COURT OF APPEALS
DECISION
DATED AND FILED

November 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2587-CR **Cir. Ct. No. 2008CF3786**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIJUAN L. WALKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Tijuan L. Walker appeals from a judgment of conviction entered after a jury found him guilty of injury by intoxicated use of a vehicle and from an order denying his postconviction motion. Walker argues that his Sixth Amendment right to effective assistance of counsel was violated because

his trial counsel failed to meaningfully challenge the State's case and failed to present a meaningful defense, and that, at the very least, the cumulative effect of trial counsel's alleged errors constitutes ineffective assistance of counsel.[1] For the reasons which follow, we disagree with Walker and affirm.

BACKGROUND

¶2 On New Year's Eve 2007, shortly after 11:00 p.m., Walker crashed into DeAnn Braggs's vehicle while driving drunk. Due to the accident, Braggs lost her left eye and suffered numerous other injuries, including a fractured neck, a fractured hip, three broken ribs, and a collapsed lung. Four hours after the accident, Walker's blood alcohol concentration (BAC) was 0.142 grams per 100 milliliters.

¶3 The State filed a criminal complaint against Walker, charging him with injury by intoxicated use of a vehicle, contrary to WIS. STAT. § 940.25(1)(a) (2007-08), and causing great bodily harm by use of a vehicle while operating with a prohibited BAC, contrary to § 940.25(1)(b) (2007-08).[2] The case went to trial.

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[1] The State Public Defender appointed Attorney Lori Kuehn to represent Walker before the trial court. Attorney Kuehn enlisted Attorney Andrew Meetz to assist her at trial. Walker's allegations of ineffective assistance of counsel refer to both attorneys. For ease of reference, we use the term "trial counsel" interchangeably throughout the opinion in reference to both Attorneys Kuehn and Meetz and use the pronoun "she" because Attorney Kuehn was the primary attorney assigned to the case.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The WIS. STAT. § 940.25(1)(b) charge was dismissed after trial and is not at issue on appeal.

¶4 At trial, the State carried the burden of proving that Walker had committed the crime of injury by intoxicated use of a vehicle. In order to meet this burden, the State had to prove, beyond a reasonable doubt, that: (1) Walker operated a vehicle; (2) Walker's operation of the vehicle caused Braggs great bodily harm; and (3) Walker was under the influence of an intoxicant at the time he operated the vehicle.[3] *See* WIS JI-CRIMINAL 1262. Walker conceded at trial that he drove one of the vehicles involved in the accident while intoxicated, thereby establishing elements one and three. However, both elements two and three, causation and intoxication, are at issue on appeal.

¶5 The State's case on causation turned on the testimony of Milwaukee Police Sergeant Christopher Kraft, who testified that he took a forty-hour course on accident investigation and has investigated thousands of car accidents. Sergeant Kraft testified that he responded to the accident scene at issue in this case eight to ten minutes after the accident occurred, sometime before midnight. Based upon his observations of debris in the street, tire marks, and damage to the vehicles involved in the accident, Sergeant Kraft concluded that Walker was

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[3] WISCONSIN JI-CRIMINAL 1262 defines the term "under the influence of an intoxicant" to mean:

> that the defendant's ability to operate a vehicle was materially impaired because of consumption of an alcoholic beverage.
>
> Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

(Footnote omitted.)

headed eastbound on West Melvina Street. Walker either ignored a stop sign at the intersection of West Melvina Street and North 27th Street or stopped and failed to see Braggs's oncoming vehicle, and while turning to head northbound on North 27th Street, collided with Braggs's vehicle. Sergeant Kraft believed Braggs was headed southbound on North 27th Street at the time of the accident.

