

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 27, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2010AP2795-CR**

**Cir. Ct. No. 2009CT77**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JEREMY M. BOOTZ,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments and an order of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed.*

¶1 REILLY, J.<sup>1</sup> Jeremy Bootz appeals from an order of the circuit court denying his postconviction motion seeking a new trial and affirming his

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

convictions for operating a motor vehicle while intoxicated and operating with a prohibited alcohol concentration. Bootz argues that he is entitled to a new trial because his trial counsel failed to object to the introduction of one of the State's rebuttal witnesses, constituting ineffective assistance of counsel. We disagree and affirm the circuit court.

## FACTS

¶2 In the early morning hours of April 5, 2009, Calumet County Sheriff's Deputy Mary Nicolais was on routine patrol when she came across a vehicle with a flat tire parked in a right turn lane. The deputy approached the driver, Jeremy Bootz, and asked him why his vehicle was stopped in the road. Bootz told the deputy that he had a flat tire and was waiting for his brother to come help him with it. The vehicle was not running and its headlights and hazard lights were off, but the keys were in the ignition. As the deputy spoke with Bootz, she noticed alcohol on his breath. When the deputy asked Bootz whether he had been drinking, he said he had been drinking at a nearby bar and had driven to his current location from that bar. The deputy then attempted to administer field sobriety tests on Bootz, but he would only cooperate during the Horizontal Gaze Nystagmus (HGN) test. The deputy reported that the HGN test showed signs that Bootz was intoxicated. Bootz then agreed to submit to a Portable Breath Test, which registered a 0.12 percent blood alcohol content (BAC) level. The deputy placed Bootz under arrest for operating a motor vehicle while intoxicated and put him in the back of her squad car.

¶3 Once Bootz was in the deputy's squad car, Bootz's brother and sister-in-law arrived to assist him with his vehicle, and Bootz's sister-in-law transported his vehicle off the road. Bootz's sister-in-law also gave the deputy her

phone with Bootz's mother on the line. Bootz's mother informed the deputy that when she had spoken to Bootz earlier, he told her he had not been drinking. A blood sample was eventually drawn at a nearby hospital, which registered a 0.172 percent BAC level. Bootz was cited for a operating a motor vehicle while intoxicated and operating with a prohibited alcohol concentration.<sup>2</sup>

¶4 On October 19, 2009, the State sent the defense a witness list. The list identified Calumet County Sheriff's Deputy Joseph Tenor and Calumet County Sheriff's Lieutenant Kelly Sippel as potential witnesses. The trial began on October 28, 2009.

¶5 During voir dire, the State again identified Tenor and Sippel as potential witnesses during its case-in-chief.

¶6 The State's first witness, the phlebotomist who took Bootz's blood sample, confirmed that Bootz's blood draw was taken with his consent at the hospital. The State then called the Calumet county sheriff's deputy who found and arrested Bootz. The deputy testified about the night of Bootz's arrest and the accuracy of her police report. The State's next two witnesses were a police officer and a paramedic who testified about Bootz at the hospital, but their testimonies are not relevant for this appeal. The State then called the chief toxicologist for the Wisconsin State Laboratory of Hygiene, who testified that he analyzed a sample of Bootz's blood and it contained 0.172 grams of ethanol per 100 milliliters of blood.

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<sup>2</sup> Bootz was also cited for operating after revocation, second offense, in violation of WIS. STAT. § 343.44(1)(b), which he pled no contest to on October 28, 2009. Bootz was also charged with resisting or obstructing an officer, a violation of WIS. STAT. § 946.41(1), and found guilty by the circuit court.

¶7 Finally, the State called Deputy Joseph Tenor to complete its case-in-chief. Tenor testified that he was on patrol the night Bootz was arrested, and issued a traffic citation very close to the intersection where Bootz parked his car. Tenor testified that he had been past the intersection a number of times during his shift, but never saw a vehicle stopped there. He said that if he had, he would have stopped to investigate it. The State rested after Tenor's testimony.

¶8 Bootz began his defense by calling his mother. Bootz's mother testified that she spoke with Bootz on the phone at approximately 12:30 a.m., when he told her that he had a flat tire. She believed he had not been drinking at that time, but could not get a hold of anyone to help him until approximately 2:25 a.m., when she reached his brother and sister-in-law. The defense then called Bootz's sister-in-law, who testified that she received a call from Bootz's mother at around 2 a.m. After the sister-in-law got a hold of Bootz about his location, she and her husband, Bootz's brother, went to help him. When they got to the scene, Bootz's sister-in-law testified that Bootz was already in the squad car, so she had to move his car off the road.

¶9 Finally, Bootz testified in his own defense. Bootz testified that he got a flat tire at approximately 12:20 a.m. and called his mother for help at approximately 12:29 a.m. When his mother told him that it would be a while before help could arrive, Bootz stated that he went to a nearby bar. Bootz testified that he drank at the bar until he called his brother before heading back to his car at approximately 2:30 a.m., and that he never saw any police officers driving around when he walked to his car. The deputy arrived about fifteen minutes after Bootz returned to his car. The defense rested after Bootz's testimony.

