendhammer presented evidence in support of his version of events.

Kendhammer described the morning of September 16, 2016, as a normal morning. (R. 120:115.) He remembered that a plumber was coming to look at Barbara's mother's well that day. (R. 120:116.) He called Barbara's mother to tell her about the plumber that morning. (R. 120:116.) Kendhammer told the jury that Barbara often called her mother in the morning, but frequently he called instead. (R. 120:117–18.) Kendhammer acknowledged that it would be out of character for Barbara to be late for work, and he had no explanation for why she was going to be late that day. (R. 120:165–66.)

Kendhammer acknowledged that he had told many different versions of where he was driving Barbara that morning.[4] (R. 120:119.) He said that he was not in the right state of mind when he made those statements. (R. 120:119.)

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[4] Kendhammer asserts that he was interviewed four times before he arrived at the hospital. (Kendhammer's Br. 15.) The State does not know how he arrived at that number. Wickland interviewed Kendhammer. (R. 124:89.) But the interview on the way to the hospital was only the second time Kendhammer was interviewed. (R. 125:114.)

He recognized that he was very emotional in his police statements because he was worried about Barbara. (R. 120:130.)

At trial, he told a brand-new version of events. Kendhammer testified that a few months before September 16, 2016, he mentioned at work that he had a spare windshield left over from one of his son's friends. (R. 120:109–10.) Kendhammer said Scott Torgerson mentioned that his friend Jared Loging needed a new windshield. (R. 120:111.) Kendhammer claimed that he did not name Torgerson or Loging on September 16, 2016, because he had forgotten this conversation. (R. 120:112.) But in any case, this did not explain where or why he was driving that morning, because Kendhammer admitted he did not know where Loging lived and had not talked to him about replacing his windshield. (R. 120:161.)

Kendhammer testified that while driving, a pipe came through the windshield of the car. (R. 120:129.) He said that everything happened fast; he was not sure how he hit the windshield, how they ended up in the ditch, or what he did with his right hand. (R. 120:132–33.)

Kendhammer's story on the stand was inconsistent. He testified that Barbara went limp after the pipe hit her but also claimed she was flailing around. (R. 120:133.) Once in the ditch, Kendhammer tried to get Barbara out of the car, but initially the door would not stay open. (R. 120:134.)

Kendhammer testified that he pulled the pipe from the windshield before taking Barbara out. (R. 120:135.) When he pulled Barbara out, the two of them fell to the ground near the rear tire. (R. 120:135–36.) Kendhammer said that he began doing CPR and called 911. (R. 120:136–37.)

Kendhammer explained that he did not remember thinking, but instead, he just acted. (R. 120:137.) He did not see Randy Erler drive by. (R. 120:139.) Kendhammer denied holding Barbara in the ditch with his hand over her mouth when Erler drove by. (R. 120:187.) Kendhammer denied bashing Barbara's head into the tire or hitting her with the travel mug or pipe. (R. 120:139.) He denied ever hitting Barbara. (R. 120:140.)

Mark Meshulam, Kendhammer's glass expert, concluded that the windshield had only three impact points—one from Kendhammer's fist, the second from the pipe, and the third from the pipe removal. (R. 119:24, 27.) He also testified that given the angle of the windshield and the cracks, that a passerby might not see the cracks in the windshield. (R. 119:83.)

Meshulam addressed the force needed to fracture the windshield from the inside, and he opined that few people could have reacted with such strength and speed. (R. 119:100.) He also conceded the perforation was from a slow speed impact, not a relative speed of 100 mph and that the pipe would likely have entered from the passenger side first. (R. 119:117.)

Dr. Barry Bates, an expert in biomechanics, testified that Barbara died from a pipe striking her head while seated in the car. (R. 119:130.) He opined that Barbara likely ducked when the pipe came towards her, causing the injury to the back of her head and skull. (R. 119:141–42.) He believed that the pipe likely bounced off her skull, causing the multiple cuts on the back of her head. (R. 119:145.) He believed that the dashboard or the travel mug found in the car caused Barbara's broken nose and whiplash. (R. 119:147.) He explained that the scratches on Barbara's neck could have been caused at the hospital. (R. 119:149.)

Dr. Bates testified that short-term memory is temporary and prone to problems. (R. 119:160–61.) He explained that when short-term memories are being put into long-term memory, many things influence what people think happened. (R. 119:161.) For example, when a person misses things during an event, their brains will fill in the blanks based on past experiences. (R. 119:161.) Stress and time can interfere with the process of encoding long-term memories. (R. 119:164.)

On cross-examination, Dr. Bates acknowledged that Barbara's neck injury could be from strangulation. (R. 119:173.) And he said it was possible that her broken nose came from being punched in the face. (R. 119:172.) He thought her skull fractures could have come from her head hitting the back tire. (R. 119:183.)

Critically, Dr. Bates opined on cross-examination that the pipe could not have come directly from a truck. (R. 119:180.) In his opinion, if that were the situation, then the pipe would have caused more damage inside the car. (R. 119:179.) Additionally, in that situation, neither would Barbara have had time to duck, nor would Kendhammer have had time to punch the windshield. (R. 119:194.)

Dr. Steven Cook testified that Barbara's injuries were consistent with the accident that Kendhammer described. (R. 120:14.) Cook believed that the injuries to the back of Barbara's head were from the pipe. (R. 120:17.) He concluded that the travel mug could have caused Barbara's facial injuries. (R. 120:18.) He opined that many of Barbara's other injuries happened when Kendhammer pulled her out of the car. (R. 120:21.) As for the scratches on Barbara's neck, Cook believed those were from the glass shattering. (R. 120:24.)

Cook testified that her injury was not the result of a beating. (R. 120:33.) He said if it was a beating, it would have been a rage beating. (R. 120:33.) Cook concluded that with a beating, there would be defensive injuries to Barbara, and he did not locate any. (R. 120:34.) He ruled out a beating in part because of the lack of significant blood in the car. (R. 120:35–36.) He thought that the blood on the rear tire was flung there when Kendhammer moved Barbara out of the car. (R. 120:37.)

As for Kendhammer's injuries, Cook concluded that the injury on the left hand was consistent with striking the windshield. (R. 120:39.) Cook also opined that given the compressed nature of an accident, Kendhammer's memory would have been subject to distortion. (R. 120:14.)

As further support for his version of events, Kendhammer called a citizen Cindy Kohlmeier to testify that she found a similar pipe on the side of the road three weeks after September 16, 2016. (R. 120:235.)

J. Kendhammer presented evidence that he did not have a motive to kill Barbara.

Kendhammer testified about how much he loved Barbara. (R. 120:89.) They met at sixteen, married August 3, 1991, and had just celebrated their twenty-fifth wedding anniversary. (R. 120:90, 92, 95.) During their marriage, the two were "[v]ery seldom" apart. (R. 120:98.)

Many witnesses testified that Kendhammer and Barbara had a happy marriage—Jordan Kendhammer, Tina McCoy, Michael Servais, David Adams, Russell Hicks, and Jessica Servais. (R. 120:245–85; 121:8–72, 114–36.) A banker testified that they were not in financial trouble. (R. 120:228–29.)

Kendhammer testified about the scene at the hospital with Barbara on life support. (R. 120:145.) He testified about how much he loved Barbara. (R. 120:146.) Kendhammer believed that he could not go home without Barbara. (R. 120:146.) He cried a lot in the days following Barbara's death. (R. 120:149.) Kendhammer testified that he did not have anything to hide from the police. (R. 120:153.)

K. The State rebutted Kendhammer's explanation and avowed lack of motive.

Kendhammer was having trouble at work. He was working at Crown, Cork & Seal forming aluminum soda cans and decorating them. (R. 120:81–82.) Kendhammer intended to call in sick to work on the date in question. (R. 120:85.) Because he could not use vacation time, he would get a verbal warning for calling in sick that day. (R. 120:86–87, 170.)

Kendhammer testified that Barbara was upset that he had switched to a night shift, yet he also testified he had switched as a favor to a coworker and that Barbara had agreed with his decision. (R. 120:87–89.)

Kendhammer acknowledged that he had some unpaid bills. (R. 120:173.) He admitted that he had been fired by previous employers. (R. 120:173.) Kendhammer had no explanation for the scratches on his neck. (R. 120:175.) He could not explain the injury to his right hand. (R. 120:181.) He did not remember opening the trunk of the car. (R. 120:188.)

Though he denied it, the State implied during cross-examination that Kendhammer had punched Barbara, broken her nose, and bruised her face. (R. 120:191.)

Kendhammer also denied trying to call Heim after the accident from his son's phone. (R. 120:196–97.) Heim testified that he had a missed call from Kendhammer's son's phone on September 22, 2016. (R. 121:156.) Heim said that the call came out of the blue and there was no voice message.

(R. 121:157.) Loging testified that he did not need a new windshield and that he never told Kendhammer that he needed one. (R. 121:151.) And he lived at a location the Kendhammers had already passed at the scene of the incident.

The jury convicted Kendhammer of first-degree intentional homicide. (R. 122:108.) The circuit court sentenced Kendhammer to life imprisonment with the possibility of parole on March 9, 2048. (R. 108:45.)

Postconviction Proceedings

Kendhammer filed a postconviction motion, alleging that the circuit court violated his due process rights when it ordered the parties to refer to the jurors by their first names. (R. 173:29–39.) He also claimed that the court violated the presumption of innocence and the right to a public trial. (R. 173:39–49.) He argued that his trial attorneys provided ineffective assistance for many reasons. (R. 173:50–119.) Relevant to his appeal, Kendhammer claimed his attorneys were ineffective for failing to: (1) object to the requirement that they not use jurors' last names; (2) hire a forensic pathologist; (3) hire a memory expert; (4) present Kendhammer's first version of the story that the pipe bounced; (5) present the pipe-drop reenactment videos; and (6) present evidence that trucks carrying scrap metal frequently traveled the area.[5] (R. 284.)

[5] In his pre-hearing motion, his post-hearing motion, and on appeal, Kendhammer raises different claims of ineffective assistance of counsel. The State focuses on the claims that he raised in his appellate brief. Kendhammer has abandoned his other ineffective assistance claims, including those concerning his attorneys' failure to file a change of venue motion, failure to object to the seating arrangement at trial, and failure to move to redact portions of the interrogation videos.

A. The Machner Hearing

At a *Machner* hearing on the motion, both of Kendhammer's attorneys—Jonas Bednarek and Steve Hurley—testified. Evidence presented for each claim of ineffective assistance of counsel relevant to this appeal is grouped in the subsections below.

1. The circuit court's order to refer to jurors by first names only.

Bednarek testified that he was not familiar with the cases about anonymous jurors. (R. 282:31.)

2. The decision not to hire a forensic pathologist.

Bednarek testified that he was concerned about the number of injuries Barbara suffered. (R. 282:43.) He stated that he took steps to respond to Dr. McCubbin. (R. 282:43.) He did not consult with a forensic pathologist. (R. 282:48.) Bednarek explained that jurors often like non-professional expert witnesses,[6] and that was part of the strategy when they hired Dr. Cook instead of a forensic pathologist. (R. 282:110.) He believed that Dr. Cook properly rebutted Dr. McCubbins's testimony. (R. 282:110.)

Attorney Steve Hurley testified that a forensic pathologist may have helped, depending on what opinion the person had about Barbara's injuries. (R. 282:149.) Hurley also said that Bednarek wanted to hire a traumatic injury expert rather than a forensic pathologist. (R. 282:168.) Hurley agreed that Dr. Cook was a good person to testify about Barbara's injuries. (R. 282:168.)

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[6] By "non-professional witnesses," counsel meant not witnesses who are not professionals, but witnesses whose profession consists of something other than testifying for money.

Kendhammer called a forensic pathologist, Dr. Shaku Teas, to testify at the hearing. (R. 281:7.) She testified that Dr. McCubbins used the wrong conclusions and methods. (R. 281:16, 73.) Dr. Teas concluded that Barbara's cranial injuries were from a car accident. (R. 281:19.) She determined that many of the bruises to Barbara's body were caused at the hospital because they were not documented upon arrival. (R. 281:35.) She believed that Barbara's injuries on her face were from the accident as described by Kendhammer. (R. 281:66.)

Dr. Teas testified that she looked at Kendhammer's story and tried to find inconsistencies with the injuries, and that she did not find any. (R. 281:74.) Dr. Teas believed that if Kendhammer hit Barbara with a pipe, she would have a more severe head injury. (R. 281:75.) Dr. Teas expected that she would see more injuries if Kendhammer had tried to strangle Barbara. (R. 281:81.)

3. The decision to proceed with Bates as the memory expert.

Bednarek testified that jurors understand that memories can be wrong. (R. 282:114.) Hurley testified that he knew that Dr. Bates had cross training in memory and thought that his testimony would be sufficient on that topic. (R. 282:165.) Hurley also believed that their three experts—Dr. Bates, Dr. Cook, and Meshulam—were sufficient to contradict the State's case. (R. 282:180.)

A memory expert, Dr. Geoffrey Loftus, testified that post event information can be dubious. (R. 281:166.) He said that sometimes conscious memory and information gathered after an event can comingle and create a new inaccurate memory. (R. 281:168.) He noted that stress impacts the accuracy of memories. (R. 281:178.) Dr. Loftus questioned the accuracy of Erler's (the passerby's) memories. (R. 281:194.) He

concluded that the first version of events told by Kendhammer was the most accurate. (R. 281:216.)

Dr. Loftus testified that his analysis about memory assumes that Kendhammer was not lying. (R. 280:69.) He said that he was not asked to look at inconsistencies in Kendhammer's statements in general, but only in his statements about the version of the story he told in which the pipe bounced. (R. 280:72.) He did not examine the inconsistent story about who Kendhammer was driving to see and why they were on that road. (R. 280:71–72.)

