COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2007AP647-CR
2007AP648-CR

Cir. Ct. Nos. 2005CT53
2005CF50

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SANDRA M. DAHL,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Sandra Dahl appeals judgments of conviction for operating a motor vehicle while intoxicated as a fifth or subsequent offense, operating with a prohibited alcohol concentration as a fifth or subsequent offense,

disorderly conduct, and operation after revocation, as well as an order denying her motion for postconviction relief. Dahl argues we should use our discretionary power to grant her a new trial in the interests of justice because the real controversy was not fully tried. Alternatively, she asserts we should at least remand for a ***Machner***[1] hearing on her ineffective assistance of counsel claim, which the trial court denied without a hearing. Because the real controversy was tried and counsel was not ineffective, we reject Dahl's arguments and affirm.

Background

¶2 On March 28, 2005, Dahl asked her boyfriend, Todd Mord, to drop her off at a bar in Ellsworth. Dahl stayed at the bar for several hours before asking James Langer to drive her back to Mord's home just outside Ellsworth. There, Dahl and Mord argued and, when Dahl allegedly struck Mord, he called the sheriff's department.

¶3 Dahl left before any deputies arrived. Mord told the deputy who arrived on scene that he had watched Dahl get into a green four-door Pontiac Grand Am and drive towards Ellsworth. Approximately twenty minutes after Mord's call, deputies located a green four-door Grand Am approximately three miles from the residence. The engine was still warm.

¶4 Dahl was found nearby in the apartment of Joseph Huppert, a complete stranger to her. Dahl had walked into Huppert's unlocked apartment, asking to wash her muddy feet and use his phone. Huppert offered to let her stay in a vacant downstairs apartment that had a cot. As he was dealing with Dahl,

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

Huppert noticed officers outside and made contact with them, asking if they were looking for a woman and informing them of Dahl's location in the vacant apartment. The deputies woke Dahl and, after a brief conversation, arrested her. During their discussion, Dahl told the deputies that Langer, who had driven her from the bar to Mord's earlier, had driven her back to Ellsworth that evening.

¶5 Dahl was ultimately charged with the OWI—fifth or subsequent, PAC—fifth or subsequent, disorderly conduct and, separately, operating after revocation. A jury convicted her on all four charges and she was sentenced to a total of three years' initial confinement and three years' extended supervision.

¶6 Dahl brought a postconviction motion, seeking a new trial in the interests of justice and alleging ineffective assistance of counsel. The court denied her motion without a hearing, concluding she was not entitled to a ***Machner*** hearing because she could not demonstrate prejudice and that the real controversy had been tried. Additional facts will be included in the discussion as necessary.

Discussion

¶7 Dahl makes two major complaints on appeal. First, she argues the real controversy was not fully tried and she asks for a new trial in the interests of justice. Second, Dahl alleges ineffective assistance of counsel and requests at least a ***Machner*** hearing. Dahl offers multiple overlapping arguments for each claim, but we begin with her arguments seeking a new trial.

I. Whether the Real Controversy was Fully Tried

¶8 Dahl asserts the real controversy—whether she operated the Grand Am[2]—was not fully tried because of four errors. She asserts: (1) the State relied on evidence later proven inaccurate; (2) a jury instruction suggested her prior OWI convictions; (3) the State relied on inadmissible evidence; and (4) the State's closing argument was improper. Individually or cumulatively, Dahl argues, these errors merit a new trial.

¶9 We review a trial court's ruling on a postconviction motion for a new trial in the interests of justice for an erroneous exercise of discretion. ***State v. Williams***, 2006 WI App 212, ¶13, 296 Wis. 2d 834, 723 N.W.2d 719. But it is also within our own discretion to grant a new trial if we conclude the real controversy was not fully tried. WIS. STAT. § 752.35.[3] Thus, we independently review the record to determine whether a new trial is warranted in the interests of justice. ***Williams***, 296 Wis. 2d 834, ¶12.

A. The State's Reliance on "Inaccurate" Information

¶10 At trial, Mord testified he had heard Dahl take keys with her when she left the apartment. The State further offered evidence that at the time Dahl was booked, she had in her possession a set of five keys. In closing, the

[2] Dahl did not dispute she was intoxicated or that her blood-alcohol concentration exceeded a permitted level. Rather, she simply denied she had been driving.

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

prosecutor asked the jury, "Why are keys on her if she didn't drive?" Dahl did not object to that statement.[4]

¶11 In her postconviction motion, Dahl alleged she had a private investigator obtain the keys and test them. The investigator determined none of the five keys fit the Grand Am. Thus, Dahl asserts, the State's presentation of this inaccurate information prevented the real controversy from being fully tried.

