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DISTRICT I

February 3, 2026

To:

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Circuit Court Judge
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Clerk of Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2024AP2314-CR State of Wisconsin v. Sherman Davion Wilks, II
(L.C. # 2022CF980)

Before White, C.J., Colón, P.J., and, Donald, J.

Summary disposition orders 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).

Sherman Davion Wilks, II, appeals from a judgment of conviction. He also appeals from a postconviction order denying him a ***Machner*** hearing based on his ineffective assistance of counsel claim.[1] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2023-24).[2] We affirm.

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

[2] All references to the Wisconsin Statutes are to the 2023-24 version.

BACKGROUND

We limit our focus to those facts that are pertinent to the parties' arguments on appeal. We provide an overview in this background section and additional detail as needed in the discussion section below.

The State charged Wilks with 20 crimes based on nine separate incidents, most of which involved his former wife, Linda.[3] Wilks's case proceeded to trial. This appeal centers on Counts 1 and 10.

Count 1

The State charged Wilks in Count 1 with first-degree recklessly endangering safety, as an act of domestic abuse and while using a dangerous weapon, for an incident that allegedly occurred on November 26, 2021. Linda testified at trial that on that date, she was at her new boyfriend Lance's house for Thanksgiving. Wilks tried to get her to come outside to talk to him.[4] When Linda told Wilks that she had a new boyfriend, he responded that he was "going to kill [her]." She subsequently heard gunshots hit the back of the house and saw Wilks outside.

[3] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

Two of the initially charged counts that did not involve Linda were dismissed by the State prior to trial.

[4] We use the pseudonym "Lance" to protect his identity.

Count 10

The State charged Wilks in Count 10 with first-degree recklessly endangering safety, as an act of domestic abuse and while using a dangerous weapon, for an incident that allegedly occurred on July 28, 2021. At trial, Linda testified that she and Lance were sitting in her car waiting for food they had ordered from the café when Wilks blocked Linda's car with his own vehicle. Wilks threatened to kill Lance but Linda distracted him so that Lance could flee. She then asked Wilks to get her something from the café, and when he went inside, she fled. Linda testified that she called 911 as she was running away and Wilks was shooting in her direction.

A police officer testified that he was dispatched to look for Wilks. The officer and his partner observed an individual matching Wilks's description get out of a vehicle. When they attempted to speak to the suspect, he fled on foot. The officers pursued but lost sight of him. When officers searched the vehicle that they had observed the individual get out of, they located a handgun under the driver's seat. They did not recover any shell casings. The officer identified Wilks at trial as the individual who ran from the vehicle.

Jury Question & Verdicts

During jury deliberations, the circuit court recalled the case, noting that it had "received a note from the jurors. It came oddly crumpled up. I don't know what that's about, but it says 'Can a phone call threat be constituted [sic] as first-degree recklessly endangering safety?'" The court instructed the jury to refer back to the provided instructions for first-degree recklessly endangering safety, which correctly defined the offense's three elements. The court did not provide any other guidance to the jury. Wilks's attorney did not object to the court's response.

Ultimately, the jury convicted Wilks of eight counts, acquitting him of the remaining 10. As to Counts 1 and 10, the jury found Wilks guilty of first-degree recklessly endangering safety, but did not find that he committed the offenses while possessing a dangerous weapon.

After trial, Wilks sought a judgment notwithstanding the verdicts on Counts 1 and 10. Wilks argued that he could not have recklessly endangered the safety of Linda under the corresponding jury instruction without using or threatening to use a dangerous weapon given that "the only evidence of that crime was shooting a firearm." He additionally asserted that the court's response to the jury question misled the jury into believing that phone threats could meet the statutory elements of recklessly endangering safety. Trial counsel asserted in the motion that she "was almost certainly ineffective" for failing to object to the court's response.

The circuit court denied the motion, concluding that "it was a proper statement of the law to direct them to read the jury instructions" and that there was no "reason to believe that [the jury] thought the phone call was the recklessly endangering safety."

WIS. STAT. RULE 809.30 Motion

Wilks filed a postconviction motion pursuant to WIS. STAT. RULE 809.30. The motion again alleged that the circuit court's response to the jury's question was misleading and, thus, violative of due process, and that trial counsel was ineffective for failing to object.

The circuit court denied the motion without a hearing. In a written decision, the court held that it had correctly responded to the jury's question by referring the jurors to the standard instruction for first-degree recklessly endangering safety, *see* WIS JI—CRIMINAL 1345, and that it was "not the court's role to specify which actions may or may not meet the elements of the

offense." The court concluded that trial counsel was not ineffective in failing to object to the court's response and denied the motion without a hearing.

DISCUSSION

The sole issue on appeal is whether trial counsel was ineffective for failing to contemporaneously object to the circuit court's response to the jury question asking whether a threatening phone call could constitute first-degree recklessly endangering safety. To prevail on a claim of ineffective assistance of counsel, a defendant must prove both that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

To prove deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." ***Id.*** at 688. To prove prejudice, "[t]he 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." ***Id.*** at 694. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, a reviewing court need not address the other. ***Id.*** at 697.

Pursuant to ***Machner***, a defendant who alleges ineffective assistance of counsel must seek to preserve counsel's testimony in a postconviction hearing. ***Id.***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The defendant, however, is not automatically entitled to such a hearing. ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Rather, the circuit court is required to hold an evidentiary hearing only if the defendant has alleged, within the four corners of the postconviction motion, sufficient material facts that, if true, would entitle

the defendant to relief. ***Id.***, ¶¶14, 23. Whether a postconviction motion alleges sufficient material facts to require a hearing is a question of law that we review de novo. ***Id.***, ¶9.

If a postconviction motion "does not raise facts sufficient to entitle the defendant to relief, or if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***State v. Ruffin***, 2022 WI 34, ¶28, 401 Wis. 2d 619, 974 N.W.2d 432. "In other words, if the record conclusively demonstrates that the defendant is not entitled to relief, then either option—holding a hearing or not—is within the circuit court's discretion. We review discretionary decisions for an erroneous exercise of discretion." ***Id.*** With these principles in mind, we consider Wilks's claim of ineffective assistance of counsel.

The premise for Wilks's argument is that the circuit court's response to the phone call jury question was erroneous and misled the jury. *See* ***State v. Schulz***, 102 Wis. 2d 423, 427, 307 N.W.2d 151 (1981) ("When a jury charge is given in a manner such that a reasonable juror could have misinterpreted the instructions to the detriment of a defendant's due process rights, then the determination of the jury is tainted."). Wilks contends that a phone call cannot be considered first-degree recklessly endangering safety—especially not the phone calls as testified to in this case.[5]

According to Wilks, by directing the jury back to the standard jury instruction instead of providing a more direct, and correct, answer to the jury's question, the circuit court implied that

[5] Wilks directs our attention to the following testimony. Linda testified that Wilks made statements during telephone calls such as "I'm going to kill you," their "relationship is to death," "[n]o one else is going to be able to have" her, and that he was "sorry."

there are certain circumstances in which a phone call could form the basis for a first-degree recklessly endangering safety conviction. He argues that trial counsel's failure to object to the court's misleading answer to the jury was deficient performance resulting in prejudice.

As aptly summed up by the State, "[t]he problem with Wilks's argument is that it is just that—legal argument, not well-settled law." Counsel's performance can only be deficient where the law is "settled in the area in which trial counsel was allegedly ineffective." ***State v. Hanson***, 2019 WI 63, ¶28, 387 Wis. 2d 233, 928 N.W.2d 607. For the law to be settled, Wilks had to offer controlling authority on the issue or at least offer a case "present[ing] a factual situation similar enough to the facts of this case[.]" ***State v. Morales-Pedrosa***, 2016 WI App 38, ¶26, 369 Wis. 2d 75, 879 N.W.2d 772 (concluding that trial counsel did not perform deficiently given that "there [wa]s no Wisconsin case law directly on point on the issue, and neither [of the cases offered] present a factual situation similar enough to the facts of this case"). Wilks's offering fell short.

Wilks argues on appeal that "the overbroad jury instruction issue in this case was largely answered … in ***State v. Frey***, 178 Wis. 2d 729, 733, 505 N.W.2d 786 (Ct. App. 1993)." In that case, we analyzed whether the circuit court erred when its instructions permitted the jury to consider the defendant's hands as a dangerous weapon. ***Id.*** at 737-38. In concluding that this was an error, we explained that if the court was correct that the defendant's hands could be considered a dangerous weapon, there would be almost no difference between first and second-degree sexual assault. ***Id.*** at 743.

According to Wilks, similar to ***Frey***, here the circuit court misled the jury to understand first-degree recklessly endangering safety very expansively to include a threatening phone call.

He asserts that if this response is correct, then two different criminal statutes—unlawful use of a telephone and first-degree recklessly endangering safety—could cover the same conduct, and the more serious charge of first-degree recklessly endangering safety could be charged for almost every instance of a threatening phone call.

Wilks's reliance on ***Frey*** amounts to a continuation of his legal argument as opposed to settled law on the issue at hand.[6] The decision offers neither controlling authority signifying that a threatening phone call is insufficient to satisfy the elements first-degree recklessly endangering safety nor a similar factual situation.[7] "When the law is unsettled, the failure to raise an issue is objectively reasonable and therefore not deficient performance." ***State v. Jackson***, 2011 WI App 63, ¶10, 333 Wis. 2d 665, 799 N.W.2d 461.

We conclude that the record conclusively demonstrates that trial counsel did not perform deficiently for failing to object to the circuit court's response to the jury's question, which directed the jury to the pattern instruction setting forth the crime's elements. ***State v. Langlois***, 2018 WI 73, ¶50, 382 Wis. 2d 414, 913 N.W.2d 812 ("A claim predicated on a failure to challenge a correct jury instruction cannot establish either deficient performance or prejudice" (citation modified)). Trial counsel was not obligated to raise a meritless objection or a novel

[6] In his briefing, Wilks seemingly acknowledges that he looks to ***State v. Frey***, 178 Wis. 2d 729, 733, 505 N.W.2d 786 (Ct. App. 1993), because "no prior case had specifically addressed whether a phone call threat alone could constitute first-degree recklessly endangering safety[.]"

[7] Wilks argues that by failing to specifically distinguish ***Frey***, the State conceded it presents an analogous situation. *See* ***Hoffman v. Economy Preferred Ins. Co.***, 2000 WI App 22, ¶9, 232 Wis. 2d 53, 606 N.W.2d 590 ("An argument to which no response is made *may* be deemed conceded for purposes of appeal." (Emphasis added.)). We are not required to determine an argument is conceded due to a party's failure to respond, and, in any event, the State adequately argued that there is a lack of settled law on this issue.

argument to instruct the jury differently. The circuit court properly denied Wilks's motion without holding a hearing.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals