

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 27, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2013AP947-CR

Cir. Ct. No. 2010CF181

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TAMMY S. COLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Monroe County: TODD L. ZIEGLER, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. Tammy Cole appeals a judgment convicting her of first-degree intentional homicide while armed in violation of WIS. STAT. §§ 939.63(1)(b) and 940.01(1)(a), and attempted arson in violation of WIS. STAT.

§§ 939.32 and 943.02(1)(a) (2011-12).¹ She also appeals an order denying her motion for postconviction relief. Cole asserts two claims of circuit court error, and she argues that she received ineffective assistance of trial counsel on six different grounds. Cole also argues that she is entitled to a new trial in the interest of justice. We conclude that there was no circuit court error, and that Cole received effective assistance of counsel. We also decline to order a new trial in the interest of justice. We therefore affirm the judgment of conviction and the order.²

BACKGROUND

¶2 According to the criminal complaint, Vance Evans was found dead in his home on April 27, 2010. An autopsy revealed that Evans died from a single gunshot wound to the back of the head. Cole was charged with first-degree intentional homicide and attempted arson in connection with Evans' death.

¶3 The case proceeded to a jury trial. The prosecution's theory was that Cole intentionally killed Evans after she found out that he was seeing another woman, and kicked in the natural gas line at Evans' home to set it on fire to cover up the crime. Cole's theory was that the shooting was accidental as she and Evans

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² As a preliminary matter, we note that the argument sections of Cole's brief-in-chief and reply brief are largely devoid of citations to the record, in violation of WIS. STAT. RULE 809.19(1)(e). We remind counsel that we have no duty to scour the record to review arguments unsupported by citations to the record. See *Tam v. Luk*, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (“[I]t is not the duty of this court to sift and glean the record *in extenso* to find facts which will support an [argument].”) (quoted source omitted) (alteration in original).

stumbled during an amorous embrace, and that she kicked in the gas line in an attempt to kill herself after the shooting.

¶4 The jury found Cole guilty of first-degree intentional homicide and attempted arson. Cole filed a postconviction motion in which she argued that she was entitled to a new trial because her trial counsel was ineffective. The circuit court denied the motion. Cole appeals. We reference additional facts below as necessary.

DISCUSSION

¶5 Cole raises multiple arguments that fall into three main categories. First, Cole argues that the circuit court erred by denying her request to instruct the jury on the lesser-included offenses of second-degree reckless homicide and homicide by negligent handling of a dangerous weapon, and by denying her request to present evidence of Evans' "suicidal ideations" due to his "impending prison sentence." Second, Cole argues that her trial counsel was ineffective on six different grounds. Third, Cole argues that she is entitled to a new trial in the interest of justice. For the reasons that follow, we reject each of Cole's arguments. Because Cole's arguments invoke different standards of review, we set forth the applicable standards of review in the sections relating to each argument.

Instruction on Lesser-Included Offenses

¶6 Cole contends that the circuit court erred in refusing to instruct the jury on the lesser-included offenses of second-degree reckless homicide and

homicide by negligent handling of a dangerous weapon.³ A circuit court must submit a lesser-included offense to the jury only if a reasonable view of the evidence provides grounds for both acquittal on the greater charge and conviction on the lesser. *State v. Wilson*, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989). Cole appears to argue that, under a reasonable view of the evidence, a jury could find that Cole was reckless or negligent because she picked up the gun without determining whether it was loaded or cocked after consuming at least three beers. As we explain below, the main problem with Cole’s argument is that, according to the testimony Cole gave at trial, Evans died from the accidental discharge of the gun when he embraced her as she was in the process of hiding the gun from him. As we shall see, her own account contains no evidence of either recklessness or negligence so as to warrant the instructions she sought.

¶7 Whether the evidence at trial supports the submission of a lesser-included offense is a question of law, which we review de novo. *Id.* We review the evidence in the light most favorable to Cole, and therefore consider Cole’s testimony of the events leading up to the shooting. *Johnson v. State*, 85 Wis. 2d 22, 28, 270 N.W.2d 153 (1978).

¶8 Cole’s testimony regarding the events leading up to the shooting was as follows. Cole and Evans had been romantically involved since 2008. On April 26, 2010, Cole traveled from Illinois to Tomah, Wisconsin, to see Evans. Cole arrived at Evans’ home sometime after 9:00 p.m. While at Evans’ home, Cole learned that Evans was seeing another woman. Cole was “upset and hurt,”

³ The State does not dispute that second-degree reckless homicide and homicide by negligent handling of a dangerous weapon are lesser-included offenses of first-degree intentional homicide.

and she told Evans that he had to make a decision between Cole and the other woman. Evans then told Cole that he loved her, and he hugged and kissed her. Cole thought this meant that Evans had chosen her over the other woman.

¶9 According to Cole, she and Evans continued to hug and kiss. Cole set a beer on the coffee table and saw a gun on the table. Cole knew that Evans kept loaded guns, and she was concerned about the gun's presence because Evans had "been depressed ... because he thought he might be going to prison."

¶10 Cole decided to hide the gun in a cupboard in the kitchen. At this point, Cole had consumed at least three beers and was "feeling it." Cole picked up the gun with her right hand and held it down at her side. Cole attempted to "sneak by" Evans, but he grabbed her to hug her. Cole and Evans were "chest to chest," and Evans had Cole in a "bear hug" with his arms "around [Cole's] back upper shoulder area." Cole's hands were "around [Evans'] waist or a little higher," and Cole's right hand was around Evans' left hip. While in this position, Cole and Evans stumbled, and the gun went off.

¶11 After the shooting, Cole put the gun in the oven and broke the gas line because she wanted to die. She went upstairs, laid on the bed, and waited for the gas to kill her. Cole left Evans' home when she realized that the gas was not "working."

¶12 For the jury to find Cole guilty of second-degree reckless homicide, the State needed to prove two elements beyond a reasonable doubt: (1) Cole caused Evans' death; and (2) Cole caused Evans' death by criminally reckless conduct. *See* WIS JI—CRIMINAL 1060. For the jury to find that Cole's conduct was criminally reckless, the State needed to prove: (1) Cole's conduct created a risk of death or great bodily harm to another person; (2) the risk of death or great

bodily harm was unreasonable and substantial; and (3) Cole was aware that her conduct created an unreasonable and substantial risk of death or great bodily harm.

Id.

¶13 For the jury to find Cole guilty of homicide by negligent handling of a dangerous weapon, the State needed to prove three elements beyond a reasonable doubt: (1) Cole operated or handled a dangerous weapon;⁴ (2) Cole operated or handled a dangerous weapon in a manner constituting criminal negligence; and (3) Cole's operation or handling of a dangerous weapon in a manner constituting criminal negligence caused Evans' death. *See* WIS JI—CRIMINAL 1175. For the jury to find that Cole's conduct was criminally negligent, the State needed to prove: (1) Cole's operation or handling of a dangerous weapon created a risk of death or great bodily harm; (2) the risk of death or great bodily harm was unreasonable and substantial; and (3) Cole should have been aware that her operation or handling of a dangerous weapon created the unreasonable and substantial risk of death or great bodily harm. *Id.*

¶14 The evidence viewed in the light most favorable to Cole does not support submission of these lesser-included offenses. If Cole is to be believed, Cole decided to hide the gun from Evans for his protection. At that time, Cole did not know that the gun was loaded. As she was in the process of hiding the gun, Evans grabbed her in a "bear hug." When Evans grabbed Cole, it knocked her off balance. Cole and Evans stumbled, and the gun went off. This evidence does not establish that Cole was or should have been aware that her having picked up the gun before Evans' amorous advance created an unreasonable and substantial risk

⁴ A firearm is a dangerous weapon. *See* WIS. STAT. § 939.22(10).

of death or great bodily harm to Evans. *See* WIS JI—CRIMINAL 1060; WIS JI—CRIMINAL 1175. Under Cole’s version, her conduct was not reckless or negligent at all – the shooting was “an unfortunate result of a prudent attempt” to protect Evans from himself. *See State v. Echols*, 152 Wis. 2d 725, 741, 449 N.W.2d 320 (Ct. App. 1989) (explaining that, while fight over gun presented unreasonable risk and high probability of death or great bodily harm, defendant’s testimony, if believed, did not create that situation; rather, “the shooting was an unfortunate result of a prudent attempt” by defendant to protect himself). We therefore conclude that the circuit court did not err by refusing to instruct the jury on the lesser-included offenses of second-degree reckless homicide and homicide by negligent handling of a dangerous weapon.

Admission of Evidence

¶15 Cole argues that the circuit court erred by denying her request to present evidence that Evans had threatened to commit suicide due to “his impending prison sentence,” which she contends was crucial to her defense because it would have “explained [her] desperate mental state in attempting to hide [Evans’] gun.” However, our review of the record reveals that the circuit court ultimately allowed Cole to present substantially similar evidence. We therefore reject Cole’s argument.

¶16 At trial, Cole’s trial counsel made two offers of proof. With the first offer of proof, Cole’s trial counsel stated that on direct examination Cole would testify:

[T]hat in March of 2010 ... Evans ... made suicidal threats that resulted in ... Cole having to take away a shotgun and put it under her side of the bed And that on the night of [the shooting] ... Evans had made the same statements and expressions of intent.

Initially, the circuit court ruled that Cole could testify regarding what may have occurred the night of the shooting, but that Cole could not testify regarding the March 2010 incident because it was not relevant. On direct examination, Cole testified without objection that Evans “was depressed ... about ... legal problems he had,” and that “the state’s attorney ... wanted to put [Evans] in prison, and he didn’t want to go there.” Cole also testified without objection that on the night of the shooting, she was concerned when she saw the gun because Evans had “been depressed ... because he thought he might be going to prison.”

¶17 Cole’s trial counsel made a second offer of proof that Cole would testify on redirect examination that in March 2010 Cole hid a gun from Evans because “Evans had expressed ... that he would not go to prison alive, and ... [Cole] was concerned ... that he might do ... harm to himself.” The circuit court ruled that it would allow Cole to testify that “in March of 2010, [Evans] made some comments that caused her concern that he might harm himself; and, therefore, she hid a gun under the bed.” Despite the court’s ruling, this testimony was not elicited on redirect examination.

¶18 Based on our review of the record, the following is clear: (1) Cole was allowed to testify that Evans was depressed about his legal problems and was facing prison time, and that Cole was concerned about the presence of a gun; and, (2) the circuit court ruled that Cole could testify that in March 2010, Evans made comments that caused Cole to believe he might harm himself and, as a result, Cole hid a gun from him. The testimony the court decided to allow would have provided the explanation that Cole proffered for her decision to hide the gun from Evans. This was ultimately the evidence that Cole sought to present. We therefore reject Cole’s argument that the circuit court erred by not allowing her to present evidence of Evans’ suicidal threats.

Ineffective Assistance of Counsel

¶19 Cole argues that her trial counsel was ineffective for: (1) failing to fully investigate and present evidence of Cole’s level of intoxication the night of the shooting; (2) failing to seek and develop evidence in support of a jury instruction on the lesser-included offense of homicide by intoxicated use of a weapon; (3) failing to investigate and present evidence of Cole’s habit of never drinking and driving; (4) failing to object to the prosecutor’s statement during closing arguments that no gunpowder residue was found on Evans’ jacket; (5) failing to seek an adjournment of the trial to compel the testimony of attorney David Towns, with whom Cole spoke the day after the shooting; and (6) failing to make a sufficient proffer for introduction of evidence of Evans’ out-of-state driving under the influence (DUI) prosecution. We set forth the standard of review for ineffective assistance of counsel claims, and then address each of Cole’s ineffective assistance of counsel arguments in turn.

¶20 To prevail on an ineffective assistance of counsel claim, a defendant must show that his or her attorney’s performance was deficient, and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). “We need not address both components of the inquiry if the defendant fails to make an adequate showing on one.” *State v. Harbor*, 2011 WI 28, ¶67, 333 Wis. 2d 53, 797 N.W.2d 828.

¶21 To show that the performance was deficient, the defendant must show that “counsel made errors so serious that [he or she] was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. To prove prejudice, the defendant must show that there is a “reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

¶22 Ineffective assistance of counsel claims present mixed questions of law and fact. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will not overturn the circuit court’s factual findings unless they are clearly erroneous. *Id.* However, whether counsel’s performance was deficient and whether the deficiency prejudiced the defense are questions of law that we review *de novo*. *Id.* at 128.

Failure to Investigate Cole’s Alcohol Use

¶23 Cole argues that her trial counsel was ineffective for failing to fully investigate and present evidence of Cole’s level of intoxication the night of the shooting. Regarding what he knew about Cole’s level of intoxication, Cole’s trial counsel testified at the postconviction hearing:

[Cole] wasn’t able to give any specific information as to how much she had to drink. She said she had ... a couple of beers that night, and she could feel it. And I questioned her often regarding that as to how much [and] whether or not she was intoxicated. And she consistently indicated to me that she was not intoxicated that night.