¶12 The trial court concluded this issue was a red herring. We agree. First, in the context of the entire trial and the closing argument, it is evident that Dahl's possession of keys was not the lynchpin of the State's case. Instead, the important evidence was Mord's testimony that he watched her drive off, Langer's specific disavowal of Dahl's claim he had driven her into town, and the proximity of Dahl to the Grand Am when the police located her.

¶13 Moreover, the private investigator obtained the keys from Dahl's mother, but did not contact the sheriff's department to determine whether it was the same set of keys that had been inventoried at booking. The investigator then had to find the vehicle in Minnesota to test it and there is no independent verification, such as recitation of the vehicle identification number, that the investigator found and tested the correct vehicle.[5] Further, according to the

[4] Failure to object to remarks in a closing argument constitutes waiver for appellate purposes. ***State v. Davidson***, 2000 WI 91, ¶86, 236 Wis. 2d 537, 613 N.W.2d 606.

[5] In her reply brief, Dahl states:

> [T]he State also makes a series of arguments suggesting that Dahl's post-conviction investigation failed to establish that the keys found on Dahl did not start the vehicle[,] … may not have been the same keys … that there may have been an extra key[,]… [and] that the vehicle … may not have been the same….

(continued)

inventory, Dahl also had in her possession a single, loose key when she was booked. This key was not tested.

¶14 Finally, Dahl offers no reason why this new evidence could not have been offered at trial. Certainly, if her defense was that she was not driving, it would seem logical that she would want to show she did not have a key to start the vehicle. The State's passing reference to Dahl's possession of keys in its closing argument did not prevent the real controversy from being fully tried.[6]

B. The Jury Instructions

¶15 The jury was given WIS JI—CRIMINAL 2660C (2004), which instructed that Dahl's prohibited alcohol concentration was .02%. Dahl asserts this was a distraction from the real controversy, evidenced when the jury sent a question to the court, asking, "What is the difference between .02 grams … compared to .08, being legally drunk?" Dahl complains the instruction allowed the jury to infer a pattern of drunk driving.

> Whatever the merit of these arguments, they are issues of fact that should have been raised in the lower court. … The State's failure to raise these factual issues below should foreclose raising them here.

Dahl makes this argument with no citation to authority. The State had no reason to raise the issues with the trial court because it was not challenging the court rulings. Further, while the general rule is that issues not raised in the trial court will not be considered for the first time on appeal, ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997), this rule generally applies only to appellants. We usually permit a respondent to employ any theory or argument on appeal that will allow us to affirm the trial court, even if those theories were not previously raised. *See* ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985).

[6] If nothing else, evidence Dahl possessed keys, regardless what those keys fit, bolstered Mord's credibility to the extent such evidence corroborated his testimony he had heard Dahl grab keys before leaving.

¶16 Dahl failed to object to the instruction below, which fails to preserve the issue for review. *See* WIS. STAT. § 805.13(3). Further, Dahl does not challenge the instruction on its face. Such a challenge would fail, as the jury instruction accurately stated the law as codified in WIS. STAT. § 340.01(46m)(c). *See* ***State v. Fonte***, 2005 WI 77, ¶15, 281 Wis. 2d 654, 698 N.W.2d 594.

¶17 When presented with the jury's question, the court informed the jurors that "these jury instructions are nothing about .08. … It's an irrelevant question. It should not have any impact on your decision, okay?" Dahl did not object to the court's response, nor does she challenge its sufficiency on appeal. Jurors are presumed to follow the court's cautionary instructions. ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992). Thus, we assume the jurors would follow the court's instruction and disregard any extraneous questions they had about .08% as a threshold number.[7] Dahl offers nothing but speculation that the jury made improper inferences. There was therefore no error in the instruction and no basis for granting a new trial.

C. The State's Use of "Inadmissible" Evidence

1. Evidence of Silence

¶18 Dahl complains the State impermissibly asked witnesses about her silence during her interactions with police, reciting approximately five instances of error from the transcript.[8] "Any time an individual is questioned by the police,

[7] Although it is true that Dahl's blood-alcohol concentration does not inform on whether she drove, it was nevertheless an element of at least one of the crimes with which she had been charged.

[8] We note that Dahl neither objected to, nor moved to suppress, any of these statements.

that individual is compelled to do one of two things—either speak or remain silent." ***State v. Fencl***, 109 Wis. 2d 224, 237, 325 N.W.2d 703 (1982). Thus, it is generally a violation of a defendant's Fifth Amendment protections against self-incrimination to comment on a defendant's silence, whether that silence occurs prearrest or post-arrest, pre-***Miranda*** or post-***Miranda***. *See* ***State v. Sorenson***, 143 Wis. 2d 226, 256, 421 N.W.2d 77 (1988); ***Fencl***, 109 Wis. 2d at 236.

¶19 For purposes of this discussion, we will assume without deciding that the State's questions and resulting answers were improper. Constitutional errors are nevertheless subject to a harmless error test.

> A constitutional error is harmless beyond a reasonable doubt if there is no reasonable possibility that the error might have contributed to the conviction. … We have considered the following factors in determining whether a constitutional error was harmless beyond a reasonable doubt: (1) the frequency of the error; (2) the nature of the state's evidence against the defendant; and (3) the nature of the defense. …
>
> The unconstitutional references to [defendant's] silence cannot be viewed in a vacuum but, rather, must be examined within the entire context of the trial.

Fencl, 109 Wis. 2d at 238 (citations omitted).

¶20 We reject two of Dahl's complained errors outright. Viewing the purported errors in the context of the trial, it is obvious that Deputy Tonette May's testimony that "the whole time, [Dahl] wasn't real happy about what was going on[]" says absolutely nothing about Dahl's silence or failure to communicate with police. Additionally, we consider the State's question, whether it "would be fair to say that [Dahl] was less than cooperative[,]" and May's response, that it was "very fair[,]" to be harmless because neither remark is a direct comment on her silence. Although the preceding question might suggest May's answer means Dahl was

uncooperative because of her refusal to answer questions, the immediately subsequent question and answer advised the jury of Dahl's slurred speech and outbursts, which may also be considered uncooperative but are unrelated to Dahl's silence.

¶21 This leaves three purported errors. As related by Dahl:

> Officer Jason Matthys testified that he "attempted to" speak with Dahl, and that, when he asked "if she'd be willing to answer any questions," Dahl answered "I guess not"…. Matthys further testified that Dahl "apparently didn't want to answer any questions" … and, when he told Dahl what he knew about the incident, Dahl "sat in silence"[9]….
>
> Matthys was not the only witness to testify about Dahl remaining silent in response to police questioning. Officer Tonette May testified that Dahl only spoke "a little bit" and "wasn't real cooperative"[10] …. May also testified that Dahl "did answer some of my questions and some of them she did not[.]" (Record citations omitted.)

Consistent with ***Fencl***, however, we conclude any error is harmless beyond a reasonable doubt.

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[9] We are not convinced that this particular exchange was even improper. Dahl's overall complaint is about the State's use of her silence in response to police questioning. But an officer confronting a suspect with incriminating evidence, or verbally summarizing the case against the suspect, is not necessarily questioning. ***State v. Fischer***, 2003 WI App 5, ¶34, 259 Wis. 2d 799, 656 N.W.2d 503.

[10] The actual context of May's testimony is:

> Q: Okay. During this period of time, did you have an opportunity to make observations of her?
>
> A: Yes. Her eyes were bloodshot, her speech was slurred. The little bit that she did speak to me, she wasn't real cooperative, but she did answer some of my questions, and some of them she did not.

Any harm here was mitigated if not cancelled by May's observation that Dahl did, in fact, answer some questions.

¶22 The trial transcript is over 190 pages. The errors appear briefly, on only three pages when we exclude the first two errors Dahl contests. More importantly, the State did not rely on Dahl's silence to prove her guilt, nor did it attempt to unduly highlight it. Rather, the key evidence was Mord's testimony that he watched her drive away. In addition, the nature of Dahl's defense was to deny that she had driven, but this was directly contradicted by Langer's testimony that he did not provide her a ride as she claimed.[11] In short, the State "did not make a concentrated, overt effort to imply [Dahl's] guilt through references to [her] silence." *See* ***Fencl***, 109 Wis. 2d at 238-39. Even if the questions and answers were impermissible, their admission was harmless.

2. Hearsay/Character Evidence

¶23 Dahl also complains about a section of Mord's testimony that he had spoken with Dahl's brother, who indicated a concern about Dahl's drinking. She complained this was inappropriate hearsay and character evidence which "may have increased the jury's tendency to believe she was drinking and driving in this case. A jury that believes a defendant has a drinking problem might easily conclude that the defendant has fewer reservations about drinking and driving, and therefore is more likely to have driven drunk on a particular occasion."

¶24 We reject Dahl's argument. First, there was no dispute she was intoxicated. The defense admitted as much in the opening statements. Mord's

[11] We also note the trial court held several of Dahl's statements were spontaneous and voluntary. The State posits her silence should be subject to the same analysis. We are not wholly convinced that we can hold silence to be "spontaneous" or "voluntary" simply because the alternative to silence is continued speech. Moreover, we know of no rule that the right to silence, spontaneous or otherwise, is forfeit once a spontaneous statement has been made.

statement does not draw any more attention to Dahl's alcohol consumption than her own opening statement. More importantly, it does not automatically follow that someone who has a drinking problem will be more likely to drive while intoxicated than someone without a drinking problem. This single, isolated statement does not provide a basis for relief.

D. State's Improper Closing Argument

¶25 Dahl complains about a portion of the State's closing argument, where the prosecutor told the jury, "So with the facts that you have, you have no other choice [than a guilty verdict], and to do so would violate your oath as a jury, quite frankly, in my humble opinion." Dahl contends first that this misrepresented the jury's choices—it could have found her guilty, or not guilty. The jury did not have "no other choice." Dahl also asserts it borders on a threat for the State, which holds prosecutorial power, to say jurors may be violating their oath with a contrary verdict. The court concluded that, in context, the State merely encouraged jurors to avoid ignoring the law and the evidence that had been presented.

¶26 A "criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements … must be viewed in context." ***Williams***, 396 Wis. 2d 834, ¶39 (citation omitted). Counsel is given considerable latitude in closing argument. *See* ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). "The prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him or her and should convince the jurors." ***State v. Nielsen***, 2001 WI App 192, ¶46, 247 Wis. 2d 466, 634 N.W.2d 325. "The line between permissible and impermissible argument is thus drawn where the prosecutor goes beyond

reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence." ***Draize***, 88 Wis. 2d at 454.

¶27 We have reviewed the transcript of the entire closing argument, and we are satisfied the State's argument did not exceed the bounds of arguments permitted by ***Draize*** and ***Nielsen***. The prosecutor stated, in part:

> What I did in my opening is I asked you, though, not to throw common sense out the door and to come in here with your life experiences and figure out how things work. I also asked you to listen to the law, and even though you don't like the law, abide by the law because you took an oath to that. And what we are asking you -- the State is asking you to do, is find Ms. Dahl guilty based upon that.
>
> I have the burden of proof. There is -- there is absolutely no question that's the case. But you also have just heard the judge read what beyond a reasonable doubt means. It doesn't mean any and all doubt, it means a reasonable doubt. In other words, don't search for doubt. In other words, look at the facts, what the evidence is, and decide accordingly.

¶28 After summarizing the evidence against Dahl, the prosecutor continued:

> All the way through that is the evidence you have before you in this case, and that is the only evidence you have before you in this case. To make up something is contrary to what the judge just read to you, and that's searching for doubt.
>
> ….
>
> In order for her to -- for you to come to the conclusion that she's not in violation of the OWI and the OAR in this case, you have to find that she didn't drive at all, period. Okay? I don't think there's any question in relationship to the Disorderly Conduct. But in order to do that, you've got to come up with facts that don't exist, because everything that you've heard here today points to the fact that, yes, she did drive.

> ….
>
> So with the facts that you have, you have no other choice, and to do so would violate your oath as a juror, quite frankly, in my humble opinion. Thank you.

It is evident to us that the State used its closing argument to urge the jurors to conclude, as it had, that the only logical interpretation of the evidence was that Dahl had been driving while intoxicated.

E. Cumulative Error

¶29 Dahl contends the aforementioned errors combine to "warrant a new trial in the interest of justice." She asserts "the evidence that she did drive was far from overwhelming" because "police never actually saw Dahl drive."

¶30 Dahl has not otherwise challenged the sufficiency of the evidence on appeal but, in the event it is not clear, there was adequate evidence Dahl drove the Grand Am. Mord testified that he saw her drive away from the residence. Mord's testimony goes directly to the question of whether Dahl drove. Her proximity, in a stranger's home, to her still-warm vehicle, coupled with Langer's denial that he was Dahl's transportation, further support an inference that Dahl had been the one to drive the Grand Am—there is no requirement the police observe an individual operate a motor vehicle. Thus, Dahl is arguing not the interests of justice so much as an alternate interpretation of the facts.

¶31 However, our power of discretionary reversal is formidable, to be exercised sparingly and with great caution. ***Williams***, 296 Wis. 2d 834, ¶36. We will not reverse merely because Dahl thinks the jury should have interpreted the facts differently. Such a reversal would undermine the jury's role as fact-finder as arbiter of witness credibility. We have concluded that Dahl's claimed evidentiary

errors either were not errors or were harmless and in any case do not warrant reversal; adding them together does not make them more problematic. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

III. Ineffective Assistance of Trial Counsel

¶32 Dahl asserts counsel was ineffective for failing to stipulate Dahl had a prohibited alcohol concentration, failing to object to testimony about her silence or drinking problem, and failing to object to the part of the State's closing argument regarding the jurors' oaths. We apply a two-part test to ineffective assistance of counsel claims. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. The defendant bears the burden of establishing both deficient performance by the attorney and prejudice from the deficient performance. ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. The questions of performance and prejudice present mixed questions of law and fact. ***Id.*** Findings of historical fact by the trial court are affirmed unless clearly erroneous. ***Id.*** But whether counsel was actually deficient and whether a defendant suffered prejudice are questions of law. ***Id.***

¶33 We reject Dahl's argument that counsel should have objected to testimony about Dahl's silence and drinking problem and to the State's closing argument. We have concluded there was either no error or simply harmless error in the inclusion of the testimony and no impropriety in the State's closing argument. There is thus no prejudice from counsel's failure to object and, further, counsel's failure to raise a non-meritorious issue is not deficient performance. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

¶34 This leaves only Dahl's complaint that counsel was ineffective for failing to stipulate that Dahl had a prohibited alcohol concentration on the night in question. Her complaint is that failure to so stipulate meant the jury heard Dahl's prohibited alcohol concentration was .02%, not .08%, and permitted the jury to infer the fact of Dahl's prior convictions.

¶35 To the extent Dahl argues counsel should have sought a stipulation because the court and state would have been obligated to accept, Dahl misapprehends the law. A defendant can offer to stipulate to elements of a crime. *See* ***State v. Wallerman***, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996). However, neither the State nor the court is required to accept a ***Wallerman*** stipulation. ***State v. Veach***, 2002 WI 110, ¶118, 255 Wis. 2d 390, 648 N.W.2d 447. A properly offered stipulation must be accepted only when the concession applies to a defendant's status,[12] such as when the defendant offers to stipulate to prior convictions, but not when the stipulation goes "to any element of the criminal act forming the basis for the current charge." ***Id.***, ¶124. Indeed, the State is obligated to prove all elements of a crime, even those the defendant does not dispute. ***Id.***, ¶121.

¶36 Accordingly, we reject Dahl's last argument for three reasons. First, the State is entitled to prove its case by evidence of its own choice; the defendant may not stipulate his or her way out of the full evidentiary force of the case as the State chooses to present it. ***Id.***, ¶125. One of the crimes Dahl was charged with

[12] A status element is "completely dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior…." ***State v. Veach***, 2002 WI 110, ¶126, 255 Wis. 2d 390, 648 N.W.2d 447 (citation omitted).

was operating with a prohibited alcohol concentration; the State was entitled to put on evidence of what blood-alcohol level applied.

¶37 Second, neither the court nor the State was obligated to accept her stipulation.[13] Because Dahl cannot show her stipulation would have been accepted by either entity, she cannot show she was prejudiced by counsel's failure to make an offer.

¶38 Finally, to the extent this argument is a surreptitious attack on the jury instruction that mentioned the .02% prohibited alcohol concentration, we have already concluded there was no error in so instructing the jury, and we reject this argument for the same reason as the two previous arguments. *See* ***Wheat***, 256 Wis. 2d 270, ¶14.

¶39 Because Dahl relied on the same arguments when she presented her motion to the trial court, we conclude the court properly denied her request for postconviction relief without a hearing. If a motion fails to allege sufficient facts to entitle a defendant to relief, the court may deny a postconviction motion without a hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996).

[13] In her reply brief, Dahl contends the court should not have "unfettered discretion to deny nearly all stipulations, even when there is no good reason for doing so. Here, the Court would have had no legitimate reason for denying the stipulation, and therefore would have been required to accept it." Even if Dahl is correct that the court must have a good reason to deny a stipulation, she ignores the fact that the State is not obligated to accept a stipulation, either. *See* ***Veach***, 255 Wis. 2d 390, ¶118. If the State rejects a stipulation, it will never be presented to the court for consideration.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.