COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1910-CR **Cir. Ct. No. 2014CF681**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACALYN E. MATTINGLY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions 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).

¶1 PER CURIAM. Jacalyn Mattingly appeals a judgment of conviction for fifth-offense operating a motor vehicle while intoxicated (OWI) and

an order denying her motion for postconviction relief. She contends her trial counsel was constitutionally ineffective. We conclude that even assuming counsel was deficient in the manners Mattingly contends, the State has shown that any error was harmless beyond a reasonable doubt and, therefore, she was not prejudiced by her counsel's deficient performance. Accordingly, we affirm.

BACKGROUND

¶2 The State charged Mattingly with OWI and operating with a prohibited blood-alcohol content (BAC), both as fifth offenses. Mattingly pled not guilty, and her case proceeded to a jury trial.

¶3 At trial, Sergeant Nathan Borman testified that late on Sunday afternoon in August 2014, while he was approaching a stop sign in downtown Appleton, he saw a car pull into a parking space in a mostly empty parking lot. As the car pulled slowly into the parking space, it struck the guardrail "at a relatively slow speed, which caused the car to kind of bounce off the guardrail gently and roll backwards." He saw a female driver in the car, which had no other occupants. He observed the driver being "somewhat surprised" by hitting the guardrail.

¶4 Borman entered the parking lot to check on the vehicle's driver. He approached the driver, who had just stepped out of the car and was standing next to it. After a brief conversation, Borman obtained Mattingly's driver's license. Borman testified that Mattingly's speech was "very thick and slurred" and she seemed "very nervous" about the interaction with him. Borman could not smell the odor of any intoxicants, but Mattingly's behavior made him think she was "under the influence of something."

¶5 Borman checked Mattingly's Wisconsin Department of Transportation records and learned she had a legal BAC limit of 0.02.[1] After initially insisting she had not been drinking, Mattingly eventually admitted she had a Bloody Mary approximately six hours earlier. Borman administered field sobriety tests and two preliminary breath tests (PBT), the second of which yielded a BAC result of .064.[2] Based on Mattingly's performance on the tests as well as his other observations, Borman arrested her for OWI.

¶6 After being arrested, Mattingly initially refused to submit to a chemical test of her blood, but she later agreed to do so upon learning the police would seek a warrant to draw her blood. After a blood draw was performed at a nearby hospital, Borman asked Mattingly the questions contained in the Alcohol-Drug Influence Report, but Mattingly was unwilling to answer them.

¶7 Two witnesses for the State testified about Mattingly's blood draw and subsequent blood test. Of note, Michelle Gee, a forensic analyst from the State Crime Laboratory, testified about her testing of Mattingly's blood sample. She said the BAC of the sample was 0.046. Gee then explained that a retrograde extrapolation from that result to the time of Mattingly's arrest indicated Mattingly's BAC was in the range of 0.057 to 0.075, for an average of 0.063, when she stopped driving.

[1] At trial, Mattingly stipulated to the prior convictions necessary to make her prohibited blood-alcohol content .02 under WIS. STAT. § 340.01(46m)(c) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] No direct evidence regarding the PBTs was introduced at trial. However, we note the PBTs and the result of the second PBT here to provide context for Mattingly's appellate claims. *See infra* ¶¶11, 24.

¶8 During voir dire, the prosecutor had told potential jurors that the State's evidence would include some recorded phone calls Mattingly made when she was in the Outagamie County Jail. The prosecutor asked if any of the potential jurors had received a phone call from someone in a jail and whether that would affect his or her ability to hear the case. Of the three potential jurors who had received such calls, none said that experience would affect their ability to serve.