Cole testified at the postconviction hearing that on the night of the shooting, she did not drink any beer before arriving at Evans’ house around 9:00 p.m., and that by 11:00 p.m. she had consumed three or four twelve-ounce cans of beer. Cole testified that her trial counsel never told her that alcohol was an important part of the case. Additionally, Cole testified that her trial counsel did not ask her whether she was intoxicated the night of the shooting, and that if he had, she would have said that she was drunk. However, Cole admitted that her testimony at the

postconviction hearing was the first time she said she was drunk when the shooting occurred.

¶24 The circuit court found Cole's trial counsel's postconviction testimony credible, and explained:

[Cole's] [t]rial counsel was reasonable in not expanding [on the intoxication] evidence ... given that [he] discussed Cole's entire story with her at least six times prior to trial, she consistently could not identify the time frame she had been drinking, she consistently told trial counsel she had a couple, and she told trial counsel she was not intoxicated that night.

The court concluded that Cole's trial counsel was not ineffective for failing to further investigate Cole's level of intoxication.

¶25 We have no basis to reject the circuit court's factual findings. *See Johnson*, 153 Wis. 2d at 127. Based on those findings, we conclude that Cole's trial counsel was not deficient for failing to further investigate Cole's level of intoxication because Cole did not provide her trial counsel with specific information regarding how much alcohol she consumed or the time frame during which she consumed alcohol, and because Cole consistently told her trial counsel that she was not intoxicated the night of the shooting.

¶26 Cole next argues that her trial counsel was ineffective for failing to request a jury instruction on the lesser-included offense of homicide by intoxicated use of a firearm. For the jury to find Cole guilty of homicide by intoxicated use of a firearm, the State would have needed to prove three elements beyond a reasonable doubt: (1) Cole handled a firearm; (2) Cole's handling of a firearm caused Evans' death; and (3) Cole was under the influence of an intoxicant at the time she handled a firearm. *See WIS JI—CRIMINAL 1190*. To find that Cole was

“under the influence of an intoxicant,” the jury would have been required to find that Cole had consumed a sufficient amount of alcohol to cause her to be “less able to exercise the clear judgment and steady hand necessary to handle a firearm.” *Id.*

¶27 As explained, Cole’s trial counsel testified that Cole “consistently indicated ... that she was not intoxicated [the] night [of the shooting].” Moreover, Cole’s account of what happened was of an accidental discharge during Evans’ embrace, not of her stumbling or accidentally shooting Evans because of alcohol in her system. For these reasons, we conclude that Cole’s trial counsel was not deficient for not requesting a jury instruction on the lesser-included offense of homicide by intoxicated use of a firearm.

¶28 Cole also argues that her trial counsel was ineffective for failing to investigate and present evidence of Cole’s “habit” of never drinking and driving. Cole contends that this evidence was exculpatory as to intent, because Cole would not have continued to drink at Evans’ house had she planned to kill Evans and flee to Illinois.⁵ Because Cole did not provide her trial counsel with specific information regarding her level of intoxication the night of the shooting, counsel had no reason to think that Cole was drunk when she drove from Evans’ home to Illinois. Counsel therefore had no reason to investigate whether Cole had a “habit” of never drinking and driving. Accordingly, we conclude that Cole’s trial counsel was not deficient on this ground.

⁵ Evidence presented at trial showed that Cole traveled from Tomah, Wisconsin, to Illinois during the early morning hours of April 27, 2010.

Failure to Object During Prosecutor's Closing Argument

¶29 Cole argues that her trial counsel was deficient for failing to object to a statement made by the prosecutor in his rebuttal in closing argument, namely, that no gunpowder residue was found on Evans' jacket. Cole appears to argue that the prosecutor's statement was not based on evidence in the record. Because the prosecutor's statement was supported by evidence in the record, we reject this argument.

¶30 At trial, a firearms and toolmark examiner for the Wisconsin State Crime Lab testified that he examined Evans' jacket to see "whether there was any evidence of gunpowder residue on ... the jacket," so that he "could relate the jacket to an approximate distance from the weapon." The examiner's findings were contained in a report, admitted into evidence at trial, which stated: "No gunpowder residue was observed on the jacket" Accordingly, the prosecutor's statement that no gunpowder residue was found on Evans' jacket was supported by evidence in the record. We conclude that Cole's trial counsel was not deficient on this ground, and we do not address Cole's argument that her defense was prejudiced by this alleged error. *See Harbor*, 333 Wis. 2d 53, ¶67 ("We need not address both components of the inquiry if the defendant fails to make an adequate showing on one.").⁶

⁶ Cole appears to argue that "the improper admission of the [examiner's] reports and the [prosecutor's] improper argument from these reports" resulted in plain error. Cole does not explain why the admission of the examiner's report was improper. Her argument is undeveloped, and we therefore do not address it. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider undeveloped arguments).