4. The decision not to take on the burden to demonstrate whether the pipe bounced or not.

Bednarek testified that he and Hurley chose a strategy not to take on the burden to prove how the pipe entered the windshield. (R. 282:70.) They did not want to demonstrate that the pipe bounced or did not bounce because they wanted the State to have to prove its case. (R. 282:70.) Bednarek also testified that Kendhammer gave inconsistent statements about whether the pipe bounced or did not bounce and that he chose not to highlight those inconsistencies. (R. 282:72.)

Hurley agreed and testified that they did not want to take on a burden to prove how the pipe got to the car windshield. (R. 282:160.)

5. The decision not to present the pipe drop reenactment videos.

Bednarek refused to call the reenactment videos experiments. (R. 282:83.) Instead, he described the videos as an "adventure with pipes." (R. 282:83.) He did not believe that the videos were scientific or admissible. (R. 282:83.) Hurley said that the pipe drop tests were based on a faulty premise. (R. 282:169.)

Kendhammer called a crime scene analyst to testify that pipes are unpredictable and that there was some video evidence that the accident could have happened from a pipe being dropped and bouncing into the car windshield. (R. 280:52, 63.)

6. Testimony about common transport of scrap metal.

Mark Inglett, a well driller, testified that he used pipes like the one found at the scene for well-drilling. (R. 280:8.) He said that sometimes homeowners keep the old pipes. (R. 280:9.) Andrew Stuhr, also a well driller, testified that he had a job in the area on September 16, 2016. (R. 280:13.) But the job was not to drill a well; he did not drive a pickup truck to the site; and the site was not in the area. (R. 280:17.) Three other citizens testified that trucks with scrap metal are often seen in the area. (R. 280:23, 33, 40.)

B. Circuit Court Order Denying Postconviction Relief

The circuit court rejected each of Kendhammer's claims. (R. 293:2.) For the juror-name issue, the court noted that it did not restrict the information counsel had available or questions that could be asked on voir dire. (R. 293:5.) They had extensive information about the jurors, their spouses and families, address, and occupations. (R. 34.) It concluded that Kendhammer did not suffer prejudice from the court's order. (R. 293:6.) It denied Kendhammer's claim. (R. 293:6.)

Likewise, the court concluded that Kendhammer's right to a public and fair trial was not impacted by the seating order. (R. 293:8.) The circuit court concluded that it had discretion to maintain a safe courtroom during a public trial and that the order fell within that exercise of discretion. (R. 293:8.)

The court denied each of Kendhammer's ineffective assistance of counsel claims. (R. 293:9.) It found that the attorneys made strategic choices about which expert witnesses to call and that those choices did not cause Kendhammer prejudice. (R. 293:10–12.)

The court found that the accident report indicating that the pipe bounced was inadmissible at trial and therefore, it was not ineffective to not seek to admit it. (R. 293:12–13.) It also found that the attorneys made a strategic choice not to question Kendhammer about the pipe bouncing, but to focus on the trauma of the incident rather than pigeonholing him into one version. (R. 293:13.)

The court found that the pipe drop videos would not have been admitted because they were built on a false premise. (R. 293:13.) Further, it concluded that the attorneys made a strategic choice not to show the videos to the jury. (R. 293:14.) There was no prejudice. (R. 293:14.)

The court found that any evidence that scrap metal was carried on that road would have had little probative value. (R. 293:17.) It concluded that there was no prejudice to Kendhammer because of his attorneys' trial strategy of avoiding taking on the burden to prove how the accident happened. (R. 293:18.)

The court also concluded that there was no cumulative prejudice by any possible error.[7] (R. 293:19.) It denied Kendhammer's motion. (R. 293:20.)

Kendhammer appealed. (R. 294.)

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[7] Kendhammer writes that the postconviction court implied that he proved the prejudice prong. (Kendhammer's Br. 27.) It did not. The court concluded that Kendhammer's attorneys' representation was not prejudicial. (R. 293:19–20.)

ARGUMENT

I. Any possible error for using juror first name was harmless.

Kendhammer frames this issue as both a claim that the circuit court violated his due process rights by ordering an anonymous jury and that his trial attorneys violated his right to effective assistance of counsel by failing to object to the court's order. (Kendhammer's Br. 7, 29–33.) Kendhammer's trial attorneys did not object to the order. As such, Kendhammer forfeited the claim. Yet the State addresses the question of whether the circuit court erroneously exercised its discretion in ordering the parties to refer only to the juror's first names in court.

Any possible error in the order was harmless. Yet, under the ineffective assistance framework, the claim also fails because for the same reasons that any error was harmless: Kendhammer cannot demonstrate that he suffered prejudice. Under either framework, this Court should affirm the circuit court's order denying Kendhammer's claim.

A. Standard of Review

This Court examines a circuit court's decision to use an anonymous jury for an abuse of discretion. *State v. Tucker*, 2003 WI 12, ¶ 10, 259 Wis. 2d 484, 657 N.W.2d 374. This Court "must be particularly deferential to the trial court's substantial discretion." *Id.* (citation omitted). A circuit court properly exercises its discretion when it considers the application law, the facts, and reaches a conclusion that a reasonable judge could reach. *Id.*

B. A circuit court may order an anonymous jury if it finds that jurors need protection and takes precautions to minimize prejudice to the defendant.

In its discretion, a circuit court may order parties not to refer to prospective jurors by their name to "assure the protection of the jurors." *State v. Britt*, 203 Wis. 2d 25, 34, 553 N.W.2d 528 (Ct. App. 1996.) Even where the court discloses the prospective jurors' names and other relevant information to the attorneys for their use during voir dire, the court may order that the jurors only be referred to by number when being questioned. *Id.* at 37.

An order for an anonymous jury that restricts "juror identification or information" impacts a defendant's due process right "to an impartial jury and presumption of innocence" because it may taint the jurors' impression of the defendant. *Tucker*, 259 Wis. 2d 484, ¶¶ 11, 17–18. Thus, "if a court withholds any juror information, it must both (1) find that a jury needs protection; and (2) take reasonable precautions to avoid prejudicing the defendant." *Id.* ¶ 19.

In *Tucker,* the court expressly prohibited "the names of jurors being stated in the courtroom," and during trial, the court corrected defense counsel in front of the jury when he referred to a juror by name rather than number. *Id.* ¶ 7. The supreme court concluded that the circuit court erred because it withheld the jurors' names without making a finding that the jurors needed protection or taking reasonable precautions to avoid prejudice, but that the error was harmless. *Id.* ¶ 26.

The erroneous exercise of discretion to order an anonymous jury is subject to a harmless error analysis, which "requires [this Court] to look to the effect of the error on the jury's verdict," considering "the totality of the circumstances." *State v. Hunt*, 2014 WI 102, ¶¶ 26, 29, 360 Wis. 2d 576, 851 N.W.2d 434. "If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of

the proceeding, the error is harmless." *In re Termination of Parental Rights to Jayton S.,* 2001 WI 110, ¶ 28, 246 Wis. 2d 1, 629 N.W.2d 768.

