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**DISTRICT III**

May 5, 2020

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

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2018AP1965-CR                      State of Wisconsin v. Angelia L. Hoppe (L. C. No. 2015CF91)

Before Stark, P.J., Hruz and Seidl, 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).**

Angelia Hoppe appeals from an amended judgment convicting her of fifth-offense operating a motor vehicle while intoxicated (OWI) and from an order denying her postconviction motion for a new trial. Hoppe claims that her trial counsel provided ineffective assistance by failing to request a jury instruction on the defense of necessity and failing to argue that defense at trial. We conclude that counsel's alleged omissions did not constitute ineffective assistance because the defense of necessity was not available to Hoppe given the facts of this case. Based

upon our review of the briefs<sup>1</sup> and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

To establish a claim of ineffective assistance, a defendant must prove two elements: (1) deficient performance by counsel; and (2) prejudice resulting from that deficient performance. *State v. Sholar*, 2018 WI 53, ¶32, 381 Wis. 2d 560, 912 N.W.2d 89. We will not set aside the circuit court’s factual findings about what actions counsel took or the reasons for them unless they are clearly erroneous. *See State v. Balliette*, 2011 WI 79, ¶19, 336 Wis. 2d 358, 805 N.W.2d 334. However, whether counsel’s conduct violated the constitutional standard for effective assistance of counsel is ultimately a legal determination that this court decides *de novo*. *See id.*

We need not address both components of the ineffective assistance test if the defendant fails to make a sufficient showing on one of them. *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. In this case, we do not address the question of prejudice because we conclude that counsel’s performance was not deficient.

To demonstrate deficient performance, a defendant must overcome a presumption that counsel’s actions fell within a wide range of professional conduct. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Counsel does not perform deficiently by failing to bring a meritless motion. *State v. Sanders*, 2018 WI 51, ¶29, 381 Wis. 2d 522, 912 N.W.2d 16. Nor is counsel

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<sup>1</sup> We note that the text in the appellant’s briefs appears to violate the appellate rules for font size in several places. *See* WIS. STAT. RULE 809.19(8)(b)3.c. (2017-18). We caution counsel to review the formatting in briefs submitted to this court before signing the required certification as to form and length.

All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

required to take action in an area where the law is unsettled. *State v. Hanson*, 2019 WI 63, ¶29, 387 Wis. 2d 233, 928 N.W.2d 607. Hoppe cannot overcome the presumption that her counsel acted within professional norms here because the facts adduced at trial provided no well-settled basis for Hoppe's attorney to request a jury instruction on the defense of necessity or to argue that defense to the jury. See *State v. Coleman*, 206 Wis. 2d 199, 213, 556 N.W.2d 701 (1996) (a jury instruction must be supported by sufficient evidence).

Hoppe testified that she drove to a remote cabin in a wooded area near Shell Lake to spend the weekend with a man she had been dating. After the two of them had been drinking together for several hours, the man's demeanor changed. He started on a tirade against women in general and then became verbally abusive toward Hoppe, bringing her to tears. When Hoppe attempted to get out of her chair to go smoke a cigarette on the porch and let the man calm down, he grabbed her by the shoulders and shoved her back down.

Hoppe eventually got past the man, went outside, and attempted to call a friend who did not answer. When Hoppe tried to return to the cabin, the man would not let her back inside. Hoppe then went to sit in her pickup truck in front of the cabin and cried. After a time, the man came to the door of the cabin and began screaming at Hoppe, leading Hoppe to fear that the situation was about to escalate into physical violence. Hoppe said she panicked at that point, thinking that if something happened to her and she was buried out there, nobody would find her. Hoppe acknowledged that she proceeded to drive her vehicle on a highway with a blood alcohol level of 0.23 because she just wanted to get out of there and back to town, where she thought she would be safe.

The defense of necessity is available when the “[p]ressure of natural physical forces” causes a defendant reasonably to believe that an otherwise illegal act is the “only means of preventing imminent public disaster, or imminent death or great bodily harm to the [defendant] or another.” WIS. STAT. § 939.47. Examples of natural physical forces include storms, fires and privations. *State v. Olson*, 99 Wis. 2d 572, 576, 299 N.W.2d 632 (Ct. App. 1980). Criminal violence poses a potential threat from a human source, not natural physical forces. *State v. Hamdan*, 2003 WI 113, ¶30, 264 Wis. 2d 433, 665 N.W.2d 785.

Hoppe argues that “the isolated countryside surrounding the remote cabin” from which she fled constituted a natural physical force. She attempts to analogize the woods around the cabin to dangerous waters surrounding a sinking boat—the fear of which would justify throwing the private property of others overboard. This analogy is not persuasive, however, and would represent a considerable extension of existing law. Hoppe did not testify that she was afraid of dying of exposure or getting lost in the woods, and there was no other evidence that weather conditions were dangerous on the evening in question. Rather, Hoppe’s expressed fear was that the man with whom she had been at the cabin was going to harm her. That represents danger from a human source, not a natural physical force. Therefore, the defense of necessity does not apply under existing case law. It follows that the circuit court properly denied Hoppe’s motion for a new trial based upon counsel’s alleged ineffectiveness in failing to raise the defense of necessity.

Upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed. WIS. STAT. RULE 809.21.

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*