



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

April 17, 2024

To:

Hon. Daniel S. Johnson
Circuit Court Judge
Electronic Notice

Sonya Bice
Electronic Notice

Michele Jacobs
Clerk of Circuit Court
Walworth County Courthouse
Electronic Notice

Gregory A. Petit
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP1714-CR

State of Wisconsin v. Angela R. Joski (L.C. #2017CF59)

Before Gundrum, P.J., Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Angela R. Joski appeals a judgment of conviction for seventh-offense operating while intoxicated, as well as an order denying her motion for postconviction relief. She argues she suffered a violation of her Sixth Amendment right to counsel as a result of her trial attorney's failure to obtain her informed consent to a student intern's representation during the cross-examination of a trial witness. Alternatively, she argues that her trial attorney was constitutionally ineffective, both for that reason and because her attorney failed to seek the exclusion of "hearsay evidence from an unknown witness." Based upon our review of the briefs

and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

At trial, the investigating trooper testified that he was performing a traffic stop when a civilian pulled over and said he had witnessed a hit and run. The civilian witness told the trooper he had followed the vehicle to a nearby gas station. The trooper went to the gas station and found Joski in the driver's seat of the running vehicle, which was parked diagonally across two spots in front of the store. The vehicle had sustained obvious damage. Joski admitted to the trooper that she had been in an accident, claiming she was not used to the driving the vehicle and had misjudged an angle on an exit. Upon further investigation of the accident scene, the trooper discovered evidence that Joski's vehicle had gone into a ditch and hit a tree.

The trooper performed field sobriety tests that suggested intoxication. Joski was transported for a blood draw, which revealed the presence of Lorazepam. This was consistent with Joski's statement to the trooper that she had consumed approximately 120 milligrams of antianxiety medication earlier in the day. A Wisconsin State Crime Laboratory analyst testified that operating while under the influence of Lorazepam would have generally the same indicia as operating while under the influence of alcohol. The blood test revealed an amount of Lorazepam that was within the therapeutic range for the drug.

The jury convicted Joski of operating while intoxicated. Joski filed a postconviction motion, in which she raised the same arguments she now raises on appeal. Following an evidentiary hearing, the circuit court denied the postconviction motion.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Joski first appears to argue she was wholly deprived of Sixth Amendment counsel when her trial attorney permitted a student intern to handle the cross-examination of the investigating trooper. The Sixth Amendment guarantees a defendant the right to counsel at any critical stage in a criminal proceeding, which includes trial. *State v. Carter*, 2010 WI App 37, ¶18, 324 Wis. 2d 208, 781 N.W.2d 527. The application of constitutional provisions presents a question of law. *State v. Spencer*, 2022 WI 56, ¶22, 403 Wis. 2d 86, 976 N.W.2d 383.

The Supreme Court Rules in effect at the time of Joski’s trial permitted a student to appear on behalf of a client in court only under the “direct and immediate supervision” of a licensed attorney. *See* SCR 50.06(1) (1982). The same is true today.² *See* SCR 50.01(2); 50.03; 50.04. Joski’s trial counsel was present—and frequently consulted with the student—during the cross-examination that the student handled. Moreover, at the *Machner* hearing,³ trial counsel testified that she decided the intern would conduct the cross-examination because she “found that his was much more thorough than the [cross-examination] that I had prepared.” On this record, there is no basis to conclude Joski suffered a wholesale deprivation of her right to counsel based on the mere fact that a supervised intern cross-examined a witness.

² SCR ch. 50 was repealed and recreated effective July 1, 2021. *See* S. Ct. ORDER 20-04, 2021 WI 20 (issued Mar. 2, 2021, eff. July 1, 2021). The trial in this case took place between the issue date and the effective date of the order. Because the parties appear to rely exclusively on the current version of SCR ch. 50, we will not further discuss the prior version.