¶6 Sergeant Kraft drew a picture and wrote a narrative of his reconstruction of the accident for the police department's motor vehicle accident report, which was admitted as an exhibit during trial. He also drew a picture of his version of the accident on a Google map during the trial for the jury. However, Sergeant Kraft admitted that the police department "screwed up" and failed to take pictures of the accident scene. In explaining the mix-up, he testified:

> It was New Year's Eve, we were actually out there at the stroke of midnight, shots are going off, you can actually -- there actually was a chase that came near our scene, really crazy, wild night. There were, if I recall right, that was -- there were six homicides I believe that night…. And we have like a CSI person like you might see on TV. They come out and take photos. And when they called for them they told us it would be probably five to six hours. You can't really keep the road blocked, you know, for five or six hours. And while, if it had been a fatal crash and someone had lost their life, that's a different scenario, we'll now keep that road closed. But the information that had been relayed back to us after a couple hours was that no one was going to perish as a result of their injuries and so my lieutenant said get it opened up, and I followed that direction.

¶7 The State could not have Braggs explain how the accident occurred because she did not recall. She testified that she remembered driving northbound on North 27th Street but could not remember anything about the accident.[4]

¶8 To rebut the State's evidence of causation, Walker's trial counsel called Willie Norman, the only eyewitness to the accident. Norman testified that Walker was completely stopped behind the stop sign on West Melvina Street when Braggs, who had been heading southbound, turned into him from North 27th Street. Norman's testimony, however, conflicted with a police report from the night of the accident, in which Milwaukee Police Officer Jeffrey Cline wrote that "Norman stated that he observed Walker *not make* a complete stop at the intersection of W. Melvina St. and N. 27th St. Norman stated [Walker] was traveling E/B on W. Melvina when his vehicle was struck by [Braggs's] vehicle traveling S/B on N. 27th St. in the 3800 Blk." (Emphasis added; some capitalization omitted.)

¶9 The State attempted to impeach Norman with his prior inconsistent statement at trial. Norman denied making the statements attributed to him in the police report. In rebuttal, Officer Cline testified that he spoke with Norman the night of the accident and that Norman reported a version of events consistent with the police report.

[4] Braggs's testimony that she was driving northbound on North 27th Street is contrary to Sergeant Kraft's testimony that he believed she was driving southbound. When asked about Braggs's testimony that she was driving northbound, Sergeant Kraft testified that, based upon his reconstruction of the accident scene, he did not believe it was possible that Braggs was driving northbound as she stated because if true, debris from the accident should have been located on the other side of the street and damage to Braggs's vehicle should have been on the other side.

¶10 To prove that Walker was intoxicated at the time of the accident, the State presented: (1) the testimony of several Milwaukee police officers; (2) the testimony of a nurse who drew Walker's blood; (3) the testimony of a forensic toxicologist who reviewed Walker's BAC results; (4) the testimony of a chemist who tested Braggs's BAC results; (5) laboratory reports; and (6) police reports.

¶11 Officer Cline testified that he reported to the scene of the accident and then accompanied Walker to the hospital, although he did not recall if he rode in the ambulance with Walker or followed the ambulance in his squad car. Once at the hospital, he smelled intoxicants on Walker, and observed Nurse Kimberly Estacio draw Walker's blood. Officer Cline testified that after the blood was drawn, it was sealed in two vials with a sticker, and that the sticker "should have" had Walker's name on it. He testified that he then turned the vials over to the custody of Milwaukee Police Officer Eric Mlodzik. During his testimony, Officer Mlodzik denied ever handling Walker's blood vials, but he is listed as the "responsible officer" on the property inventory form for the vials. (Capitalization omitted.)

¶12 Nurse Estacio testified that she was working the night of the accident and recalled drawing blood for the police, although she could not recall whose blood she drew. A form requesting the blood draw the night of the accident lists Nurse Estacio as drawing Walker's blood. Nurse Estacio could not remember the specifics of Walker's blood draw at the time of trial, but described hospital policy regarding blood draws generally. She explained that the police provide a sealed test kit that contains everything she needs, and that nurses seal and label the blood vials before giving them to police.

¶13 Sara Schreiber, a forensic toxicologist from the State Crime Lab, testified about Walker's BAC test. She explained that a retired colleague had tested Walker's blood sample but that she had personally reviewed the colleague's findings and agreed that Walker's BAC was 0.142 grams per 100 milliliters when the sample was drawn at 2:55 a.m. on January 1, 2008. She also testified that her colleague did not note any problems with Walker's blood sample.