¶9 The prosecutor referred to the jail calls again during her opening statement, explaining that an investigator had retrieved recordings of the calls. The prosecutor told the jurors they would hear portions of the phone calls, during which Mattingly never denied driving or hitting the guardrail and admitted to having a drink that afternoon before her contact with Borman. Defense counsel's opening and closing statements focused on Mattingly's defense theory, which was that Sergeant Borman must not have observed Mattingly driving because her car had a very loud exhaust system and Borman made no mention of hearing a loud muffler.[3]

¶10 At the end of the State's case-in-chief, William Flood, an investigator with the district attorney's office, testified about the procedures used for recording and obtaining phone calls from jail. He summarized the content—and laid the foundation for playing the recordings—of the phone calls Mattingly

[3] On cross-examination, Borman explained that where he was driving in relation to the parking lot placed him "[e]ssentially, directly in front of" Mattingly's car while she was parking. Borman did not recall hearing either a loud muffler on the car or the car's collision with the guardrail. Rather, Borman testified that when he decided to check on the driver of the car, he was relying on what he had seen, not on what he had heard. During their encounter, Mattingly never denied to Borman that she was driving or that she hit the guardrail. In fact, Borman testified that Mattingly told him she hits parking lot guardrails "all the time."

made to James Mattingly, her ex-husband, from jail shortly after her arrest. The State played audio from two phone calls, both of which occurred on September 2, 2014, with corresponding transcripts being provided to the jury. Flood testified about the content of a third phone call that was not played for the jury. Mattingly's counsel did not object to the State's evidence of these calls.

¶11 The audio and transcript from the first call include this statement by Mattingly:

> I was just calling to ask you a few things and to say good bye. I know nobody can get me out and I've lost my daughter for good now. She was going [to] come live with me. I was pulling in the parking lot Jim and this guy across in his car he, he thought I hit the silver thing and sometimes I bump it because of the, you know. Only a point zero six. Jelica needed to get out of the house cause there was problems. I was parked, I had the keys out of the ignition, I was out of the car. So I don't know how that doesn't make a difference how he says he saw me drive in, he didn't even see me drive in. He couldn't [have] not from where he came from[.]

Later in the recording, Mattingly stated that she "shouldn't have been drinking but I had one drink that afternoon." Mattingly also said that she could have gotten out of the car "a little sooner. I mean legally the car was turned off and the keys were out of the ignition. I don't know how they can call that OWI. I wasn't even on the city streets you know what I mean."

¶12 The State then played two excerpts from the second call made on September 2. In the first, Mattingly stated:

> [I] had the car parked with, that's why I think I can fight this Jim. They gave me an OWI for a car that wasn't even running and I wasn't even in. Don't you understand that? I was out of the car. I was … out of my car, starting to walk over to my house and he stopped me. He did a u-turn and he came driving into the county parking lot and said well

> what's, what's wrong with you today? I said nothing. And I tried to start walking to my house and he wouldn't let me. Did you try telling her that?

During the second excerpt, Mattingly again stated that she was not in the car when Borman arrived: "How can he get me for a drunk driving because I, I didn't smack the guardrail. I bumped it. I do that at least four three four times a week. Pulling into that lot. How can I, I, you don't seem to understand I wasn't even in the car." James Mattingly responds, "If he's trying to get [sic] out of the car, it's just as good." Mattingly replies, "No it isn't Jim."

¶13 A third call, made on September 3, was not played for the jury, but Flood testified about its contents. Asked whether there was a comment about Mattingly's blood-alcohol level during that call, Flood said, "Yes." When asked what was generally said in that regard, Flood replied, "Basically, she had indicated to Jim that it was low. Her level was low." Flood was not cross-examined.

¶14 Defense counsel called three witnesses who each were with Mattingly at some point on the day of her arrest but prior to the guardrail incident. None of them was with Mattingly the whole day, and none saw her drink alcohol that day. Each of them testified that Mattingly's car's exhaust system was very loud. The defense also called James Mattingly. Besides also describing the loudness of the exhaust on Mattingly's car, he confirmed that Mattingly called him while she was in jail. Mattingly elected not to testify.

¶15 During deliberations, the jury asked one question: "Can we base Count 1 [operating while intoxicated] on Wisconsin's .08 level of B.A.C.?" The circuit court told the jurors to base their decision on Count 1 on the instructions the court had given, which instructions explained that Mattingly's BAC legal limit

was .02. The jury returned verdicts of guilty on both counts. Mattingly was then adjudged guilty of fifth-offense OWI.[4]

¶16 After sentencing, Mattingly filed a postconviction motion for a new trial. Relevant to this appeal, she claimed that her attorney was ineffective for failing to take steps to exclude references to the fact she was in the county jail before trial, to the result of her preliminary breath test, and to the consequences of her conviction, including her recorded statement that she had "lost [her] daughter." After briefing and a ***Machner***[5] hearing, the circuit court denied Mattingly's motion, determining that defense counsel's actions were reasonable strategic decisions and that Mattingly was not prejudiced by them. Mattingly now appeals.