C. Kendhammer's jury was not anonymous, and any possible error was harmless.

Here, the jury was not anonymous because the jurors' partial names were used on the record. And the parties had pre-trial questionnaires including extensive information about each potential juror. (R. 34.) The circuit court properly exercise its discretion in limiting the parties to first names to protect the jurors from exposure in the media. But even if there was error, any possible error was harmless. This Court should affirm.

Kendhammer assumes without argument that the jury was an anonymous one because the public did not have access to the jurors' last names. But in doing so, Kendhammer skips a crucial step in the analysis. This was not a "numbers" jury. The jurors' names were used. As such, it was not anonymous.

Before trial, the court required jurors to disclose their full name and any other names they have used. (R. 34:4.) The jurors' full names appeared in the record. (R. 62.) The court ordered the parties to refer to the jurors on the record by only first name. (R. 123:5.) The order had no impact on the questions that the parties could ask on voir dire.

There is no need to go further. The jury was not anonymous, so the court was not required to make a finding that the jury needed protection. *See Tucker*, 259 Wis. 2d 484, ¶ 17. Nor did it need to take reasonable precautions to avoid prejudicing the defendant. *See id.* The circuit court properly exercised its discretion during voir dire when it limited the parties to the jurors' first names. Kendhammer's due process rights were not violated.

Even if the limitation to jurors' names created an anonymous jury, the circuit court properly exercised its discretion. Kendhammer claims that the court failed to decide whether the jury needed protection. (Kendhammer's Br. 31.) But the court in fact made the proper finding. The court felt the order was needed to prevent the jurors' identities from becoming public due to the livestream television coverage of the trial. (R. 61:2.) Postconviction, the court reiterated that its order was necessary because the extensive publicity of the case could expose jurors to intimidation and harassment. (R. 156:4.)

Finally, even if this court concludes that the jury was anonymous and that the circuit court did not make the proper findings, any error was harmless. Kendhammer cannot point to any possible prejudice from using jurors' partial names. The jurors knew that the limitation was because of the media coverage and not related to Kendhammer's conduct or associations. (R. 293:6.) Referring to jurors only by their first names under the circumstances would not be expected to taint jurors' impressions of Kendhammer. It had no impact on the vast evidence of Kendhammer's guilt.

Kendhammer asserts that a precautionary instruction was required. (Kendhammer's Br. 31–32.) It was not. Here, the jury was not anonymous, and the requirement *Tucker* admonition did not apply. No precautionary instruction was required.

Kendhammer also argues that the jurors who had served on prior juries would conclude "that something was amiss with [Kendhammer]" because of the different procedure. (Kendhammer's Br. 32.) The record rebuts this conclusion. The trial was broadcast in its entirety on two television networks. (R. 61:1.) The fact that the trial was for a homicide and the court used pretrial questionnaires made it obvious it was different. A juror would attribute any deviation

from the usual routine for trial to the publicity surrounding the case, not Kendhammer himself.

The jury was not anonymous. The circuit court properly exercised its discretion in limiting the parties to first names to protect them from harassment from the media. Alternatively, any possible error was harmless. This Court should affirm.

II. Attorneys Bednarek and Hurley did not provide ineffective assistance.

On appeal, Kendhammer raises six ineffective assistance claims. Kendhammer claimed his attorneys were ineffective for failing to: (1) object to the requirement that they not use jurors' last names; (2) hire a forensic pathologist; (3) hire a memory expert; (4) present Kendhammer's first version of the story that the pipe bounced; (5) present the pipe drop reenactment videos; and (6) present evidence that trucks carrying scrap metal frequently traveled the area. (Kendhammer's Br. 7–9.) He argues that the cumulative nature of the errors caused him prejudice. (Kendhammer's Br. 9–10.)

Kendhammer fails to meet his burden to show ineffective assistance. He cannot prove either prong of the test on any claim. The circuit court properly rejected his claims following the *Machner* hearing. This Court should affirm.

A. Standard of Review

Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. *State v. Manuel*, 2005 WI 75, ¶ 26, 281 Wis. 2d 554, 697 N.W.2d 811. This Court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that this Court reviews without deference to the circuit court's conclusions. *Id.*

B. The defendant bears the burden of proving deficient performance and prejudice.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. "[S]trategic choices made [by an attorney] after thorough investigation of law and facts. . . are virtually unchallengeable." *Id.* This Court defers to strategic decisions by counsel and strongly presumes that trial counsel's conduct was not deficient. *Id.* at 689. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Williquette*, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (Ct. App. 1993) (citation omitted).

To demonstrate prejudice, the 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. Although that is not as difficult a standard to meet as "more likely than not," the difference matters "only in the rarest case." *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011) (quoting *Strickland*, 466 U.S. at 693, 697). In determining prejudice, this Court determines whether the aggregated errors by counsel caused prejudice based upon the totality of the circumstances at trial. *State v. Thiel*, 2003 WI 111, ¶ 62, 264 Wis. 2d 571, 665 N.W.2d 305.

C. Kendhammer failed to prove that Attorneys Bednarek and Hurley provided ineffective assistance.

The circuit court concluded that Kendhammer failed to prove either of the two *Strickland* prongs. It correctly held that neither Attorney Bednarek nor Attorney Hurley were ineffective.

1. Kendhammer's attorneys made a strategic decision to hire a traumatic injury expert and a biomechanics expert to rebut the State's case.

Kendhammer claims that his attorneys provided ineffective assistance for failing to hire a forensic pathologist. (Kendhammer's Br. 33.) He asserts that a forensic pathologist would have testified that the State's autopsy procedure was flawed, that a number of Barbara's injuries had innocent explanations, and that the marks on Barbara's neck were not caused by strangulation. (Kendhammer's Br. 34.) Kendhammer improperly frames the State's case as being centered around Dr. McCubbin's testimony. (Kendhammer's Br. 33.) It was not. And the defense experts—Drs. Cook and Bates—testified to those conclusions. Kendhammer cannot demonstrate either prong of the ineffective assistance test.

As for deficient performance, the attorneys discussed hiring an expert to rebut Dr. McCubbins's conclusions regarding Barbara's injuries. Kendhammer's claim that "[n]either attorney provided any reasoned strategy for the decision not to consult with or present the opinions of a pathologist" is completely rebutted by the testimony. (Kendhammer's Br. 35.)

Hurley initially wanted to hire a forensic pathologist, and Bednarek wanted to hire a traumatic injury expert. (R. 282:168.) They had hired pathologists in other cases and understood the value and strategical concerns. (R. 282:110.)

As preparation for trial, the attorneys consulted with Dr. Cook, a traumatic injury expert. (R. 282:43.) They concluded that Dr. Cook could rebut Dr. McCubbins's testimony. (R. 282:110.) Bednarek testified that jurors often in fact prefer non-professional witnesses and that Dr. Cook's background as an emergency room doctor could make him more credible to the jury than Dr. McCubbins. (R. 282:110.)

Attorneys Bednarek and Hurley also hired Dr. Bates to testify that Barbara's injures were consistent with Kendhammer's story. Between the two experts, the attorney rebutted the State's expert.

Throughout the trial preparation process, Attorney Bednarek's and Attorney Hurley's performance was not deficient. If the attorneys had chosen not to refute Dr. McCubbins's testimony with any expert, maybe Kendhammer would have an argument. *See State v. Zimmerman*, 2003 WI App 196, ¶ 41, 266 Wis. 2d 1003, 669 N.W.2d 762 (defense counsel should have presented alternative medical testimony to counter the State's expert). But that is not what happened here. Instead, the attorneys selected a qualified expert to rebut the State's expert, but Kendhammer wishes they had hired someone else. That is not the standard.

Here, Attorneys Bednarek and Hurley chose to hire Dr. Cook after thorough investigation of the circumstances. This strategic decision is virtually unchallengable. *Strickland*, 466 U.S. at 690–91. The attorneys were not deficient for failing to hire the specific expert Kendhammer now argues they should have hired.

As for prejudice, Kendhammer's claim also fails. At the *Machner* hearing, he presented testimony from a forensic pathologist, Dr. Teas. (R. 281:7.) Yet, her report and testimony was consistent with what Dr. Cook testified to at trial.

Both experts refuted Dr. McCubbin's methods and conclusion. At the postconviction hearing, Dr. Teas testified that that Dr. McCubbins's conclusions and methods were wrong. (R. 281:16, 73.) At trial, Dr. Cook refuted Dr. McCubbins's conclusions. (R. 120:23.)

Both experts testified that Barbara's injuries happened as described by Kendhammer. At the postconviction hearing, Dr. Teas concluded that Barbara's cranial injuries were from a car accident. (R. 281:19.) Dr. Teas concluded that Barbara's injuries on her face were from the accident as described by Kendhammer. (R. 281:66.) At trial, Dr. Cook testified that Barbara's injuries were consistent with the accident Kendhammer described. (R. 120:14.) At trial, Dr. Bates concluded that Barbara died from a pipe striking her in the car. (R. 119:130.) He opined that Barbara likely ducked when the pipe came towards her causing the injury to the back of her head and skull. (R. 119:141–42.) He believed that the dashboard or the travel mug found in the car caused Barbara's broken nose and whiplash. (R. 119:147.)

Both experts attempted to explain away many of Barbara's injuries. At the postconviction hearing, Dr. Teas surmised that many of the bruises to Barbara's body were caused at the hospital because they were not documented upon arrival. (R. 281:35.) At trial, Dr. Cook explained away the bruises as possibly the result of being pulled out of the car or other interventions. (R. 120:21.) He also thought some injuries were inflicted at the hospital. (R. 120:27.) Also at trial, Dr. Bates explained that the scratches on Barbara's neck could have been caused at the hospital. (R. 119:149.)

Both experts ruled out intentional infliction of injury. At the postconviction hearing, Dr. Teas believed that if Kendhammer hit Barbara with a pipe, she would have a more severe head injury. (R. 281:75.) Dr. Teas expected more injuries if Kendhammer had tried to strangle Barbara. (R. 281:81.) At trial, Dr. Cook likewise opined that Barbara's

injures were not the result of a beating. (R. 120:33.) He rejected the conclusion that a blow to the face would have caused the injuries. (R. 120:28.)

Kendhammer cannot demonstrate prejudice because the jury heard all the information and opinions that Dr. Teas would have testified to from Drs. Cook and Bates. Kendhammer cannot show that but for counsel's errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. He failed to meet his burden regarding either prong of the ineffective assistance test.

Kendhammer argues that Drs. Cook and Bates were unqualified to address weaknesses in Dr. McCubbins's opinions. (Kendhammer's Br. 43.) But the question at this stage is not whether Drs. Cook and Bates were qualified or perfect witnesses. An ineffective assistance claim is not a retrospective determination of whether Kendhammer had the best possible defense. Instead, the question is whether Kendhammer's attorney's performance was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. It was not. They hired qualified experts to rebut the State's case. Kendhammer cannot meet his burden.

Next, Kendhammer asserts that the strategic decision to hire Drs. Cook and Bates rather than a forensic pathologist was unreasonable and not entitled to deference. (Kendhammer's Br. 43.) Kendhammer cannot point to *any* requirement that a certain type of expert needs to be hired in to avoid an ineffective assistance claim. The attorneys consulted with qualified experts. Those experts testified at trial the same way Kendhammer's now-proffered expert would have and refuted the State's version of events. Kendhammer's claims to the contrary misrepresent the record. Kendhammer cannot meet his burden.

Kendhammer relies upon *Thomas v. Clements*, 789 F.3d 760, 765 (7th Cir. 2015), as persuasive support for his claim that his attorneys were ineffective for failing to hire a forensic pathologist. (Kendhammer's Br. 44.) Yet, *Thomas* is not on point. There, the defendant's attorney did not hire any expert to testify and did not make a conscious strategic decision not to do so. *Thomas*, 789 F.3d at 768. Here, the attorneys hired *two* medical experts to testify on Kendhammer's behalf *and* did so after a discussion about what type of expert would offer the best defense. Their decisions were strategic and are virtually unchallengeable. Kendhammer's reliance on *Thomas* is misplaced, even if that case were authoritative in this forum, which it isn't.

Kendhammer sets up a straw man to argue that cross-examination was insufficient to refute Dr. McCubbins's testimony and cites to *Dunn v. Jess*, 981 F.3d 582, 592–93 (7th Cir. 2020), another non-authoritative case. (Kendhammer's Br. 44–45.) Likewise, *Dunn* is not on point because the facts are different than Kendhammer's. Here, Kendhammer's attorney did not rely on cross-examination to refute Dr. McCubbins's testimony. Instead, Attorney Hurley cross-examined her extensively *and* hired two medical experts to refute her conclusions.

Next, Kendhammer relies upon yet a third non-authoritative case, *Dunn v. Neal*, 44 F.4th 696, 709 (7th Cir. 2022). *Dunn* offers no support. In *Dunn*, the defense attorney did not offer any expert testimony to refute the State's case. *Id.* at 708. Here, again, Kendhammer had two medical expert witnesses testify in support his version of events.

Finally, Kendhammer relies upon a fourth non-authoritative case with completely different facts: *Adams v. Bertrand*, 453 F.3d 428, 436 (7th Cir. 2006). (Kendhammer's Br. 45–46.) In *Adams*, the defense attorney did not interview an exculpatory witness. *Adams*, 453 F.3d at 436. Here, there

is no claim that trial counsel failed to interview any percipient witnesses.

Trial counsel thoroughly investigated his case and hired two medical experts to rebut the State's expert and support Kendhammer's version of events. As the circuit court concluded, the attorneys made the specific strategic decision not to hire a forensic pathologist because they concluded that the other medical experts would be able to discuss the forensics in a more meaningful way and that the jury might be alienated by a professional witness. (R. 293:10–12.)

