**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 16, 2013**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2013AP822-CR** **Cir. Ct. No. 2009CT905**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DEBORAH A. NIXON,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

¶1 REILLY, J.[1] Deborah A. Nixon appeals from a judgment of conviction for second-offense operating while under the influence of an intoxicant

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

(OWI) and from a postconviction order denying her request for a new trial. Nixon contends that she is entitled to a new trial due to ineffective assistance of counsel or, alternatively, in the interest of justice as her trial counsel erred in not introducing expert testimony that would have supported her version of events. The circuit court denied Nixon's motion without an evidentiary hearing as it found she was not prejudiced by the absence of such testimony. We agree and affirm.

## BACKGROUND

¶2 Kenosha county sheriff's deputies were dispatched to the home of Paul Linn on September 15, 2009, after Linn reported that Nixon was being disorderly and would not leave. When the deputies arrived at 8:23 p.m., Nixon had already driven off in her vehicle. The deputies remained at Linn's home until 8:39 p.m., during which time Nixon did not return. The deputies came back to the Linn home at 8:58 p.m. after Linn called at 8:54 p.m. to report that Nixon was back. When the deputies encountered Nixon outside of Linn's house, they noticed that her eyes were red and glassy, her breath smelled of intoxicants, and her speech was slurred. Nixon admitted that she had been driving between Linn's first and second calls and that she had consumed alcohol. Nixon was taken to a local hospital for a blood draw at 10:28 p.m. The results of her blood test showed that her blood alcohol concentration (BAC) was .089 percent. Nixon was charged with second-offense OWI and operating a motor vehicle with a prohibited alcohol concentration (PAC).

¶3 Nixon's defense at her jury trial was that although she drank some alcohol before she drove from Linn's house, she drank more after she returned, such that her blood test could not establish her level of intoxication for when she was driving. Nixon testified that while the deputies were at Linn's home the first

time, she drove to a nearby gas station and bought either a six- or twelve-pack of beer and then drove back to Linn's house, where she sat at a bonfire pit at the rear of the property and drank up to three beers before the deputies arrived the second time. Nixon testified that after she was arrested and was being transported for blood testing, she asked Deputy Jason Sielski to turn his squad car around to look for the case of beer she left by the fire pit.

¶4 Her version of events contrasted sharply with that of the deputies. Both Sielski and Deputy Jon Hasselbrink testified that Nixon was expressly asked before her arrest whether she had anything to drink after returning to Linn's house and that she said, "No," and never retreated from that claim over the course of the night. Hasselbrink testified that he walked around Linn's property that night and did not see any bottles, glasses, or cans except for one beer can that Linn told him had been left by Nixon before she drove. A blood analyst testified about the results of Nixon's blood test, estimating that a person with Nixon's BAC at 10:25 p.m. would have had a BAC between .119 and .125 two hours earlier, the time when Nixon admitted she had been driving. A jury convicted Nixon on both the OWI and PAC charges. A judgment of conviction was entered on the charge of second-offense OWI.

¶5 Nixon filed a motion for a new trial, on the bases that she had received ineffective assistance of counsel and that the real controversy was not fully tried. She relied solely on her trial counsel's failure to call an expert witness or to elicit testimony from the blood analyst that her blood test result could be due to postdriving alcohol consumption. She averred that she contacted an expert after trial who estimated that, combining her trial admissions that she had consumed

about one and one-half beers over three hours before driving from Linn's home in addition to three Coors Light beers between 8:37 p.m.[2] and 8:58 p.m., her BAC would have ranged between .076 and .089 at the time of her blood test. The circuit court denied Nixon's motion without an evidentiary hearing. Nixon appeals.

## DISCUSSION

¶6 A circuit court may deny a postconviction motion alleging ineffective assistance of counsel without a ***Machner***[3] hearing "if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111 (citation and emphasis omitted). We review de novo whether a motion entitles a defendant to an evidentiary hearing or whether a court has the discretion to deny the motion without a hearing. ***State v. Jacobs***, 2012 WI App 104, ¶24, 344 Wis. 2d 142, 822 N.W.2d 885.

¶7 Before a convicted defendant may be awarded a new trial due to ineffective assistance of counsel, the defendant must show that his or her counsel was deficient and that this deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the record sufficiently establishes that the defendant was not prejudiced by counsel's performance, it is not error for a court to deny the defendant's motion without a ***Machner*** hearing.

[2] On appeal, Nixon concedes that this time was wrong as the record established that the deputies were at Linn's house until 8:39 p.m. and did not see her there at that time.

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

***Roberson***, 292 Wis. 2d 280, ¶44. We find that the record sufficiently establishes that Nixon was not prejudiced by her counsel's failure to present the expert testimony proffered in her postconviction motion, and thus she was not entitled to a ***Machner*** hearing or a new trial based on an ineffective assistance claim.[4]

¶8 This case revolves around credibility. Either the jury believed Nixon when she testified that she returned to Linn's property and quickly downed up to three cans of beer in a nineteen-minute time period before the deputies arrived for a second time or the jury did not believe her testimony. We presume from the verdict that the jury did not credit Nixon's version of events. Her expert witness would not have changed this. Although Nixon's expert might have presented evidence that her story was within the realm of possibility based on her blood test results, she has not shown how such testimony would refute the State's contention that Nixon's blood test results were due to her consumption of alcohol prior to driving. The evidence that Nixon claims her counsel was ineffective for omitting would not have tipped the scales of credibility away from the State's witnesses and in her direction. Therefore, there is not a reasonable probability that the outcome of Nixon's trial would have been different had she presented such evidence and she was not prejudiced by her counsel's alleged error. *See* ***Strickland***, 466 U.S. at 694.

¶9 Nixon also requests a new trial in the interest of justice as she contends the real controversy was not fully tried. She argues that she is entitled to

[4] On appeal, Nixon argues that the remedy for the court's denial of her motion alleging ineffective assistance of counsel, which was decided without an evidentiary hearing, is a new trial. Nixon is wrong. The available remedy is remand for an evidentiary hearing where trial counsel may explain the reasons underlying his handling of the case. ***Machner***, 92 Wis. 2d at 804.

this extraordinary remedy as the jury did not hear expert evidence that her blood test results could be explained by her version of events. Thus, "the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case." ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 504-05, 451 N.W.2d 752 (1990). As we have explained, we do not view Nixon's expert evidence as important testimony as it was no more favorable to her defense than it was to the State's case. Nixon's credibility was the real controversy in this case, and Nixon's credibility was fully tried.

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

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