Failure to Request Adjournment of Trial

¶31 Cole argues that her trial counsel was ineffective for failing to request an adjournment of the trial to compel the testimony of David Towns, the attorney with whom Cole spoke the morning after the shooting. Cole appears to argue that Towns' testimony would have: (1) demonstrated that Cole's version of events remained consistent from the date of the shooting through the trial; and (2) provided an explanation as to why Towns advised Cole to remain silent, which would have mitigated the prosecutor's argument that Cole's failure to call 911 or speak to the police following the shooting showed consciousness of guilt.

¶32 It appears from the record that the parties attempted to compel Towns' testimony, but that Towns presented a medical excuse stating that he could not travel to Wisconsin to testify. The parties reached a stipulation regarding what Towns' testimony would have been, which the circuit court read to the jury. The stipulation read, in pertinent part:

[O]n April 27, 2010, Attorney David Towns called Tomah, Wisconsin Police Investigator Robert Walensky and told Investigator Walensky that he was an attorney for Tammy S. Cole from Belvidere, Illinois. Mr. Towns told Investigator Robert Walensky that he represented Ms. Cole, and that she was involved in an accidental discharge of a firearm in Tomah, Wisconsin the previous night.... Mr. Towns stated that Tammy Cole was aware of the phone call he made to law enforcement authorities.

In addition to the stipulation, Cole testified that she spoke to a lawyer after the shooting who told her not to talk to anyone about the case, and that she listened to the lawyer's advice.

¶33 Based on the stipulation, the jury could have deduced that Cole's version of events (specifically, that the shooting was accidental) had remained the

same from the day after the shooting through the trial. And from Cole's testimony, the jury could have surmised that Towns was the attorney who advised her, as she testified, not to speak to anyone else about the case. Moreover, Towns' expected testimony about what he told Cole once she reached out to him could not have established any relevant facts or inferences explaining why Cole did not call authorities *before* she consulted Towns. We therefore conclude that Cole's trial counsel was not deficient for not seeking an adjournment to compel Towns' testimony.

Failure to Present Evidence Regarding Evans' Legal Problems

¶34 Cole argues that her trial counsel was deficient for failing to introduce "documentation" corroborating Evans' "impending prison sentence." We understand Cole's argument to be that because of this error, the circuit court did not allow her to present specific evidence regarding Evans' DUI prosecution, and that therefore Cole's defense was prejudiced because it "was only ... specific and dramatic documentation regarding Evans' [DUI prosecution and] impending prison sentence that would have allowed the jury to accept Cole's testimony [that] she believed" she needed to hide the gun from Evans to "protect Evans from himself."

¶35 Cole's argument fails for multiple reasons. Cole testified at trial that Evans was depressed because he had legal problems and was facing time in prison, and she was therefore concerned about the presence of the gun. Additionally, as we explained, the circuit court ruled that Cole could testify that in March 2010, Evans made comments that caused Cole to believe he might harm himself and, as a result, Cole hid a gun from him. The circuit court also ruled that Cole could testify regarding what happened the night of the shooting, which logically

encompassed any suicidal threats that Evans may have made. Cole therefore could have testified and did testify as to why she thought she needed to hide the gun from Evans, “to protect Evans from himself.” Accordingly, assuming without deciding that Cole’s trial counsel was deficient for not presenting “documentation” of Evans’ DUI prosecution, Cole has not shown that her defense was prejudiced.

New Trial in the Interest of Justice

¶36 Cole argues that she is entitled to a new trial in the interest of justice. The arguments that Cole offers in support are largely a rehash of arguments that we have rejected above. In addition, Cole’s arguments are not supported by legal reasoning, and are therefore undeveloped. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider undeveloped arguments). Therefore, we decline to order a new trial in the interest of justice. In addition, this opinion omits recitation of the many facts supporting the State’s theory because they are not pertinent to any issues raised above; however, we also rely on the many sources of incriminating evidence in declining to order a new trial.

CONCLUSION

¶37 For the reasons set forth above, we affirm the judgment of conviction and the order denying Cole’s motion for postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