¶14 Officer Mlodzik testified that he reported to the scene of the accident where he observed the scene and noted that Walker smelled of alcohol. He accompanied Braggs to the hospital where he observed Nurse Robert Drewek draw Braggs's blood and place it into two vials.[5] Officer Mlodzik testified that after Nurse Drewek gave him Braggs's blood, he put the vials in a protective cloth, which he put in a plastic bag and then a Styrofoam container for protection. Officer Mlodzik did not recall if the vials were labeled with Braggs's name, but noted that it was common practice to label the vials with the name of the individual whose blood they contained.

¶15 Officer Mlodzik filled out a form with the test kit that lists Braggs as the "subject" and that Nurse Drewek signed. The form with Nurse Drewek's signature was introduced into evidence at trial. On the bottom, in a section completed by Diane Kalscheur from the State Lab of Hygiene, it is noted that the two vials filled with Braggs's blood were labeled "Walker, Tijuan."

¶16 Kalscheur, a chemist at the State Lab of Hygiene, testified about the results of Braggs's BAC test. She explained that given alcohol's elimination rate,

[5] Nurse Drewek did not testify at trial.

Braggs's BAC at the time of the accident could have been anywhere from zero to 0.06 grams per 100 milliliters. She also explained that there was nothing unusual about Braggs's blood specimen, but that although the form accompanying the vials listed Braggs as the subject, the vials themselves were labeled "Walker, Tijuan." Kalscheur testified that she noted the discrepancy in her report because she makes a notation "[a]nytime there's a discrepancy."

¶17 The jury found Walker guilty of both injury by intoxicated use of a vehicle (count one) and causing great bodily harm by use of a vehicle while operating with a prohibited BAC (count two). However, the trial court dismissed count two before sentencing. On count one, the trial court sentenced Walker to eighteen months of initial confinement to be followed by twenty-four months of extended supervision.

¶18 Walker brought a postconviction motion requesting a new trial on the grounds that his trial counsel was constitutionally ineffective. Following a ***Machner*** hearing,[6] at which Walker and both of his trial attorneys testified, the postconviction court denied Walker's motion.[7] Walker appeals.

¶19 Additional facts relevant to Walker's claims are set forth below as necessary.

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

[7] Both the trial and postconviction proceedings were presided over by the Honorable Thomas P. Donegan.

DISCUSSION

¶20 Walker argues that his trial counsel was ineffective for failing to meaningfully challenge the State's case and for failing to present a meaningful defense. In the alternative, he contends that the cumulative effect of all of trial counsel's errors constitutes ineffective assistance of counsel. We address each of his contentions in turn.

¶21 The right to the effective assistance of counsel derives from the Sixth Amendment to the United States Constitution, made applicable by the Fourteenth Amendment, and article 1, section 7 of the Wisconsin Constitution. ***State v. Sanchez***, 201 Wis. 2d 219, 225-26, 548 N.W.2d 69 (1996). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must identify specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. We strongly presume counsel has rendered adequate assistance. ***Id.*** at 690.

¶22 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). "The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous." ***State v. Johnson***, 133 Wis. 2d 207, 216, 395 N.W.2d 176

(1986). However, whether counsel's conduct was deficient and whether it was prejudicial to the defendant are questions of law that this court decides without deference to the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

I. Walker's trial counsel meaningfully challenged the State's case.

¶23 Walker first submits that his trial counsel was ineffective because she failed to meaningfully challenge the State's case. More specifically, Walker complains that his trial counsel erred when she: (1) conceded that Walker was legally intoxicated at the time of the accident; (2) failed to cross-examine Sergeant Kraft and Officer Cline about inconsistencies in the motor vehicle accident report; and (3) failed to cross-examine Sergeant Kraft about inconsistencies in his account of the accident before and during trial. We address each allegation in turn.

A. Intoxication

¶24 Walker first argues that his trial counsel was ineffective for conceding that he was intoxicated at the time of the accident, despite possessing a copy of Braggs's BAC report, which noted that Braggs's blood vials were labeled with Walker's name. Walker contends that the labeling mishap made the results of both BAC reports unreliable and that his trial counsel's decision to concede intoxication irreparably harmed his defense. We disagree.

