COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3301-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL A. MALDONADO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

EICH, C.J. Michael Maldonado appeals from a judgment convicting him of first-degree intentional homicide and from an order denying his motion for postconviction relief. He argues that: (1) the trial court erred in allowing a transcript of the testimony of a witness at an earlier trial of one of Maldonado's alleged accomplices to be read to the jury; (2) the court erred in

admitting evidence of certain inculpatory gestures and statements he made to police officers prior to his arrest; (3) he was denied the effective assistance of counsel when his attorney permitted him to talk to police officers and travel with them to the scene of the crime; (4) he was denied his right to an impartial jury as a result of comments a prospective juror made during *voir dire*; and (5) he is entitled to a new trial based on newly discovered alibi evidence. We reject his arguments and affirm the judgment and order.

In April 1994, Ruben Borchardt was found seriously wounded and covered with blood in the basement of his home in Jefferson County. He died that same day and, after an extensive police investigation, Maldonado, who was fifteen years old at the time, and two of his friends, Douglas Vest and Joshua Yanke, became suspects in the case, along with Diane Borchardt, Ruben Borchardt's estranged wife, who was alleged to have recruited Vest, Yanke and Maldonado to kill him. Prior to the commencement of any legal proceedings, Maldonado and his attorney accompanied two police officers to the scene of Borchardt's murder, during which time Maldonado made incriminating gestures and statements in response to the officers' questions. Along with Vest and Yanke, Maldonado was eventually charged with Borchardt's murder. The three young men were tried separately.

At Maldonado's trial, the State presented substantial testimony linking him to the crime, including testimony from Vest and Yanke identifying Maldonado as the one who had shot Borchardt twice with a shotgun. The two officers who accompanied Maldonado to the crime scene also testified, and the trial court permitted the prosecutor to read to the jury the testimony of Jebediah Simmons, a friend of Maldonado's who had testified earlier at the Vest trial that Maldonado had admitted having been involved in Borchardt's murder.

Maldonado denied any involvement in either the murder itself or any plot to kill Borchardt.

The jury found Maldonado guilty of first-degree intentional homicide and he was sentenced to life in prison. He filed a postconviction motion asserting various evidentiary errors by the trial court, as well as claims that his counsel was ineffective and that newly discovered evidence warranted a new trial. The trial court denied the motions and Maldonado appeals.

I. Testimony of Jebediah Simmons

Simmons, testifying at the Vest trial, stated that he was Maldonado's friend and that, both before and after the murder, Maldonado admitted taking part in Borchardt's murder. Before the murder, Maldonado told him he had a chance to make a lot of money and asked whether Simmons knew Diane Borchardt; about two weeks after the murder, Maldonado said that he and two others went to Ruben Borchardt's house and shot him, describing what they were wearing and where they had disposed of the gun. Maldonado also told Simmons that he was supposed to get money and jewelry for killing Borchardt.

After finding that Simmons was unavailable to testify at Maldonado's trial, the trial court permitted his testimony at the Vest trial to be read to the Maldonado jury. Maldonado argues that Simmons's prior testimony should not have been admitted.

The acceptance or rejection of evidence is discretionary with the trial court, ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982), and "[w]e will not reverse a discretionary determination … if the record shows that discretion was … exercised and we can perceive a reasonable basis for the court's

decision. ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). We do not test a trial court's discretionary rulings by some subjective standard, or even by our sense of what might be a "right" or "wrong" decision; the court's ruling will stand unless "no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." ***State v. Jeske***, 197 Wis.2d 905, 913, 541 N.W.2d 225, 228 (Ct. App. 1995). If, however, a discretionary decision rests upon an error of law, the decision exceeds the limits of the court's discretion. ***State v. Wyss***, 124 Wis.2d 681, 734, 370 N.W.2d 745, 770 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990).

Maldonado argues that the testimony was inadmissible hearsay, citing § 908.045(1), STATS., which describes the "former testimony" exception to the hearsay rule:

> **(1)** FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, *with motive and interest similar to those of the party against whom now offered.*

(Emphasis added.) Emphasizing the italicized language, Maldonado argues that the exception does not apply because Vest's defense theory rested on the claim that he was coerced into participating in Borchardt's murder, while Maldonado presented a straightforward denial of any participation in the crime during his trial. He asserts that, as a result, Vest's interest in cross-examining Simmons was simply to minimize his own role in the crime and that he had no interest in "questioning [Maldonado's] involvement."

We disagree with Maldonado's assessment. While Vest may have had a different defense theory—that he was somehow "coerced" into participating in Borchardt's murder—he and Maldonado shared a strong incentive to discredit Simmons's testimony because that testimony incriminated Vest as well. As indicated, Simmons testified at Vest's trial that, prior to the murder, Maldonado stated that he had a chance to make a lot of money by "do[ing] something for somebody," and mentioned Diane Borchardt's name. In one conversation, Maldonado implicated Vest in the plot and stated that Vest knew Diane Borchardt. Simmons also recounted another conversation with Maldonado after the murder where Maldonado stated that he and "two other people went to Mrs. Borchardt's house, and they went inside and one person shut off the light or one person unplugged the telephone and then they turned on the light and went to go downstairs, I believe, and then Mr. Borchardt came out and they shot him." According to Simmons, Maldonado described events transpiring after the murder, including Vest's involvement in getting the promised money from Diane Borchardt.

During an extensive cross-examination, Vest's counsel attacked Simmons's credibility in a number of ways. He attempted to impeach Simmons's testimony with a contradictory written statement, and to impeach his credibility by suggesting a motive to falsify his testimony because Simmons may have been a suspect in the case. He also attempted to show that Simmons may have been reading more into Maldonado's statements than was actually true.

We agree with the State that Vest's attorney's cross-examination of Simmons was animated by a similar motive and interest—the desire to neutralize Simmons's testimony about Maldonado's incriminating statements. And we are satisfied that Vest's interest is sufficiently similar to the interest Maldonado would

have had if Simmons had personally testified at his trial to invoke the prior-testimony exception set forth in § 908.045(1), STATS. An identity of interests is not required. We said in ***State v. Barksdale,*** 160 Wis.2d 284, 289, 466 N.W.2d 198, 200 (Ct. App. 1991), that a similarity of interests satisfies § 908.045(1). That situation is present here, and we conclude that the trial court correctly ruled that Simmons's testimony was admissible under the "prior testimony" exception set forth in the statute.[1]

Even where the evidence is otherwise admissible, however, we must still consider whether "unusual circumstances" warrant exclusion. ***State v. Bauer,*** 109 Wis.2d 204, 215, 325 N.W.2d 857, 863 (1982). Maldonado contends that his inability to cross-examine Simmons with respect to his inculpatory testimony constitutes such a "circumstance." Again, we disagree. The statute plainly contemplates such a circumstance, for it renders an unavailable witness's prior testimony admissible if certain conditions are met—even though the testimony was given in a proceeding in which the person against whom it is now being offered was not a party and thus lacked any opportunity to cross-examine the witness. The inability to cross-examine the absent witness simply cannot constitute the type of "unusual circumstance" discussed in ***Bauer*** and similar

[1] The State frames its argument in constitutional terms: that the trial court's ruling did not abridge Maldonado's right to confront witnesses. Maldonado, however, does not argue the constitutional issue. He contends only that Simmons's testimony does not fit the § 908.045(1), STATS., exception to the hearsay rule. Other than a nonspecific suggestion that he was not allowed to "inquire as to Simmons'[s] motivation for lying," or "as to the dates and times of these alleged conversations"—which appear to be directed more toward the "unusual circumstances" language in ***State v. Bauer***, 109 Wis.2d 204, 325 N.W.2d 857 (1982), discussed below—he never develops a constitutional argument. As we have noted on several occasions, we need not consider unexplained and undeveloped arguments. ***M.C.I., Inc. v. Elbin***, 146 Wis.2d 239, 244-45, 430 N.W.2d 366, 369 (Ct. App. 1988).

cases. If it could, an absent witness's prior testimony could never be allowed, and that would swallow the plain language of § 908.045(1), STATS.

II. Maldonado's Statements and Gestures to Police

As indicated, when police were investigating Borchardt's murder, Maldonado, along with his then-attorney, Gene Linehan,[2] voluntarily joined two police officers, Ricky Brunk and Gary Lenz, in their squad car and traveled to the crime scene. Brunk testified at trial that while they were parked outside the Borchardt home, he simulated or pantomimed throwing a gun through the side window of the car, and that Maldonado nodded his head in an "affirmative" gesture. According to Brunk, he repeated the gesture as they pulled away from the curb and Maldonado again nodded his head. Then, while they were driving in an area about a quarter-mile from Borchardt's house, Brunk asked Maldonado to estimate the location where he threw the gun away and he pointed to a spot along the road and said "about here." Brunk also asked Maldonado what had happened to the gloves used in the commission of the crime, and Maldonado said he threw them in a culvert near an interstate highway entrance ramp.

The trial court allowed Brunk and Lenz to testify—as rebuttal witnesses—with respect to Maldonado's gestures and statements, and Maldonado argues on appeal that it was error to do so because: (1) the State failed to disclose the information to him in violation of the criminal discovery statute then in effect, § 971.23, STATS., 1993-94; (2) he made the gestures and statements involuntarily and prior to being advised of his ***Miranda*** rights;[3] and (3) admission of the

[2] Maldonado replaced Linehan with another lawyer prior to his trial.

[3] ***Miranda v. Arizona,*** 384 U.S. 436 (1966).

evidence "denied [him] due process and a fair trial, instead allowing trial by ambush."

The § 971.23, STATS., effective during Maldonado's trial, which has subsequently been modified and reorganized, states in pertinent part:

> **(1)** DEFENDANT'S STATEMENTS. Upon demand, the district attorney shall permit the defendant within a reasonable time before trial to inspect and copy or photograph any written or recorded statement concerning the alleged crime made by the defendant which is within the possession, custody or control of the state .... Upon demand, the district attorney shall furnish the defendant with a written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial....
>
> ....
>
> **(7)** CONTINUING DUTY TO DISCLOSE; FAILURE TO COMPLY. If, subsequent to compliance with ... [§971.23(1)], and prior to or during trial, a party discovers additional material ... the party shall promptly notify the other party of the existence of the additional material .... The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply.

Maldonado, asserting that he made the pretrial demand required by subsection § 971.23(1), STATS., complains that the State's failure to inform him of the officers' proposed testimony until some time after opening statements of his trial violated the subsection and that, as a result, the officers' testimony was improperly allowed—an error which, he claims, warrants reversal of his conviction.

The first sentence of § 971.23(1), STATS., plainly limits its application to "written or recorded statement[s]." Brunk and Lenz, however, never wrote down or made any record of Maldonado's gestures and statements. Brunk testified that because Maldonado's attorney was present when the

statements and gestures were made he mistakenly believed they were subject to the attorney-client privilege, and Lenz testified that he never made any record of Maldonado's statements because he assumed Brunk would do so. As a result, Maldonado's statements and gestures not only were never reduced to writing or otherwise recorded, but apparently were never disclosed by the officers to anyone prior to trial—including the prosecutor. Then, after opening statements, when defense counsel indicated that Maldonado would be pursuing an alibi defense—that he had been at home during the time of the murder—the court adjourned the proceedings for two days to give the prosecutor the opportunity to investigate the purported alibi. According to Brunk, it was during this investigation that he informed the prosecutor of the meeting with Maldonado and of Maldonado's statements and gestures. The prosecutor immediately notified defense counsel by telephone, and as soon as the information could be reduced to writing, it was sent to counsel *via* facsimile.

It thus appears that, until the prosecutor learned of the officers' meeting with Maldonado, and the substance of what occurred at that meeting—and until that information was reduced to writing—no "written or recorded" statement existed that would be subject to § 971.23(1), STATS. Maldonado argues that fact does not excuse the prosecutor's failure to disclose the information to him, citing ***State v. Martinez***, 166 Wis.2d 250, 260, 479 N.W.2d 224, 229 (Ct. App. 1991), where the supreme court found that the prosecution could not excuse its failure to provide a copy of a tape-recorded statement of the defendant by simply stating that the tape had "disappeared" while in custody of the police. Here, no such tape or document ever existed and the information had never been reported to anyone until the prosecution began investigating Maldonado's

eleventh-hour alibi notice.[4] We see ***Martinez*** as offering scant support for Maldonado's argument.

Maldonado also refers us to ***Wold v. State,*** 57 Wis.2d 344, 204 N.W.2d 482 (1973)—a case arising prior to the adoption of § 971.23, STATS.—for the proposition that the prosecutor's lack of knowledge of the evidence cannot be excused: that she had an affirmative duty to seek out and learn everything the officers might be able to testify to, regardless of the information already provided. ***Wold*** was a sexual assault case in which the prosecutor had volunteered to provide all crime laboratory reports to the defense. The reports given to the defense contained no incriminating evidence but, at trial, a crime-lab analyst testified she had found seminal stains on Wold's underwear. The prosecutor stated that he was unaware of the seminal-stain report, and the supreme court phrased the issue as "whether evidence allegedly unknown to the [S]tate prior to trial and not disclosed to the defense pursuant to an agreement to disclose or an order of discovery should be excluded," and answered that question in the affirmative.[5] ***Id***. at 349, 204 N.W.2d at 486. In ***Wold***, the prosecutor was under an obligation to disclose the information, either by affirmative agreement or by court order, and the supreme court said only that the prosecutor, by agreeing to provide the scientific reports, "assumed a duty to disclose [the] *reports*…. [and] to seek to know of the existence of *such reports.*" ***Id***. at 350, 204 N.W.2d at 487 (emphasis added). Here, not only

[4] Section 971.23(8), STATS., requires a defendant to notify the prosecutor, either at arraignment "or at least 15 days before trial," of the existence and nature of any alibi defense. We assume Maldonado's untimely alibi notice prompted the trial court to adjourn the trial to allow the prosecutor to investigate.

[5] The court was unsure whether the prosecutor's agreement to provide the reports—which was made in response to a defense discovery motion—was formalized in a pretrial order. ***Wold v. State***, 57 Wis.2d 344, 347, 204 N.W.2d 482, 486 (1973).

were no such reports in existence, but, as we concluded above, the State was under no obligation to provide the information under the plain language of § 971.23(1), STATS.

Maldonado also suggests that the information was improperly withheld under the second sentence of § 971.23(1), STATS., which states that, on demand, the State must furnish the defendant "with a written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial." Because the prosecution was not aware of the officers' information until defense counsel's opening statement, it is apparent that the information was not something the prosecutor had "plan[ned] to use in the course of the trial," within the meaning of the statute. We said in ***State v. Larsen,*** 141 Wis.2d 412, 425, 415 N.W.2d 535, 541 (Ct. App. 1987), for example, that the statute "did not require the district attorney to ... provide [the defendant] with a written summary of [inculpating] oral statements ... prior to the time the district attorney concluded he [or she] would introduce [the] statements at ... trial." As in ***Larsen***, there is no suggestion in this case that the State had "always intended to use the ... statement ... but, as a stratagem, waited until the last minute to notify [the defendant] of the existence of the statement and [his or her] intent to use it." ***Id.***

Maldonado next argues that the trial court should have suppressed the statements and gestures he made to the officers because they were made involuntarily and in violation of his ***Miranda*** rights. The trial court, while agreeing that the officers never advised Maldonado of his ***Miranda*** rights, went on to find that the statements and gestures were voluntarily made and thus were admissible for purposes of impeaching his own contrary testimony. Maldonado challenges that finding.