³ *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Joski next argues her attorney was constitutionally ineffective by failing to obtain Joski's informed consent to the intern performing the cross-examination.⁴ The Sixth Amendment guarantees a defendant the effective assistance of counsel. *State v. Savage*, 2020 WI 93, ¶27, 395 Wis. 2d 1, 951 N.W.2d 838. We review an ineffective assistance of counsel claim using a mixed standard of review. *Id.*, ¶25. The circuit court's factual findings, including those regarding trial counsel's conduct and strategy, will not be overturned unless they are clearly erroneous, but we review de novo whether counsel's conduct constitutes constitutionally ineffective assistance. *Id.* To prevail on an ineffective assistance claim, the defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Id.*; see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Joski's ineffective assistance of counsel claim fails on both components. Regarding the alleged deficient performance, the circuit court's factual findings establish that Joski did, in fact, provide her informed consent to the intern's cross-examination at trial.⁵ In testimony the circuit court found credible, trial counsel stated that she discussed with Joski the idea of the intern performing the cross-examination as they were entering the courthouse on the first day of trial.

⁴ Joski also presents this argument as a variation of her argument above, essentially positing that her trial attorney's failure to obtain her informed consent to a student appearance on her behalf constitutes a per se Sixth Amendment violation. For the reasons explained herein, we are no more persuaded by this framing of the issue. In any event, the two concepts overlap to a significant degree: a defendant disadvantaged by the complete absence of counsel is in as bad a position as a defendant who is represented by an attorney that makes "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁵ SCR 50.01(3) states that a legal intern providing services to a client under SCR 50.04, including making a court appearance, "shall obtain the informed consent of the client, as specified in SCR 20:1.0 (f)." In turn, SCR 20:1.0(f) (2023) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Trial counsel advised Joski that she thought the intern had prepared a better cross-examination and that it would “ultimately garner more information.” Trial counsel also told Joski that she could perform the cross-examination instead of the intern if that was what Joski wanted. Trial counsel testified that Joski was “originally ... a little bit hesitant, but she didn’t say no and ultimately she said okay.”

Joski appears to primarily rely on her own averments that there was no meaningful discussion of the student intern’s participation at trial and she did not consent to his appearance on her behalf. This testimony was rejected by the circuit court, and Joski has provided no basis for deeming that credibility determination clearly erroneous. *See State v. Carter*, 2010 WI 40, ¶19, 324 Wis.2d 640, 782 N.W.2d 695. The student intern’s testimony corroborated trial counsel’s assertion that Joski had given permission. Joski’s silence at trial when her counsel informed the court that the student intern would be performing the cross-examination also supports the court’s factual finding that Joski provided valid consent. *See State v. Dwyer*, 181 Wis. 2d 826, 834, 512 N.W.2d 233 (Ct. App. 1994).

To the extent Joski claims the discussion with her attorney was insufficient to allow Joski to make an informed choice about the intern’s trial participation, we disagree. Additionally, because Joski testified she was unsure how she would have responded to the request had she had more time to discuss it, we conclude Joski has not demonstrated prejudice arising from the alleged lack of informed consent. *See Dwyer*, 181 Wis. 2d at 834.

We turn next to Joski’s claim that her trial attorney and the student intern were constitutionally ineffective in their handling of alleged hearsay testimony: the trooper’s testimony that a citizen witness stated she had just witnessed an accident involving the vehicle

she had followed. The circuit court addressed this matter prior to trial. Over trial counsel's objection, the court ruled that the statement from the citizen witness was not hearsay because it was not being offered for the truth of the matter asserted, but rather to illustrate how Joski's vehicle came to the officer's attention.

On appeal, the State argues there can be no claim for ineffective assistance of counsel pertaining to the adequacy of the student intern's cross-examination because testimony on that issue was not preserved at the *Machner* hearing. Joski does not respond to the State's invocation of *Machner*, which indeed requires the preservation of such testimony. See *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). We take this lack of a reply as a concession. See *United Co-op. v. Frontier FS Co-op.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578.

As for the effectiveness of trial counsel, Joski has failed to demonstrate prejudice stemming from trial counsel's failure to renew the hearsay objection. That Joski had been in an accident was never disputed at trial, and Joski admitted as much in a non-hearsay statement to the investigating trooper. See WIS. STAT. § 908.01(4)(b)1. The record therefore does not support Joski's argument that, had the witness statement testified to by the trooper been excluded, the trial defense would have been conducted in a different manner. Joski has not demonstrated a reasonable probability that, but for any of counsel's alleged errors, the result of the proceeding would have been different. See *State v. Jenkins*, 2014 WI 59, ¶37, 355 Wis. 2d 180, 848 N.W.2d 786.

Based on the foregoing,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.

See WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals