STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2024AP001875-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

NICOLAS J. BERGNER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE ANDERSON M. GANSNER AND HONORABLE LENA TAYLOR, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Did the circuit court properly deny without a hearing Bergner's postconviction motion, which alleged Attorney Michael Houlihan provided ineffective assistance of counsel for failing to object to the selection of a numbers-only jury?

Trial court answer: The trial found that Bergner's motion failed to present sufficient facts to raise a question of fact, and determined that the motion was conclusory and insufficient to warrant a hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On August 22, 2019, Franklin Police Officer Alan German arrested Nicholas Bergner for operating a motor vehicle while under the influence of an intoxicant (OWI), after conducting a traffic stop for expired vehicle registration at Forest Home Avenue and Kelm Road in the Village of Hales Corners, Milwaukee County. (R. 1; R. 88:120-121.) Officer German made contact with Mr. Bergner, detecting evidence of impairment. (R. 88:121-122, 127.) Mr. Bergner admitted consuming alcohol prior to operating the motor vehicle. (R. 88:128-129.) After Bergner failed several field sobriety tests, Officer German arrested him. (R. 88:130-144.) Mr. Bergner submitted to a breath test by an Intoximeter EC IR II. (R. 88:146.) Mr. Bergner's breath contained an ethanol concentration of .08 grams of ethanol per 210L of breath. (R. 55; R. 88:153.)

Mr. Bergner was charged with OWI-3rd offense and operating with a prohibited alcohol concentration-3rd offense [1] on September 16, 2019. (R. 1.) At his initial appearance, Mr. Bergner was represented by Attorney Donald Conner. (R. 5.) On January 29, 2020, Attorney Allison Ritter began representation. (R. 11.) On December 14, 2023, Attorney Michael Houlihan appeared for Mr. Bergner. (R. 86:3.)

The matter went to jury trial on January 16, 2024. (R. 96.) Both Attorneys Ritter and Houlihan appeared on behalf of Mr. Bergner. (R. 88:2.) In its case-in-chief, the State called Officer German and Officer Krakau. (R. 88:119-191; R. 63:34-43.) Dr. Ronald Henson testified for the defense, providing his opinion

[1] Contrary to Wis. Stat. §§ 346.63(1)(a) and (1)b), respectively.

that the field sobriety test could not be conclusive that Bergner was impaired due to alcohol at the time of driving, raising concerns regarding the margin for error in the intoximeter testing. (R. 63:44-83.) Therese Sanders testified as a rebuttal witness for the State and gave her opinion as to accuracy and reliability of the Intoximeter instrument. (R. 63:100-136.)

The case was submitted to the jury on January 17, 2024, and the jury returned a verdict of not guilty as to OWI-3rd offense and a verdict of guilty as to operation of a motor vehicle with a prohibited blood alcohol concentration-3rd offense. (R. 89:14-15.) Judge Gansner sentenced Mr. Bergner the same day.

On January 23, 2024, Mr. Bergner filed a motion for post-conviction relief, alleging ineffective assistance of trial counsel, in that Attorney Houlihan failed to object to a numbers-only jury. Mr. Bergner asserted that Attorney Houlihan was deficient for failing to object to a numbers-only jury, thereby prejudicing Bergner because a numbers-only jury allegedly shifted the jury's perception of the burden of proof regarding the accuracy of the Intoximeter test; consequently, the jury found Bergner guilty of the PAC charge. (R. 92:2-3.)

Judge Lena Taylor, successor to Judge Gansner, denied the motion by written order dated August 29, 2024, ruling:

> The court and parties in this case merely adopted a common practice, and the defendant has made no showing that counsel was deficient for failing to object to this practice given the context of the trial and the nature of the charges against him. More critically, however, the defendant fails to develop a convincing prejudice argument… The defendant's claim of prejudice is nothing more than speculation. Again, the defendant has provided no support for a finding that the jury would interpret the court procedure as implying dangerousness on his part given the context of the trial. Moreover, the defendant has not engaged in a meaningful discussion of the evidence against him or established that the jury procedure would have been reasonably likely to alter the trial's outcome – particularly given the narrow issues before the jury (i.e., whether the defendant had been operating under the influence or with a prohibited alcohol concentration). The defendant's claims that the jury procedure would have sent the message that he was dangerous or that that message would have been reasonably probable to alter the outcome of an OWI trial are

> speculative, conclusory, and insufficient to demonstrate prejudice due to counsel's failure to object to the procedure.

(R. 94:3-4.)

This appeal follows.

STANDARD OF REVIEW

The principles governing a circuit court's summary denial of a postconviction motion and an appellate court's review of such denial are well-established. *See State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. *Bentley*, 201 Wis. 2d at 309-10 … If the motion raises such facts, the circuit court must hold an evidentiary hearing. *Id*. at 310; *Nelson v. State*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. *Bentley*, 201 Wis. 2d at 310-11; *Nelson*, 54 Wis. 2d at 497-98. We require the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." *Nelson*, 54 Wis. 2d at 498. See *Bentley*, 201 Wis. 2d at 318-19 (quoting the same). We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard. *In re the Commitment of Franklin*, 2004 WI 38, ¶ 6, 270 Wis. 2d 271, 677 N.W.2d 276; *Bentley*, 201 Wis. 2d at 311.

State v. Allen, 274 Wis. 2d 568, ¶ 9.

ARGUMENT

I. The Trial Court Properly Denied Mr. Bergner's Post-Conviction Motion without a Hearing Because He Made Only Conclusory Allegations to Support His Claim.

A. Legal Principles.

Criminal defendants are constitutionally guaranteed the right to counsel under both the United States Constitution and the Wisconsin Constitution. U.S. Const. amends. VI, XIV; Wis. Const. art. I, § 7. The right to counsel includes the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

When a defendant claims that counsel was ineffective, he must assert that his attorney was deficient and that he was prejudiced as a result of that deficiency. *Allen*, 274 Wis. 2d 568, ¶26 (citing *Strickland*). To show deficient performance, the defendant must identify specific acts or omissions falling "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment." *Allen*, 274 Wis. 2d 568, ¶26; *Strickland*, 466 U.S. at 687. A defendant demonstrates prejudice if he establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Allen*, 274 Wis. 2d 568, ¶26; *Strickland*, 466 U.S. at 694. A defendant must satisfy both prongs of the *Strickland* test to succeed on the claim. *Allen*, 274 Wis. 2d 568, ¶26; *Strickland*, 466 U.S. at 687.

However, the mere assertion of a claim of ineffective assistance does not entitle a defendant to a hearing. *Allen*, 274 Wis. 2d 568, ¶15. Rather, a defendant must assert facts which allow the reviewing court to meaningfully assess the claim. *Bentley*, 201 Wis. 2d at 314; *Allen*, 274 Wis. 2d 568, ¶21. Such facts must be material: that is, significant or essential to the issue presented to the court. *Allen*, 274 Wis. 2d 568, ¶22.

The *Allen* court wrote:

> As an assistance to defendants and their counsel, we propose that postconviction motions sufficient to meet the Bentley standard allege the five "w's" and one "h"; that is, who, what, where, when, why, and how. A motion that alleges, within the four corners of the document itself, the kind of material factual objectivity we describe above will

> necessarily include sufficient material facts for reviewing courts to meaningfully assess a defendant's claim.

Allen, 274 Wis. 2d 568, ¶23. (Footnote omitted)

Because Mr. Bergner's motion failed to meet these standards, the trial court properly denied it without a hearing.

B. Mr. Bergner failed to allege sufficient non-conclusory facts to warrant a hearing

In his post-conviction motion, Mr. Bergner asserted, first, that Attorney Houlihan's performance was deficient, in that Houlihan failed to object to the selection of a numbers-only jury; and, second, that the failure was prejudicial, because allowing the jurors to maintain secrecy concerning their identities allegedly sent the message that Bergner must be a very dangerous person. The motion failed as to both prongs of *Strickland*.

1. Mr. Bergner did not establish that Attorney Houlihan's performance was deficient.

In his post-conviction motion, Mr. Bergner asserts that because jurors were consistently referred to by their juror numbers during the jury selection process, it is likely that the jurors believed that their personal information was not part of the record. (R. 92:2.) Mr. Bergner claims that the jurors evidently did not want the information to be disclosed in court, and that this procedure impermissibly led the jury to believe that Mr. Bergner is a dangerous person. Bergner offered no evidence in support of this claim. However, there is, in fact, evidence to the contrary in the record.