We apply a deferential standard of review when considering challenges to a trial court's determination that an inculpatory statement was voluntary: we will not upset such a determination unless the finding was clearly erroneous. ***State v. Echols***, 175 Wis.2d 653, 671, 499 N.W.2d 631, 636 (1993).

Maldonado argues generally that his statements should be held to have been coerced, or not voluntarily made, because: (1) he "was 15 years of age at the time"; (2) no evidence was presented to the court showing that he "had any understanding of what was going on"; (3) no testimony was offered "as to [Maldonado's] age, education, or intelligence"; and (4) no testimony was offered to show that Maldonado had ever consulted with his attorney about his rights "or even knew of the purpose of the trip." And, citing ***State v. Cumber***, 130 Wis.2d 327, 387 N.W.2d 291 (Ct. App. 1986), he states that age, education and intelligence are factors that relate to voluntariness. That is true. It is also true, however, that determinations of voluntariness are made in consideration of the "totality of the circumstances." ***Id.*** at 330, 387 N.W.2d at 293. In ***State v. Clappes***, 136 Wis.2d 222, 239-40, 401 N.W.2d 759, 766 (1987), the supreme court had this to say about the appropriate analysis in such cases:

> While a defendant's personal characteristics are relevant, they only become determinative in the voluntariness analysis when there is something against which to balance them. The totality of the circumstances analysis requires a balancing of the personal characteristics of the defendant against the coercive or improper pressures brought to bear on him [or her] during the questioning. However, the police employed no inherently coercive tactics [in this case]. Therefore, because there is no support for the proposition in Wisconsin that the amount of pressure or coerciveness required can decrease to none, a defendant's personal characteristics, while certainly relevant to our analysis, are simply not dispositive of the issue of voluntariness. If the police had employed improper or coercive tactics, our holding might be different. However, under the facts … and employing the totality of the

> circumstances analysis, there simply is no foundation for reaching a finding of involuntariness.

We said in ***State v. Owen***, 202 Wis.2d 620, 642, 551 N.W.2d 50, 59 (Ct. App. 1996), that the inquiry in "voluntariness" challenges "focuses on whether the police used actual coercion or improper police practices to compel the statement," and that "[i]f the defendant fails to establish that the police used actual coercive or improper pressures to compel the statement, the inquiry ends." We also said that only when the defendant establishes the existence of coercive police conduct must the court undertake a balancing analysis, weighing the defendant's personal characteristics against the coercive police conduct, to determine the voluntariness of the statement. ***Id***.

The trial court's ruling in this case was based on the testimony of Officers Brunk and Lenz: that Maldonado was accompanied by—and sitting next to—his attorney at all times during the brief automobile ride and that he spoke to counsel from time to time during the conversation; that the officers addressed Maldonado in a normal tone of voice and made no threats or promises to him; that the conversation and the atmosphere surrounding it were "relaxed" and "businesslike"; and that Maldonado made no complaints and did not appear to show any form of distress or anguish at any time.

Maldonado has not put forth any evidence to refute the officers' description of the events surrounding the meeting and leading up to his gestures and statements, and, on this record, we see no evidence of coercion. We conclude, therefore, that the trial court could properly determine that Maldonado's statements and gestures were voluntarily made and thus admissible for purposes of impeachment.

Finally, Maldonado challenges admission of the statements and gestures as denying him due process and resulting in "trial by ambush." He cites no cases in support of the argument, stating very generally that he "formulated strategy and made his opening statement to the jury" without knowing of the existence of this evidence, and asserting that the State "must live with [its] failure" to "determine [its] existence" prior to trial. We frequently have said we need not address an unsupported and unexplained argument. *See, e.g.*, ***State v. Flynn***, 190 Wis.2d 31, 39 n.2, 527 N.W.2d 343, 346 (Ct. App. 1994).

III. Ineffective Assistance of Counsel

Maldonado next argues that Gene Linehan, the lawyer who represented him prior to trial, was ineffective for permitting him to accompany the police officers to the scene of the crime, where he made the statements and gestures that have been the subject of much of this appeal.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish that counsel's actions constituted deficient performance *and* that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Representation is not constitutionally ineffective unless both elements of the test are satisfied. ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 37 (Ct. App. 1992). Thus, a reviewing court may dispose of an ineffective assistance of counsel claim where the defendant fails to satisfy either element. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

An attorney's performance is not deficient unless it is shown that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance," ***Guck***, 170 Wis.2d at 669, 490 N.W.2d at 38 (quoted source and internal quotation marks omitted), and the basic

inquiry is whether such performance was reasonable under the circumstances of the particular case. ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 105 (Ct. App. 1992).

To prevail on an ineffective-assistance claim, the defendant must show that the attorney "'made errors so serious that [he or she] was not functioning as the "counsel" guaranteed ... by the Sixth Amendment.'" ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 847 (quoting ***Strickland***, 466 U.S. at 687). Our review of counsel's performance accords great deference to the attorney and "every effort is made to avoid determinations of ineffectiveness based on hindsight. Rather, the case is reviewed from counsel's perspective at the time of trial, and the burden is ... on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Id***. at 127, 449 N.W.2d at 847-48. "'[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" ***State v. Pitsch***, 124 Wis.2d 628, 637, 369 N.W.2d 711, 716 (1985) (quoting ***Strickland***, 466 U.S. at 690).

The trial court's findings as to what the attorney did, what happened at trial, and the basis for the challenged conduct are factual and will be upheld unless they are shown to be clearly erroneous. ***State v. Weber***, 174 Wis.2d 98, 111, 496 N.W.2d 762, 768 (Ct. App. 1993). Whether counsel's actions were deficient and, if so, whether they prejudiced the defense are questions of law which we review independently. ***Hubanks***, 173 Wis.2d at 25, 496 N.W.2d at 104-05.

Linehan testified at the hearing on Maldonado's postconviction motions. Linehan stated that, at the time of the meeting with Officers Brunk and

Lenz, he was aware that Maldonado had admitted to Simmons that he had participated in Borchardt's murder and that Vest was also accusing Maldonado of being involved in the crime. Linehan said that he concluded the State "would not have any difficulty" proving its case against Maldonado. Linehan became aware that the State sought testimony from one of the three young men and would offer leniency in return. According to Linehan, the State was also willing to extend leniency if one of the defendants would assist in recovering the murder weapon, as long as that person was not the shooter.[6] And the prosecutor emphasized that the offer would not remain open long. According to Linehan, he discussed all this with Maldonado and it was agreed that "cooperation was probably the only viable tactic in th[e] case." As a result, Linehan and Maldonado agreed that they would meet with Brunk and Lenz in an attempt to locate the murder weapon.

In arguing Linehan's ineffectiveness, Maldonado emphasizes that he was only fifteen years old, had not asked for the meeting himself and did not have any firm plea agreement with the prosecution at the time. His argument, in its entirety, is that Linehan should have taken a different approach—such as "communicat[ing] information to the State," or "request[ing] to see what the State's evidence against [Maldonado] was"—before he "made a deliberate choice to abandon [Maldonado]'s most treasured constitutional right" by "start[ing] a process by which the … statements/gestures … would be admitted [at] trial."

[6] While Maldonado had admitted to Linehan from the start that he was involved in Borchardt's murder, he denied that he had fired the shots.

On this record, and in light of the deference we pay to counsel's decisions—particularly those regarding defense strategy[7]—Maldonado has not persuaded us that Linehan's representation was ineffective as that term is defined in the law.[8]

IV. Juror Prejudice

Maldonado next argues that he was denied the right to an impartial jury because of the comments of a prospective juror, Kenneth Hafferman, during the *voir dire*.[9] Asked whether he knew Maldonado, Hafferman responded:

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[7] Citing the supreme court's decision in ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983), we said in ***State v. Elm***, 201 Wis.2d 452, 464-65, 549 N.W.2d 471, 476 (Ct. App. 1996), that we "will not second-guess a trial attorney's 'considered selection of trial tactics in the face of alternatives that have been weighed by trial counsel,'" and that "[a] strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel."

[8] The State also argues persuasively that, even if counsel's representation could be considered ineffective, there was no prejudice. To establish prejudice, a defendant must show that the particular errors of counsel actually had an adverse effect on the defense, for not every error that conceivably could have influenced the outcome undermines the reliability of the result in the proceeding. There must be 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.'" ***State v. Johnson***, 153 Wis.2d 121, 129, 449 N.W.2d 845, 848 (1990) (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

Both Vest and Yanke testified that Maldonado was actively involved in Borchardt's murder—that he not only procured the murder weapon but fired the fatal shots. And much of that testimony was corroborated by other witnesses, in particular, Simmons's testimony regarding Maldonado's admissions to him, and the testimony of Seth Jones, who said that he drove the three co-defendants to Milwaukee to pick up the shotgun. Timothy Quintero, a friend of all three co-defendants, offered testimony linking Maldonado to the murder and further corroborated the testimony of Vest and Yanke. Given that evidence, it would indeed be difficult to conclude that the outcome of Maldonado's trial would have been different if his gestures and his statement to the police officers about throwing away the gloves and the location of the shotgun had not been admitted into evidence.

[9] Hafferman was excused from hearing the case.

> I don't know Michael personally. But my brother-in-law lived in Watertown for 15 years and he knew him; and we discussed the case a little bit....
>
> ....
>
> From the things that he told me, which I'm not going to repeat, I don't, I wouldn't be fair to Michael.
>
> ....
>
> … [I]t would be hard for me [to be impartial] because of the things that they told me. And his son committed suicide. Because of some of the things he told me, it would be hard for me.

After a brief recess, the prosecutor asked Hafferman several questions:

> MS. LARSON. Mr. Hafferman …. isn't it true that your nephew['s] … suicide had nothing to do with Mr. M[a]ldonado? Is that right?
>
> JUROR HAFFERMAN: Right. True.
>
> MS. LARSON: Excuse me?
>
> JUROR HAFFERMAN: True.
>
> MS. LARSON: …. And when was it that he died?
>
> JUROR HAFFERMAN: I would say probably four years. I'm not positive.
>
> MS. LARSON: Four years ago?
>
> JUROR HAFFERMAN: Yes.
>
> MS. LARSON: So that would be sometime before the events of this case; isn't that right?
>
> JUROR HAFFERMAN: Yeah. Right.

The trial court also questioned Hafferman:

> THE COURT: … Your nephew and Mr. M[a]ldonado didn't know each other?
>
> JUROR HAFFERMAN: As far as I knew, they didn't.
>
> THE COURT: You just made some kind of mental bridge, Watertown/Jefferson County and so on, when you made your earlier statement; is that right?

> JUROR HAFFERMAN: Yes. Plus—
>
> THE COURT: But there's no connection between the tragedy in your brother-in-law's house and this case; correct?
>
> JUROR HAFFERMAN: Nothing. No.

Maldonado's argument centers on Hafferman's comments prior to the recess and the further questioning by the prosecutor and the trial court. He argues that those initial comments, made in the presence of other members of the panel, prejudiced his defense to the murder charge because they linked him to the suicide of the prospective juror's nephew. He states:

> The statement by Juror Hafferman connecting [Maldonado] with his [brother-in-law] in Watertown and the fact his [brother-in-law]'s son had committed suicide because of some of the things he was told by friends relating to the Maldonado case,[10] made a clear influence. Somehow [Maldonado] was intimated to be peripherally involved in the suicide of Juror Hafferman's [nephew].

Maldonado made a similar argument to the trial court at the hearing on his postconviction motions. The court rejected the argument concluding that, when considered along with his responses to the prosecutor's and the court's own subsequent questions, the statements "are simply not amenable to misconstruction or prejudice by members of the jury." In so ruling, the court noted that "the jurors were instructed to decide without prejudice and had sworn an oath to the same [effect]."