DISCUSSION

¶17 On appeal, Mattingly again argues that her trial counsel was constitutionally ineffective for failing to take steps to exclude references made at trial to: (1) the fact she was in the county jail before trial; (2) the result of her preliminary breath test; and (3) the consequences of her conviction. The references to her being in jail occurred at various times during the trial. *See supra* ¶¶8-12, 14. The references to Mattingly's PBT were, indirectly, from her comment during the first phone call on September 2 that she was "[o]nly a point zero six" and, even more vaguely, during the September 3 call when she alluded to her BAC level by saying it "was low." The reference to the consequences of her

[4] Mattingly had been charged with both OWI and operating with a prohibited alcohol content (PAC). After the jury returned a verdict of guilty on both charges, the circuit court opted to dismiss the PAC charge in favor of a judgment of conviction on the OWI charge, as required under WIS. STAT. § 346.63(1)(c).

[5] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

conviction relates to Mattingly's comment during the first September 2 phone call that she "lost [her] daughter for good now." Mattingly contends these failures had the effect of telling the jury she had prior convictions for OWI, which is prohibited once a defendant stipulates to that fact, *see* ***State v. Alexander***, 214 Wis. 2d 628, 642, 649-51, 571 N.W.2d 662 (1997), thereby constituting "the kind of propensity evidence that is inherently and dangerously prejudicial."

¶18 To establish a violation of a criminal defendant's constitutional right to effective assistance of counsel, a defendant must show: (1) that her lawyer's performance was deficient, and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove prejudice, a defendant must show "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694; ***Sanchez***, 201 Wis. 2d at 236. The defendant need not prove that, in the absence of the error, she would have been acquitted. ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379 (1997). Instead, the "touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" ***Id.*** (quoted source omitted). A claim of ineffective assistance of counsel fails when the defendant has not satisfied either prong of the two-part test. ***Strickland***, 466 U.S. at 697.

¶19 Whether a defendant received ineffective assistance of counsel is a mixed question of fact and law. ***State v. Domke***, 2011 WI 95, ¶33, 337 Wis. 2d

268, 805 N.W.2d 364. We uphold the circuit court's findings of fact unless they are clearly erroneous, ***id.***, but we decide de novo whether counsel's performance was deficient and prejudicial to the defense, ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶20 We assume without deciding that Mattingly's trial counsel performed deficiently. However, we also conclude the State has demonstrated that any errors occasioned by the admission of the complained-of information were harmless beyond a reasonable doubt. We reach this conclusion because the evidence of Mattingly's guilt unaffected by the errors was overwhelming. In the context of the overwhelming evidence of guilt, the errors alleged here neither undermine our confidence in the outcome nor render the proceeding fundamentally unfair. As such, Mattingly has not established—and cannot establish—that she was prejudiced by her counsel's alleged failures.[6]

¶21 As mentioned earlier, Mattingly's claim of prejudice is essentially that her counsel's failures had the effect of telling the jury she has prior convictions for OWI, which is inherently and dangerously prejudicial propensity evidence and is not allowed. *See* ***Alexander***, 214 Wis. 2d at 650. If such propensity evidence, admitted in error, is demonstrated beyond a reasonable doubt to have been harmless under the ***Alexander*** analysis,[7] we conclude, *a fortiori*, a

[6] This is true whether we assume counsel had objected to the complained-of information and the circuit court sustained those objections, or the court overruled the objections and (for purposes of our assumptions) erroneously admitted them, such that the evidence was admitted in the same manner as occurred here.