¶25 Walker's trial counsel admitted during the ***Machner*** hearing that she had received a copy of Braggs's BAC report before trial and observed that Kalschuer, when writing the report, noted that the vials were labeled "Walker, Tijuan," even though they were accompanied by the State-issued form signed by Nurse Drewek, labeling them as belonging to Braggs. Trial counsel testified that,

despite that discrepancy, she made a strategic choice to concede intoxication because Walker never disputed that he had been drinking the night of the accident. In fact, Walker told his trial counsel to rely on Norman's eyewitness testimony because Walker was so drunk the night of the accident that he could not even remember which direction he was traveling when the accident occurred.

¶26 We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted). Here, trial counsel's strategic decision to concede intoxication is exactly the sort of professional judgment that we conclude does not support an ineffective assistance of counsel claim.

¶27 First, trial counsel's decision to concede intoxication seems particularly sound given that there was plenty of evidence indicating that the blood vials attributed to Braggs were in fact Braggs's. While it was undisputed that all four of the blood vials collected by police the night of the accident were labeled with Walker's name, three witnesses—Officers Cline and Mlodzik and Nurse Estacio—testified that the police collected samples from both Braggs *and* Walker that night. The two vials that Kalschuer attributed to Braggs were accompanied by a State-issued form indicating that the vials belonged to "Braggs, Diann M.," were drawn by Nurse Drewek, and listed Officer Mlodzik as the attending officer—corroborating the testimony that the vials did indeed contain Braggs's blood sample. In sum, while the sloppy labeling of the vials did not shine a favorable light on the police investigation, there was plenty of evidence, both circumstantial

and documented, demonstrating that the vials attributed to Braggs were in fact hers.

¶28 Second, trial counsel rationally concluded that the State's case with regards to causation was weak and that the defense's efforts would be better spent attacking that element. The State's case on causation relied upon a police investigation that was admittedly hurried, sloppy, and incomplete; the police had mislabeled important evidence, failed to photograph the scene, and testified inconsistently. Moreover, trial counsel believed that Norman, an independent eyewitness with no motive to lie, who told her he saw Walker come to a complete stop on West Melvina Street and saw Braggs turn her vehicle into Walker's vehicle, was an "ace in the hole" with regard to causation. Trial counsel's decisions in that regard were based on the facts, law, and her sound professional judgment. *See* ***Elm***, 201 Wis. 2d at 464-65.

¶29 Third, while trial counsel conceded intoxication, she did not ignore police error in labeling the vials; trial counsel cross-examined the witnesses accordingly and raised the issue in her closing statement. Trial counsel ably used the mistake to Walker's advantage, pointing out the sloppiness of the police investigation, while simultaneously gaining credibility with the jury by conceding an issue that she did not believe strong enough to pursue.

¶30 In short, trial counsel's decision to concede intoxication and focus the defense's energy on causation was a rational, strategic decision based upon professional judgment given the evidence demonstrating that the vials were correctly identified by the State Crime Lab and the weakness of the State's case on causation. Consequently, trial counsel's concession does not amount to ineffective assistance of counsel. *See* ***Strickland***, 466 U.S. at 687.

B. Cross-examination of Sergeant Kraft and Officer Cline About Discrepancies in the Motor Vehicle Accident Report

¶31 Next, Walker complains that his trial counsel was ineffective for failing to cross-examine Sergeant Kraft and Officer Cline about inconsistencies in the motor vehicle accident report. The report consisted of a four-page form issued by the State of Wisconsin, which set forth numerous questions about the accident and required the officers to answer the questions in fill-in-the-blank ovals. The form also provided a small space for officers to draw a picture reconstructing the accident and provided a small space for a written narrative. Sergeant Kraft testified that he drew the picture of the accident and completed the handwritten narrative. Officer Cline is listed as the reporting officer on the final page of the report, and presumably completed the remainder of the form.