We agree with the trial court that the follow-up questioning by the prosecutor and the court diffused any possible potential for prejudice that

[10] Maldonado's counsel does not explain this reference to "his case," nor does he supply any record reference to support the statement.

otherwise might have stemmed from Hafferman's initial comments, for—contrary to the major premise of his argument—that questioning plainly established that Maldonado had nothing whatever to do with Hafferman's nephew's suicide. We reject Maldonado's argument that Hafferman's initial comments denied him the right to an impartial jury. We are satisfied that, taken in context, Hafferman's comments had no prejudicial effect on the jury as finally selected.[11]

V. Newly Discovered Evidence

Maldonado argues that he is entitled to a new trial based on newly discovered evidence because his mother, Hortencia Quintero, "testified incorrectly at trial." At trial, Quintero testified that at approximately 1:30 a.m. on April 3, 1994—about two hours before Borchardt's murder—she saw Maldonado and Vest together in the living room of her home. At the hearing on Maldonado's postconviction motions, Quintero stated that she was mistaken in her trial testimony and had since realized that she had been out with a friend on the night in question, did not arrive home until 2:15 to 2:30 a.m. and had seen Maldonado, but not Vest, at that time. Maldonado claims that this "new" evidence is "critically important evidence which helps to exonerate [him]," presumably because other evidence presented at trial indicated that Borchardt's body was discovered at approximately 3:30 a.m.

Five criteria must be satisfied before a new trial will be granted on grounds of newly discovered evidence: (1) the evidence must have come to the

[11] At several points in his argument, Maldonado refers to ***State v. Poh,*** 116 Wis.2d 510, 343 N.W.2d 108 (1983), a case dealing with impeachment of jury verdicts by, among other things, testimony of a juror that extraneous prejudicial information was improperly brought to the jury's attention during deliberations. We do not see that ***Poh*** applies to the issue before us.

defendant's knowledge after trial; (2) the defendant must not have been negligent in seeking to discover it; (3) the evidence must be material to a trial issue; (4) the testimony must not be merely cumulative to testimony introduced at trial; and (5) it must be reasonably probable that a different result would be reached on retrial. ***State v. Kaster***, 148 Wis.2d 789, 801, 436 N.W.2d 891, 896 (Ct. App. 1989). To prevail on such a motion, the defendant must establish the existence of these criteria "by clear and convincing evidence." ***State v. Brunton***, 203 Wis.2d 195, 208, 552 N.W.2d 452, 458 (Ct. App. 1996).

Maldonado's argument on this issue, in its entirety, is as follows:

> Ms. Quintero's testimony satisfies all five parts of the test. The evidence came to [Maldonado] after trial. [Maldonado] was not negligent in seeking to discover it. The evidence is material and not cumulative and it is reasonably probable a different result would have been reached had the jury heard that when Quintero came home … between 2 and 3 in the morning, [Maldonado] was home and Douglas Vest was not present. Given so many areas where the Trial Court erred, it is quite probable [that the] newly discovered evidence would have allowed for a different result.

The trial court denied Maldonado's motion, concluding that the first criterion was not met because the "new evidence" did not come to Maldonado after trial. We reach the same conclusion. Quintero testified at the postconviction hearing that she came to know that, contrary to her trial testimony, she had gone out with a friend on the night in question because "my son [Maldonado] said that I had gone out that night." And she stated that Maldonado had told her this prior to the time she testified at his trial. As the State concedes, although Quintero tempered that testimony somewhat in response to further questioning—stating that she did not recall precisely when Maldonado told her that—the trial court could reasonably conclude that Maldonado had failed to prove by clear and convincing

evidence that he was not aware, at the time of his trial, that Quintero had gone out with a friend on the night in question and had seen him at home at 2:30 a.m.[12]

By the Court.–Judgment and order affirmed.

Not recommended for publication in the official reports.

[12] Additionally, the trial court expressly found that Quintero's testimony at the postconviction hearing "lack[ed] credibility," and Maldonado has not attempted to argue that the court's finding was clearly erroneous. *See* ***State v. Terrance J.W.***, 202 Wis.2d 496, 501, 550 N.W.2d 445, 447 (Ct. App. 1996).