During jury selection, a number of jurors shared personal information. Jurors 8, 7, 24, 20, 19, 28 all shared personal information about the ways in which alcohol abuse affects their lives. (R. 88:73-75.) Additionally, Juror 5 shared identifiably personal information on the record when Juror 5 shared being in the final semester of graduate school at the University of Wisconsin and then planning to become an auditor in accounting. (R. 88:49.) Juror 8 shared being an intern at the State

Public Defender Office. (R. 88:50.) Juror 11 shared being a retired disability services worker for Milwaukee County and also a current radio DJ in Milwaukee. (R. 88:51.) Juror 13 shared working as a parts associate for Lake Chevrolet. (R. 88:52.) Juror 16 shared working as an assistant manager at Potawatomi Casino and having a spouse who also worked at the casino as an executive casino host. (R. 88:54.)

Mr. Bergner fails to establish that the jurors did not want personal information to be disclosed in court, or how identifying jurors by numbers led them to believe Mr. Bergner to be a dangerous person. The record does not indicate any restrictions placed on questions asked in jury selection. Nor does the record demonstrate that jurors were instructed to provide vague answers that offered little to no identifiable information.

2. Mr. Bergner did not establish that Attorney Houlihan's performance prejudiced his client.

Even if Attorney Houlihan were to have performed deficiently in failing to object to the selection of a numbers-only jury, Bergner's motion must fail because he does not establish prejudice. Bergner offers no viable theory as to how the use of a numbers-only jury caused them to find him guilty of the PAC charge or why the jury believed his expert had not demonstrated that the Intoximeter was not operating properly.

Had the jurors believed Bergner to be dangerous as a result of a numbers-only jury selection process, Mr. Bergner still fails to show how this then shifted the burden of proof to him as to the accuracy of the Intoximeter.

In *State v. Tucker*, 2003 WI 12 ¶26, 259 Wis. 2d 484, 657 N.W.2d 374, the Court concluded that the trial court's error of using numbers to refer to jurors—instead of using jurors' names over the objection of defense counsel—was harmless, since it was clear beyond a reasonable doubt that a rational jury would have found defendant guilty notwithstanding any trial court error.

In this jury trial, evidence was presented to the jury that Mr. Bergner's breath contained an ethanol concentration of .08

grams of ethanol per 210L of breath. (R. 55; R. 88:153.) Dr. Hensen was called by the defense and testified that the Intoximeter EC IR II has various margins of error and is not exactly reliable. (R. 63: 53, 61.) Dr. Hensen also testified that the Intoximeter EC IR II does not compensate for the breath temperature, and with higher breath temperature, there is an increase of alcohol molecules being measured. The State countered by calling Therese Sanders in rebuttal. Ms. Sanders testified that she was unaware of a margin of error as it relates to the Intoximeter EC IR II. (R. 63:106.) Ms. Sanders testified that the instruments are tested every 120 days, pursuant to state statute. (R. 63:107.) Ms. Sanders also testified about different peer reviewed studies which found that breath temperature does not affect alcohol concentration. (R. 63:109.)

Based on the evidence presented at trial, a rational jury would have found Mr. Bergner guilty beyond a reasonable doubt, notwithstanding the use of a numbers-only jury. Mr. Bergner failed to assert information sufficient to enable the circuit court to conclude that the use of a numbers-only jury impacted their verdict. Plus, Mr. Bergner's expert failed to "prove" that the Intoximeter was not operating properly. Even were this Court to find Attorney Houlihan's failure to object as deficient performance, it cannot be found to be prejudicial.

CONCLUSION

For the reasons herein, the State asks that the court affirm the denial of Mr. Bergner's motion for post-conviction relief.

Dated this 24th day of February 2025.

Respectfully submitted,

Electronically signed by:

Madeline A Witte
Madeline A. Witte
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 2366 words.

Dated this 24th day of February 2025.

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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 24th day of February 2025.

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