¶32 Walker alleges that the report contains two discrepancies between Sergeant Kraft's picture and handwritten narrative of the accident and Officer Cline's answers to the form's questions. First, Sergeant Kraft's picture depicts Walker's vehicle turning left onto North 27th Street from West Melvina Street. Braggs is shown as traveling southbound on North 27th Street. Sergeant Kraft's handwritten notes explain that Walker, "while attempting a *left* turn[,] collided into" Braggs. (Emphasis added.) However, under a section of the form entitled "What Drivers Were Doing," Officer Cline filled in the oval indicating that Walker was making a *right* turn, contrary to Sergeant Kraft's picture and narrative. Second, the picture and handwritten narrative completed by Sergeant Kraft indicate that the accident occurred at an angle. However, in a section of the form entitled "Manner of Collision," Officer Cline filled in the oval indicating that the collision occurred "Head On."

¶33 Walker argues that his trial counsel was deficient for not noticing these inconsistencies in the motor vehicle accident report and for not cross-examining Sergeant Kraft and Officer Cline accordingly. He submits that he was prejudiced by the deficiency because during opening statements his trial counsel told the jury that she would challenge the State's ability to demonstrate that Walker caused the accident and later in the trial labeled the police investigation as "sloppy." Walker alleges that trial counsel's failure to capitalize upon this opportunity to demonstrate the sloppiness of the police investigation was detrimental to his case. We disagree.

¶34 Both attorneys who represented Walker at trial acknowledged during the ***Machner*** hearing that, although they had a copy of the motor vehicle accident report before trial, they did not notice the discrepancies between the picture and written narrative and the fill-in-the-blank ovals. However, we conclude that their failure to do so was not deficient. The discrepancies were buried in a busy, fill-in-the-blank form that was dense with information. Trial counsel's failure to notice the discrepancies cannot be defined as an act or omission that falls "outside the wide range of professionally competent assistance." *See* ***Strickland***, 466 U.S. at 690.

¶35 Furthermore, even if trial counsel's failure to notice the discrepancies was deficient, it did not prejudice Walker's defense. Trial counsel argued throughout the trial that the police investigation was sloppy and presented substantial evidence to support that statement, including the improperly labeled blood vials and failure to take pictures of the accident scene. Moreover, Sergeant Kraft admitted before the jury that the police "screwed up" the investigation and that it was a hectic night. Cross-examining Sergeant Kraft and Officer Cline about the inconsistencies in the motor vehicle accident report would have been merely

cumulative evidence that the investigation was sloppy and would have added little to the defense's case. *See* ***United States v. Jackson***, 935 F.2d 832, 845-46 (7th Cir. 1991) (not ineffective assistance for defense counsel not to pursue a course of investigation that would produce evidence counsel is already aware of or would add little to what is otherwise available).

C. Cross-examination of Sergeant Kraft About Discrepancies Between his Pretrial and Trial Accident Reconstruction

¶36 Finally, Walker contends that his trial counsel failed to meaningfully challenge the State's case when she did not cross-examine Sergeant Kraft about alleged differences in the picture of the accident he drew for the motor vehicle accident report prior to trial, and his testimony and picture of the accident drawn during trial. Again, we disagree.

¶37 In the motor vehicle accident report, Sergeant Kraft depicted that the front end of Braggs's vehicle, after the accident, was pointed southwest. At trial, the State asked Sergeant Kraft to draw on a Google map "where the two vehicles were located on the roadway," presumably at the end of the accident, although it is unclear from the record. Walker argues that on the Google map, Sergeant Kraft drew the front end of Braggs's vehicle pointing northwest. The Google map we received in the record does not indicate direction, making it impossible to tell which direction Braggs's vehicle, as drawn by Sergeant Kraft, is facing. However, Sergeant Kraft's trial testimony was that Braggs's vehicle was pointed northwest, which was inconsistent with his drawing in the motor vehicle accident report.

¶38 Even if we accept Walker's argument that Sergeant Kraft's testimony and Google map drawing at trial are inconsistent with his drawing of the

accident in the motor vehicle accident report, the discrepancy is a minor one, with little impeachment value.