Kendhammer cannot demonstrate that this strategy was deficient. He likewise cannot show prejudice because the defense experts that testified at trial testified consistent with the testimony proffered postconviction. There was no ineffective assistance. This Court should affirm the circuit court's conclusion.

2. Kendhammer's attorneys made a strategic decision to hire an expert who could discuss how memories are formed.

Next, Kendhammer claims that his attorneys provided ineffective assistance for failing to hire an expert of human perception and memory.[8] (Kendhammer's Br. 46–47.) But Dr. Bates had training in memory issues and testified about the impact of stress and trauma on memory. Kendhammer cannot demonstrate either prong of the ineffective assistance test.

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[8] Kendhammer mixes his claim regarding the memory expert with a claim that the State's closing argument was objectionable. (Kendhammer's Br. 48–49.) To the extent that he is raising a claim that his attorneys were ineffective for failing to object during the State's closing, this Court should reject the claim as insufficiently briefed. *See State v. Pettit,* 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992).

Regarding deficient performance, the attorneys decided to hire Dr. Bates to testify about memory. Bednarek testified that jurors understand that memories can be wrong. (R. 282:114.) Hurley testified that he knew that Dr. Bates had some cross training in memory and thought that his testimony would be sufficient on that topic. (R. 282:165.) Hurley also believed that their three experts—Dr. Bates, Dr. Cook, and Meshulam—were sufficient to contradict the State's case. (R. 282:180.) No expert could address the fact that Kendhammer did not remember *who* he was going to see that morning and *why* they were on that road. (R. 293:12.)

Here, Attorneys Bednarek and Hurley chose to hire Dr. Bates after thorough investigation of the circumstances. This strategic decision is virtually unchallengable. *Strickland*, 466 U.S. at 690–91. The attorneys were not deficient for failing to hire the specific expert Kendhammer now argues they should have hired.

As for prejudice, Kendhammer's claim also fails. At the *Machner* hearing, he presented testimony from a memory expert, Dr. Loftus. (R. 281:166.) Yet, Dr. Loftus's report and testimony was consistent with what Dr. Bates testified to at trial.

At the postconviction hearing, Dr. Loftus testified that post event information can be dubious. (R. 281:166.) He said that sometimes conscious memory and information gathered after an event can comingle and create a new inaccurate memory. (R. 281:168.) He noted that stress impacts the accuracy of memories. (R. 281:178.)

At trial, Dr. Bates testified about memory and its limitations. (R. 119:160.) He said that short-term memory is a temporary source of memory prone to problems. (R. 119:160–61.) He testified that when short-term memories are being put into long-term memory, many things influence what people think happened. (R. 119:161.) He said if there are

things that a person missed during the event, their brains will fill in the blanks based on past experiences. (R. 119:161.) He also told the jury that stress and time can interfere with the process of encoding long-term memories. (R. 119:164.)

At the postconviction hearing, Dr. Loftus testified that Erler's memories could be faulty because there was no reason for him to pay attention, and post event information could have changed his memories. (R. 281:194.) At trial, Meshulam testified that the weather, including rain or angle of the sun, could have impacted Erler's ability to see whether the windshield had been cracked when he drove by. (R. 119:72–73.)

The jury heard the information Kendhammer now argues his attorneys should have presented. Kendhammer cannot demonstrate prejudice. He cannot show that but for counsel's errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. He failed to meet his burden regarding either prong of the ineffective assistance test.

Kendhammer argues that Dr. Bates was not qualified and failed to address the subject in the depth Kendhammer believes was required. (Kendhammer's Br. 54.) But again, at this stage, Kendhammer does not simply get a second chance to retry his case. The question for this Court is whether Kendhammer can meet his burden to demonstrate that his attorneys were deficient, and that deficiency caused him prejudice. "Counsel need not be perfect." *See Williquette*, 180 Wis. 2d at 605 (citation omitted). Here, Kendhammer cannot meet his burden.

Next, Kendhammer claims that Dr. Loftus could have testified about Erler's memory and refuted his testimony. (Kendhammer's Br. 55.) He claims that Erler's memories might have been tainted by media coverage. (Kendhammer's Br. 55.) He fails to support this claim. Erler was interviewed before any media coverage of the event.

And beyond expert speculation as to faulty memory, Attorney Hurley challenged Erler's memory and ability to perceive the details directly. Erler did not remember whether the Kendhammer car had its lights on. (R. 125:149.) Erler testified that his windows were down, yet it was raining. (R. 125:149–50.) Meshulam testified that the angle of the windshield meant that a passerby might not see the cracks. (R. 119:83.)

Of course, a memory expert could have testified that Erler's memory could be faulty. But jurors understand that fact, and Attorney Hurley pointed it out with examples relevant to Erler's own testimony. The circuit court reminded the jury of the fact when instructing the jury about the weight of testimony. (R. 123:286.) And Dr. Bates's testimony about memory was not limited to Kendhammer's memory, but memories in general. (R. 119:160–61.) Kendhammer cannot demonstrate that his attorneys' performance was outside the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 690.

Notably, Kendhammer does not rely on case law supporting his argument that an expert witness on how memories are formed was required. Instead, he relies upon *Rompilla v. Beard*, 545 U.S. 374, 383–84 (2005) to argue that his attorneys were ineffective for failing to investigate material that they knew the State would present. (Kendhammer's Br. 56.) There is no support for an allegation that a lack of investigation was the reason Kendhammer's attorneys did not hire an expert to testify about memory alone. Instead, they hired an expert to testify about memory—

Dr. Bates—who could also testify about biomechanics. If failure to hire a memory expert here was deficient, then all trials would require a memory expert, which is not the law.

Kendhammer claims that a memory expert could explain away the inconsistencies in his story. (Kendhammer's Br. 70.) While an expert could have tried to explain away the holes in Kendhammer's story, the jury ultimately heard testimony from expert and lay witnesses and concluded that Kendhammer's explanation was lacking. He cannot demonstrate prejudice from the lack of an expert telling the jury what they already know as part of their common experiences: that people can have faulty memories.

Kendhammer cannot demonstrate that the decision to hire Dr. Bates was deficient. He likewise cannot show prejudice because a defense expert that testified at trial testified consistent with the testimony proffered postconviction. There was no ineffective assistance. This Court should affirm the circuit court's conclusion.

3. Kendhammer's attorneys employed a reasonable strategy to avoid evidence of how the pipe moved before it struck the car.

Kendhammer claims that his attorneys provided ineffective assistance when they failed to present evidence that Kendhammer initially told officers that the pipe bounced on the road before striking his car. (Kendhammer's Br. 57.) Kendhammer fails to explain *what* evidence supports this version, *who* would testify about that evidence, and *how* the evidence would help his defense.

Kendhammer repeatedly told officers that the pipe came directly from the truck without bouncing. (R. 124:90; 254:4.) He said he watched the pipe roll off the flatbed and head right for him. (R. 259:3.) The jury heard Kendhammer make those statements in the audiovisual evidence played at trial.

As for the evidence he thinks should have been admitted, Kendhammer only points to a police report from Officer Loeffelholz and a motor vehicle report. (Kendhammer's Br. 58.) The motor vehicle report was inadmissible at trial. *See* Wis. Stat. § 346.73. Therefore, Kendhammer's attorneys would have only had Officer Loeffelholz's testimony to introduce the statement to the jury.

But when talking to Officer Loeffelholz on the squad car video, Kendhammer said that the pipe came off a truck. (R. 254:4.) Kendhammer did not say that it bounced off the road before it struck his car. Officer Loeffelholz's report does not say that the pipe bounced, either. (R. 267:3.)

As for deficient performance, Kendhammer has not demonstrated that the evidence was admissible. The State presumes that Kendhammer's argument is that his attorneys should have called the author of the accident report, Robert Kachel, to testify. But Kendhammer does not directly state that argument. Instead, Kendhammer asserts that his attorneys were deficient for failing to present "this evidence." (Kendhammer's Br. 59.)

Likewise, Kendhammer offers nothing to support his assertion that the pipe-bouncing theory was any more plausible than his pipe-directly-striking-the-windshield theory. He offers no explanation for how the pipe would bounce and strike the car.

Nor can Kendhammer demonstrate prejudice. Each of Kendhammer's attorneys testified that they did not want to help the State prove their case by proffering alternative theories. (R. 282:70, 160.) Additionally, Bednarek did not want to highlight Kendhammer's various inconsistent statements for the jury. (R. 282:72.) Their strategy was reasonable.

Kendhammer asserts that the State's case was "focused heavily" on the impossibility of his version of events. (Kendhammer's Br. 57.) He states that it was the "lynchpin" of the State's evidence. (Kendhammer's Br. 58.) It was not. The State's case was built on the physical evidence: the blood, DNA, and windshield fracture patterns. It was built on Kendhammer's inability to explain why they were on that road and why Barbara deviated so completely from her usual Friday routine. The impossibility of the physics of the pipe drop was a part of the State's case, but not at all the lynchpin or the focus of it.

Kendhammer has the burden to prove prejudice. He fails to demonstrate what evidence or witnesses he believes his attorney should have called to testify about the pipe bouncing on the roadway apart from his own prior (alleged) statement that would only show his story had changed in this additional way. He does not explain why this would have helped his defense. His attorneys had a strategic reason for avoiding discussion of whether the pipe bounced on the road.

Kendhammer cannot demonstrate that this was deficient or prejudicial. There was no ineffective assistance. This Court should affirm the circuit court's conclusion.

4. The pipe drop videos were inadmissible.

Kendhammer claims that his attorneys provided ineffective assistance when they failed to present videos of pipe drop experiments conducted by the police.

(Kendhammer's Br. 59–60.) Kendhammer does not explain *how* the videos would have been admitted at trial, *who* would testify about that evidence, and *how* the evidence would help his defense.

The videos in question were performed to demonstrate whether a pipe could fall from a truck and penetrate an oncoming car's windshield on the passenger side and to show how quick the oncoming car would pass the truck, giving Kendhammer little time to punch the windshield before the pipe penetrated it. Yet, the police conducting the actual experiments did not replicate the exact mechanics of the accident. Therefore, the videos had no evidentiary value. The parties agreed not to present the video evidence for this reason. (R. 282:127–28.)

Kendhammer cannot demonstrate that his attorneys' performance was deficient because the videos were inadmissible. Scientific testimony must be the product of reliable principles and methods. Wis. Stat. § 907.02(1). The proponent of the evidence bears the burden of proving its admissibility by a preponderance of the evidence. *State v. Bucki*, 2020 WI App 43, ¶ 45, 393 Wis. 2d 434, 947 N.W.2d 152.

Here, Kendhammer does not offer any argument about why the videos would be admissible. The officer's tests were not based on sufficient facts or data. They admitted that they did not know the speed of either the truck or the Kendhammer car. As Bednarek testified, the pipe drop videos were not even experiments, but an "adventure with pipes." (R. 282:83.) They were not scientific or admissible. (R. 282:83.) Hurley believed the tests were based on a faulty premise. (R. 282:169.)

Kendhammer's attorneys made the decision not to offer the videos because they concluded that the videos did not meet the requirements for admissibility. Kendhammer offered nothing postconviction to refute that conclusion. He cannot demonstrate his attorneys' performance was deficient.

Additionally, he cannot prove prejudice. Since the videos were inadmissible, even if Kendhammer's attorneys had tried to present them, the jury would not have seen the videos. The videos had no impact on the outcome of the trial.

Kendhammer does not engage with admissibility of the videos but instead argues that the videos would have presented evidence that his version of events was not impossible. (Kendhammer's Br. 62.) He hired a crime scene reconstructionist who testified that the accident could have happened the way Kendhammer described. (R. 280:52, 63.) But that argument conflates general relevance with the admission of scientific testimony. Kendhammer failed to demonstrate that the evidence was admissible, and therefore, he cannot prove either prong of the ineffective assistance test.

There was no ineffective assistance. This Court should affirm the circuit court's conclusion.

5. Kendhammer's attorneys were not ineffective for choosing not to present evidence that trucks hauled metal on the road because it was irrelevant.

Kendhammer claims that his attorneys provided ineffective assistance when they failed to present testimony from witnesses that trucks hauled scrap metal on that road frequently. (Kendhammer's Br. 63.) But this testimony would have been irrelevant to the defense presented at trial. It would not have changed the trial result.

As for deficient performance, Kendhammer argues that testimony from well drillers and neighbors would have given the jury an explanation for how the pipe ended up on the road. (Kendhammer's Br. 64.) Yet, he cannot demonstrate how this evidence was relevant to the trial. Relevancy is the tendency to make a fact of consequence more probable than it would be without the evidence. Wis. Stat. § 904.01. Whether well-drilling trucks carrying pipes ever drive on that country highway does not have any relevancy over any fact of consequence. To believe Kendhammer's version of events, the jury needed to determine whether a dark colored truck with a flatbed drove on that road on September 16, 2016, around 8:00 a.m. and dropped a pipe from its load. Other trucks at other times were irrelevant.

Kendhammer cannot demonstrate deficient performance because his attorneys did not present irrelevant evidence.

As to prejudice, Kendhammer also failed to meet his burden. To the extent that the circuit court determined that Kendhammer's witnesses had minimal relevance, even if the witnesses were called, he cannot demonstrate prejudice. At best, the testimony was tangential to the question of whether the pipe ever came off a vehicle or whether Kendhammer had the pipe in the trunk of his car and staged the accident after he brutally beat Barbara. And the jury heard from Kohlmeier that she found a similar pipe on the roadway three weeks after the accident. (R. 120:235.) There was no prejudice.

Kendhammer argues that the evidence would have demonstrated to the jury a greater chance that his story was true. (Kendhammer's Br. 65.) He asserted that if the jury concluded that his memory about *what* the truck looked like, if the jury believed that a well-drilling truck carrying a pipe travelled that road even though the truck was not seen in surveillance video, then the result of the trial might have been different. His argument is based on layers of speculation and

ignores the great weight of the evidence against him. The fact that trucks hauling scrap metal "frequently" travel that road would be minimally relevant. The omission of that evidence could not have reasonably caused Kendhammer prejudice, especially given the video surveillance evidence excluding any such trucks travelling in the relevant location during the relevant time frame.

Kendhammer cannot show deficiency or prejudice. This Court should affirm the circuit court's conclusion.

6. Kendhammer failed to prove prejudice regarding any of his claims, and therefore, he cannot show cumulative prejudice.

Even considering all of his claims together, *see Thiel*, 264 Wis. 2d 571, ¶ 62, Kendhammer fails to show ineffective assistance. "[Z]ero plus zero equals zero." *State v. Simpson*, 185 Wis. 2d 772, 786, 519 N.W.2d 662 (Ct. App. 1994) (citation omitted). Kendhammer failed to meet his burden to show deficient performance or prejudice for any of his ineffective assistance claims. Since he has shown no prejudice, there cannot be cumulative prejudice. The circuit court properly rejected this claim.

As the circuit court concluded, Kendhammer "merely show[ed] … that a different trial counsel, using different strategies, would have presented the case differently." (R. 293:19.) It believed Kendhammer was simply "second guessing the qualified and experienced attorneys [that he] originally hired." (R. 293:19–20.) He did not suffer prejudice.

The evidence of Kendhammer's guilt was overwhelming. His story did not match the evidence.

Barbara had numerous injuries to her face, head, neck, arms, hands, and legs that could not be explained by a single blow from a pipe. And Kendhammer had unexplained injuries to his neck, chest, and hands. The blood evidence in the car showed that Barbara had been bleeding for a long time. Blood found near the back tire was evidence that at least one of Barbara's injuries happened outside the car.

An eyewitness drove past the car after it was stopped in the ditch and the windshield was not yet broken. Someone or something struck the windshield four separate times thereafter. And the glass-shatter evidence showed that no one was seated in the passenger seat when the windshield was penetrated. After ending up in the ditch, Kendhammer opened the trunk of the car, and the pipe had Barbara's DNA on both ends. Officers never found a truck hauling scrap metal that matched Kendhammer's description despite the existence of surveillance video that would have been expected to have shown one had there been one in the relevant time and place.

Importantly, Kendhammer could never explain *why* he and Barbara were travelling on the road, *where* they were going, *why* Barbara was not at work, and *why* Barbara failed to call her mom that morning as she did every other morning. He told three different stories for where they were going and why they were on the road. The stories he told were shown to be false by the testimony of various witnesses. He never explained why Barbara was not at work.

The windshield being penetrated in the center by his fists is impossible, and the windshield in front of the passenger was first struck, then penetrated, which is also impossible if Kendhammer's version is true.

Kendhammer argues that the State's case was built on three pillars. (Kendhammer's Br. 10.) But Kendhammer's framing ignores much of the State's evidence to make that statement. Likewise, Kendhammer's argument that the State's evidence was not overwhelming focuses on irrelevant factors. (Kendhammer's Br. 68–69.)

Kendhammer argues that the State failed to prove a motive. (Kendhammer's Br. 11.) Yet, the State did not need to prove a motive. It was not an element of the crime. Instead, the State needed to prove beyond a reasonable doubt that Kendhammer caused Barbara's death and that he did so with the intent to kill Barbara. Wis. JI-Criminal 1010 (2000). Kendhammer's focus on motive is a distraction from evidence relevant to a determination of whether he suffered prejudice. He did not.

Likewise, the lack of eyewitnesses to the assault, the fact that he called 911, and whether Kendhammer and Barbara were fighting 20 minutes before the accident, were facts that could not explain the volume of evidence that Kendhammer killed his wife. He cannot meet his burden to show prejudice from any of the acts or omissions of trial counsel he complains about.

In sum, the circuit court properly denied Kendhammer's motion. Kendhammer failed to meet his burdens to prove deficient performance or prejudice. This Court should affirm.

III. Reversal in the interest of justice is not appropriate here.

A. The decision whether to reverse in the interest of justice lies with this Court's discretionary power.

"Appellate courts may also reverse judgments 'where unobjected-to error results in either the real controversy not

having been fully tried or for any reason justice is miscarried.'" *State v. Zdzieblowski*, 2014 WI App 130, ¶ 24, 359 Wis. 2d 102, 857 N.W.2d 622 (quoting *Vollmer v. Luety*, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990)); *see also* Wis. Stat. § 752.35.

The power of discretionary reversal is a "formidable" statutory power. *State v. Wery*, 2007 WI App 169, ¶ 21, 304 Wis. 2d 355, 737 N.W.2d 66. The Wisconsin Supreme Court has charged this Court with exercising that formidable power only in exceptional cases—infrequently, judiciously, and with great caution and reluctance. *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60. Whether this Court should do so is within this Court's discretion. *Id.* ¶ 23.

As the Wisconsin Supreme Court has explained, a controversy may be held as not fully tried when: (1) "the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case"; and (2) "when the jury had before it evidence not properly admitted which so clouded a crucial issue." *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

B. This Court should refuse to reverse in the interest of justice.

The rarely used exceptional discretionary power to grant a new trial in the interest of justice is not warranted. Kendhammer argues that the real controversy was not fully tried because the jury did not hear the evidence presented at the *Machner* hearing. (Kendhammer's Br. 74.) But for the reasons stated above, the evidence at the *Machner* hearing was variously inadmissible, irrelevant, or cumulative, and even potentially harmful to his defense. There is an insufficient basis for this Court to exercise its discretionary reversal powers here.

Additionally, Kendhammer's argument is an attempt to repackage his ineffective assistance claims in an attempt to avoid proving prejudice. As established in section II of this brief, Attorneys Bednarek and Hurley did not provide ineffective assistance. An interest-of-justice claim fails if it merely rehashes arguments that this Court has rejected. *State v. Arredondo*, 2004 WI App 7, ¶ 56, 269 Wis. 2d 369, 674 N.W.2d 647. Kendhammer's argument for discretionary reversal rehashes his meritless claims of ineffective assistance. This Court should refuse to use its extraordinary power to reverse in the interest of justice.

As for whether Kendhammer's trial yielded a result so untrustworthy and unfair as to constitute a miscarriage of justice, a ruling in Kendhammer's favor would hinge on whether he has shown a "substantial probability of a different result on retrial." *See Vollmer*, 156 Wis. 2d at 19. There is nothing in this record that supports the conclusion that the real controversy, whether Kendhammer intentionally murdered Barbara, was not fully tried, or that there was a miscarriage of justice. Rather, the record demonstrates the contrary. Accordingly, Kendhammer is not entitled to this extraordinary relief.

CONCLUSION

This Court should affirm the judgment of conviction and the circuit court's order denying postconviction relief.

Dated this 14th day of April 2023.

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 12,832 words.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

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

Dated this 14th day of April 2023.

Electronically signed by:

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