¶10 The State again called the chief toxicologist for the Wisconsin State Laboratory of Hygiene as its first rebuttal witness to testify about the number of drinks Bootz consumed and his BAC. The State then called Lieutenant Kelly Sippel as its second rebuttal witness. Sippel testified that each car in the sheriff's department was equipped with a global positioning system that documents the car's location every seven to ten seconds. Sippel testified that Tenor drove past the intersection where Bootz allegedly left his car four times between 12:30 a.m. and 2:00 a.m., and that Tenor was in the immediate area of the intersection when he issued a citation that night. Finally, Sippel testified that it is standard policy for officers to identify and tag abandoned vehicles. The defense did not object to Sippel's testimony, but cross-examined him.

¶11 On September 13, 2010, Bootz filed a postconviction motion seeking a new trial. Bootz argued that his trial counsel was ineffective because he did not object to the rebuttal testimony of Sippel. After a motion hearing, the circuit court denied Bootz's motion, holding that his trial counsel was not deficient. Bootz appeals.

### STANDARD OF REVIEW

¶12 Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). We will not set aside the circuit court's factual findings concerning counsel's actions and the circumstances of the case unless those findings are clearly erroneous. *Id.* Whether counsel's performance fails to meet constitutional standards, however, is a question of law subject to de novo review. *Id.*

¶13 To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *See id.*, (adopting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To prove that counsel's performance was deficient, the defendant must show specific acts or omissions that were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The defendant must also show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. If we determine that counsel's performance was deficient, we examine whether the deficient performance prejudiced the defendant. *Id.* To prove prejudice, the defendant must show that there is a reasonable probability that the outcome of the proceeding would have been different had counsel's performance not been deficient. *Id.* at 694. If the defendant fails to prove one prong, we need not address the other prong. *Id.* at 697.

## DISCUSSION

¶14 Bootz argues that his trial counsel's failure to object to Sippel's testimony constitutes deficient performance because Sippel was not a bona fide rebuttal witness. A bona fide rebuttal witness is a witness whose testimony only becomes necessary and appropriate after the defense presents its case-in-reply. *See Lunde v. State*, 85 Wis. 2d 80, 91-92, 270 N.W.2d 180 (1978). A witness's testimony that would be useful in the case-in-chief does not, however, disallow that witness from being used as a rebuttal witness. *State v. Konkol*, 2002 WI App 174, ¶19, 256 Wis. 2d 725, 736, 649 N.W.2d 300. The State has no duty to provide a list of bona fide rebuttal witnesses to the defense, even if the State anticipates that the defense will raise a particular contention that might call for specific rebuttal witnesses. *Id.*, ¶15.

¶15 Bootz's case-in-reply was based on the theory that he never operated his car while he was intoxicated. Bootz argued that he abandoned his car after it got a flat tire to go drink at a nearby bar while waiting for help, and that he was merely sitting in his car waiting for his family to come help him when the deputy found him. The defense used testimony about phone calls between the family members to establish this theory.

¶16 A defendant is not required to provide notice of the theory of defense, but once that theory has been presented, the credibility of that theory becomes an issue in the case. *Id.*, ¶17. The State can then rebut that theory using evidence of its own. *Id.* Simply because the State reasonably and correctly anticipated Bootz's theory did not bar it from presenting legitimate rebuttal evidence. *See id.*, ¶15.

¶17 Additionally, Sippel was a bona fide rebuttal witness. As previously stated, a bona fide rebuttal witness is a witness whose testimony only becomes necessary and appropriate after the defense presents its case-in-reply. *See Lunde*, 85 Wis. 2d at 91-92. During the State's case-in-chief, Tenor testified that Bootz's car could not have been abandoned on the road for over two hours because Tenor drove past the intersection numerous times that night and would have seen and investigated any abandoned vehicle. Consequently, Sippel's testimony was not necessary during the State's case-in-chief. When, however, Bootz testified during the defense's case-in-reply that his vehicle got a flat tire at around 12:20 a.m., and that he never saw any police officers driving around, Sippel's testimony became necessary and appropriate to rebut Bootz's claims.

¶18 The Wisconsin Supreme Court has suggested that a witness who would normally be used in the case-in-chief, but is deliberately held back for the

dramatic effect of being a final witness in the rebuttal case, is not a bona fide rebuttal witness. *See Caccitolo v. State*, 69 Wis. 2d 102, 118, 230 N.W.2d 139 (1975). This rule, however, is inapplicable to the present case. Sippel's testimony was not surprising—the State provided Sippel's name as a potential witness in its list of witnesses, and again during voir dire, eliminating any surprise factor to the introduction of Sippel as a rebuttal witness.

¶19 As Sippel was a bona fide rebuttal witness, Bootz's trial counsel had no obligation to object to his testimony. Bootz has not shown his trial counsel's performance was deficient. We therefore need not address whether Bootz was prejudiced. *See Strickland*, 466 U.S. at 697.

### CONCLUSION

¶20 We affirm the circuit court's order denying Bootz's postconviction motion seeking a new trial, and we affirm Bootz's convictions.

*By the Court.*—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.