¶39 First, any discrepancy would have been obvious to the jury. The jury was shown Sergeant Kraft's drawing in the motor vehicle accident report, with Braggs's vehicle pointing southwest, just moments before Sergeant Kraft drew the picture of Braggs's vehicles on the Google map and testified that Braggs's vehicle (at some point, presumably at the end of the accident) was facing northwest.

¶40 Second, trial counsel extensively cross-examined Sergeant Kraft on his credentials as an accident reconstruction expert, revealing Sergeant Kraft's lack of training and the apparent problems with his investigation. Sergeant Kraft testified that a specialized four-year degree is required for an officer to be certified as an accident reconstruction specialist, but that he had only taken a forty-hour course on the subject. Furthermore, Sergeant Kraft admitted that the accident scene was hectic and that traffic travelling through the area may have moved some of the debris before his arrival, potentially compromising his conclusions. He also acknowledged that his reconstruction of the accident, which required Braggs to be travelling southbound on North 27th Street conflicted with Braggs's testimony that she was travelling northbound.

¶41 In sum, trial counsel did an excellent job during Sergeant Kraft's testimony of informing the jury of Sergeant Kraft's lack of training in accident reconstruction and of portraying the police investigation as sloppy. Any benefit of cross-examining Sergeant Kraft on the discrepancies between his drawing in the motor vehicle accident report and his testimony and Google map drawing at trial would have been nominal, and any such discrepancies were otherwise already

apparent to the jury. Consequently, trial counsel was not ineffective for failing to cross-examine Sergeant Kraft about the discrepancies. *See* ***Strickland***, 466 U.S. at 687.

II. Walker's trial counsel presented a meaningful defense.

¶42 Next, Walker argues that his trial counsel was ineffective because she failed to present a meaningful defense when she: (1) relied on Norman's testimony to prove the defense's theory of causation; and (2) failed to investigate the viability of Norman's account of the accident and to present expert testimony to otherwise support the defense's theory of the accident. We address each in turn.

A. Reliance on Norman's Eyewitness Testimony

¶43 Walker first argues that his trial counsel failed to present a meaningful defense because she relied on Norman's testimony to prove the defense's theory of the case. Walker submits that, because Norman's testimony at trial conflicted with Officer Cline's recollection of what Norman told him the night of the accident and the police report, trial counsel should "have expected Norman to implode on cross-examination" and to be impeached. We disagree.

¶44 At trial, and in his conversation with trial counsel prior to trial, Norman consistently stated that Walker was completely stopped behind the stop sign on West Melvina Street when Braggs turned into him from North 27th Street. Norman's testimony, however, conflicted with the police report from the night of the incident, written by Officer Cline, which stated that Norman "observed Walker *not make* a complete stop at the intersection of W. Melvina St. and N. 27th St. Norman stated [Walker] was traveling E/B on W. Melvina when his vehicle was

struck by [Braggs's] vehicle traveling S/B on N. 27th St. in the 3800 Blk." (Emphasis added; some capitalization omitted.)

¶45 During the ***Machner*** hearing, Walker's trial counsel testified that she learned that Norman's version of events differed from what was set forth in the police report when she interviewed Norman before trial, but that when asked about it, Norman denied making the statements in the police report. In fact, Walker's trial counsel, when describing her conversation with Norman before trial, stated that Norman was "very, very adamant and seemed very credible with regard to what he saw on that particular day."

¶46 The State attempted to impeach Norman with his prior inconsistent statement, introducing both the police report and calling Officer Cline to the stand on rebuttal. When faced with his alleged statement to Officer Cline the night of the accident, Norman continued to deny having made the statement attributed to him in the police report.