[7] More specifically, the test for harmless error is

> whether there is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result. The burden of proving no prejudice is on the

(continued)

defendant is unable to establish prejudice under ***Strickland***.[8] Wisconsin cases state that the test for harmless error is "essentially consistent with the test for prejudice in an ineffective assistance of counsel claim" as articulated by ***Strickland***. ***State v. Harvey***, 2002 WI 93, ¶41, 254 Wis. 2d 442, 647 N.W.2d 189; ***Sanchez***, 201 Wis. 2d at 231. The only distinction between the two tests is which party bears the burden of proof. ***Sanchez***, 201 Wis. 2d at 231. When, as here, the State benefits from an alleged error, it must prove harmlessness, while in an ineffective assistance of counsel claim, the defendant must prove prejudice. *See* ***Harvey***, 254 Wis. 2d 442, ¶41. ***Alexander*** itself noted that both tests focus on whether the error undermines confidence in the outcome. ***Alexander***, 214 Wis. 2d at 652-53 (citing cases).

¶22 In ***Alexander***, the supreme court found the admission of the defendant's prior convictions in an OWI case to be harmless because, given the facts of the case, there was "no reasonable possibility that the error [could have] contributed to the conviction." ***Id.*** at 653. The court made that determination on a record establishing the defendant's erratic driving, a "strong smell of intoxicants" about his person, red eyes and slurred speech, his admission that he had been

> beneficiary of the error, here the state. The state's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction.

State v. Alexander, 214 Wis. 2d 628, 652-53, 571 N.W.2d 662 (1997) (citation omitted).

[8] While the State's prejudice argument occasionally lapses into asserting there is no evidence the jury actually drew inappropriate inferences from the allegedly improperly admitted evidence, the State fails to appreciate that the standard does not require prejudice in fact but merely a "reasonable probability" of a different result. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). However, certain portions of the State's prejudice argument correctly note the evidence's minimal prejudicial value. Moreover, the State's argument regarding the overwhelming evidence of guilt is properly directed to the issue of whether the proceedings were reliable such that their outcome cannot reasonably be questioned.

drinking and his "You got me" statement to the arresting officer, his failure of three field sobriety tests, and a .24% breath test. ***Id.*** The ***Alexander*** court stated these facts constituted "overwhelming evidence" of guilt.

¶23 Similar facts to some of those found in ***Alexander*** were adduced at the trial in this case. Indeed, our review of the entire trial transcript in this case demonstrates that the evidence of Mattingly's guilt was quite strong. The trial testimony established Mattingly drove her car into the guardrail (a form of "erratic" driving), had very thick and slurred speech upon meeting Sergeant Borman, failed field sobriety tests, and made *multiple* admissions during postarrest phone calls that she had been drinking and driving.

¶24 Even more compelling is the undisputed evidence that Mattingly's blood was drawn shortly after her arrest and her BAC at the time of her blood draw was .046. The State's witness who later tested Mattingly's blood testified that extrapolation principles indicated Mattingly's BAC was approximately 0.063 when she stopped driving. This number is almost exactly the same as that to which Mattingly once referred during one of her phone calls (even though she never specifically used the term "PBT" or the like when referencing the number). This testimony regarding the extrapolation was unrebutted by any expert testimony from the defense. And even if the jury did not find the extrapolation persuasive, Mattingly's blood test result of .046 was still more than double her legal limit of .02.

¶25 All of the foregoing evidence would have been admitted at trial even if Mattingly's counsel had successfully raised the objections Mattingly argues would have been appropriate. The jury would have still heard multiple admissions from Mattingly that she had a drink that afternoon, that she was operating her car,

and that she bumped into the guardrail with her car. Mattingly's factual admissions in these regards would be admissible as statements against interest, regardless of whether information that they were made during jail phone calls was introduced. Furthermore, as Mattingly admits on appeal, her admissions during the calls directly refute her sole theory of defense, which was that she was never driving the car when it bumped into the guardrail, not that her BAC did not exceed her legal limit.

¶26 In all, even without the information presented to the jury allegedly in error, we are confident the jury still would have found Mattingly guilty. In addition, and contrary to Mattingly's argument, the admission of the evidence at issue did not render Mattingly's trial unreliable or fundamentally unfair, such that her trial counsel's failures to act to exclude the complained-of evidence caused her prejudice.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.