¶47 Trial counsel's reliance on Norman's testimony was reasonable because he was an impartial eyewitness, who had no motive to lie, and whose account of the accident was favorable to the defense. It was reasonable for trial counsel to believe any impeachment resulting from the contradictory police report was of little consequence because of the evidence presented by the defense demonstrating that the police investigation was sloppy and unreliable. Weighing the sloppiness and unreliability of the police investigation against an adamant eyewitness with no motive to lie, trial counsel acted well within the realm of professional reasonableness in relying on Norman's testimony to attack the State's case on causation. *See* ***Elm***, 201 Wis. 2d at 464-65. In short, trial counsel's

decision to rely on Norman's testimony was not deficient, and therefore, not ineffective. *See* ***Strickland***, 466 U.S. at 690.

B. Failure to Investigate the Viability of the Defense and Present Expert Testimony

¶48 Walker also submits that his trial counsel was ineffective for failing to present a meaningful defense because she failed to properly investigate the viability of Norman's eyewitness testimony by consulting with an expert. Walker further argues that trial counsel should have otherwise consulted an expert to formulate a viable defense and attack Sergeant Kraft's reconstruction of the accident. During the ***Machner*** hearing, trial counsel explained that she did not feel an accident reconstruction expert was necessary based on her conversations with Walker and Norman. We conclude that trial counsel's conclusion was a reasonable one and does not support a claim for ineffective assistance of counsel.

¶49 First, as set forth above, trial counsel's decision to rely on Norman's testimony was sound trial strategy based on the facts and the law: Norman was an independent eyewitness with no apparent motive to lie; his account of the accident was favorable to Walker; and, if Walker chose to testify, his account of the accident would have been consistent with Norman's.

¶50 Second, Walker did not need an expert witness to attack Sergeant Kraft's testimony concerning his reconstruction of the accident. The problems with Sergeant Kraft's testimony—lack of accident reconstruction training, failure to secure the accident scene, failure to photograph the scene, contradictions in his reconstruction before and during trial—were readily apparent and did not require specialized testimony. *See* WIS. STAT. § 907.02 (Expert testimony is necessary

"[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.").

¶51 Third, while Walker argues that an expert was necessary to attack Sergeant Kraft's testimony that Norman's account of the accident was "impossible" given the evidence at the scene, we disagree. As we have already discussed at length, trial counsel had already attacked Sergeant Kraft's reconstruction of the accident and presented the jury with ample evidence to conclude that Sergeant Kraft's account of the accident was unreliable. Given the other risks attached to calling an expert, trial counsel's decision not to do so was reasonable.

¶52 Fourth, hiring an expert witness could have been detrimental to the defense. In fact, in his postconviction motion, Walker presented an expert report from John J. DeRosia, a consulting engineer, who after reviewing the evidence, concluded that Norman's version of events did not match up against the evidence. Given the strength of Norman's independent account of the accident, any expert testimony supporting his account would have been of little evidentiary value, while any expert testimony contradicting his account could only hurt the defense.

¶53 Fifth, the State held the burden of proof in this case. Trial counsel's defense was to present a tenable alternative to the State's account of causation and to attack the viability of the State's account of causation through emphasizing the mistakes made by police during the investigation. That defense was certainly reasonable given the facts and the law. It was not trial counsel's responsibility to prove, beyond a reasonable doubt, that Braggs struck Walker's vehicle while he was stopped at the stop sign on West Melvina Avenue. *See* WIS JI-CRIMINAL 1262. Rather, it was the defense's responsibility to poke holes in the State's case

to demonstrate to the jury that the State could not prove beyond a reasonable doubt that Walker struck Braggs's vehicle when turning onto North 27th Street from West Melvina Street. Expert testimony was not necessary for that purpose.

¶54 In sum, trial counsel did not act deficiently in failing to call or consult an expert witness on accident reconstruction nor was her decision not to do so prejudicial to the defense. *See* ***Strickland***, 466 U.S. at 687. Consequently, trial counsel was not ineffective. *See* ***id.***

III. The cumulative effect of any errors Walker's trial counsel may have made does not amount to ineffective assistance of counsel.

¶55 Finally, Walker asserts that the cumulative effect of the foregoing instances of trial counsel's alleged ineffectiveness prejudiced him and warrants a new trial. We disagree. Lumping together failed ineffectiveness claims does not create a successful claim. As our supreme court has often repeated, "[a]dding them together adds nothing. Zero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.