COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1648-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SALLY ANN MINNIECHESKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: EARL SCHMIDT, Judge. *Affirmed in part and reversed in part.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Sally Ann Minniecheske appeals a judgment of conviction for two counts:[1] obstructing an officer, contrary to § 946.41, STATS.,

[1] Minniecheske does not appeal her conviction for disorderly conduct, contrary to § 947.01(1), STATS.

and eluding a police officer with willful disregard to an officer's visual or audible signal, contrary to § 346.04(3), STATS. She also appeals an order denying her postconviction motions contesting her sentence and requesting a new trial.

On appeal, Minniecheske contends that: (1) insufficient evidence supports her convictions because she lacked knowledge that the officer was acting as a deputy sheriff for Shawano County; (2) her counsel was ineffective; and (3) the sentencing court erroneously exercised its discretion by basing her sentence on her constitutionally protected ideological beliefs and associations with the Posse Comitatus. Additionally, she requests that we exercise our power of discretionary reversal under § 752.35, STATS. Because we agree with Minniecheske that the evidence is insufficient to support her conviction for obstructing an officer, we reverse that portion of the judgment. We reject her remaining arguments and decline to invoke our power of discretionary reversal.

I. BACKGROUND

The State presented the following evidence. Charles Gehrman had the dual function of police chief of Tigerton and a deputy sheriff for Shawano County since 1988. On September 13, 1995, Gehrman was providing security to a crew surveying village-owned land the Minniecheske family had formerly owned. The Minniecheskes contend that they still own the land,[2] which is just outside the village limits, and which the village plans to develop into an all-terrain vehicle park. Due to previous confrontations between the surveyors and the

[2] Minniecheske testified that she and her husband, Donald Minniecheske, "have a quiet title action pending" because they do not agree that the village owns the property. In September 1996, this court affirmed the circuit court's order denying her motion to vacate a tax lien foreclosure judgment regarding the disputed property. ***In re Foreclosure of Tax Liens v. Redman***, No. 95-2938, unpublished slip. op. (Wis. Ct. App. Sept. 24, 1996).

Minniecheskes,[3] the surveyors refused to work on the property without security. The Minniecheskes' cows frequently roamed the property because unknown persons left a gate or fence open, so the village president had asked Gehrman to put the cattle back into the fenced area as necessary.

Gehrman found the cows on the property that morning. At approximately 10:45 a.m., he radioed Tammie Jo Berg, Tigerton village clerk, and asked her to call and inform the Minniecheskes that "their cattle were out again." Berg called the Minniecheskes; Donald answered, and Sally picked up an extension. Berg informed Donald that the cattle were out, and Donald told Berg that the property did not belong to the village and that Gehrman was trespassing. Then Donald said, "Do I have to bring in the armed militia?" Berg replied, "No, please remove your cattle." Sally interjected, in an agitated manner, "Can't you hear? Don just told you that this was not your property."

Based on past dealings with the Minniecheskes, Berg took Donald's statement seriously and told Gehrman that it would be wise to leave because Donald had threatened to bring in the armed militia. Gehrman replied that he would not leave because he was concerned about the surveyors' safety. Gehrman was using a village squad car that day; it had a light bar on top, two-by-two-and-a-half foot orange emblems and decals on the doors depicting the Wisconsin state seal and containing the words "Village of Tigerton Police Department." He was not in uniform but wore shorts, a sweatshirt, boots, an undercover holster, and had handcuffs inside his pocket. Gehrman thought an armed confrontation would ensue and parked his squad car perpendicular to the road into the property, thereby

[3] Surveyors had previously surveyed the land, but because the stakes were removed, it had to be resurveyed.

blocking it. He put on his bullet-proof vest, retrieved a shotgun from his trunk, and waited for Shawano County backup.

As Gehrman waited for backup, Sally arrived in a car, stopped, and exited. When Gehrman told Sally the cattle were back where they belonged, Sally began "ranting and raving" that it was not village land and that he was trespassing. Sally rambled for over four minutes, screaming as loud as she could, and at one point told Gehrman to go home and smoke his dope. Gehrman walked over to Sally's car and told her that she was under arrest, and Sally said, "I'm not under arrest." After Gehrman reached in and shut off Sally's car engine, he returned to the squad car to answer a radio call.[4] Gehrman exited the squad car to return to Sally's vehicle, and as Gehrman explained, he

> was going to shut the car off again. Her door was still open, and I ran around the door, and the door kind of bumped me because she was increasing speed, and I held out my hand, tried to reach in the car, and I couldn't, and she continued to increase speed, and in fear of being dragged underneath the vehicle, I had to jump out of the way. At one point she was pushing on me so hard I believe that the door even might have sprung open, and I ran out of the way and ran back to my squad car, and she turned and she backed into an access road that goes into the woods.

During this time, he kept telling her, "Stop, you are under arrest for disorderly conduct," but Sally kept driving and ultimately turned around in the access road and drove south down county highway M. Gehrman then got into the squad car, activated his lights and sirens, and followed her. Sally traveled as fast

[4] The sheriff's office requested a report on Gehrman's safety.

as fifty-five miles per hour and failed to stop for a stop sign. To end the chase, Gehrman passed her and blocked her path.

Sally had a different version of the events. She denied having a conversation with Berg, testified that Gehrman wore no shoes or shirt, denied yelling at Gehrman, denied that he tried to turn off her engine, and denied that Gehrman ever told her that she was under arrest. Instead, she testified that he told her that she was going to jail and that she feared for her life and "didn't know if he was going to rape me or what." Because she was so upset, she never heard the sirens or saw the flashing lights during the chase.

A jury found Minniecheske guilty on all counts. The trial court sentenced her to thirty days in jail on the disorderly conduct charge, sixty days for obstructing an officer, and six months for eluding an officer, all to run consecutively. After the trial court denied her postconviction motions, Minniecheske filed this appeal.

II. ANALYSIS

1. Sufficiency of the Evidence

Minniecheske contends that the evidence is insufficient to sustain her convictions for obstructing an officer and eluding an officer. Because the evidence is insufficient to show Minniecheske's knowledge of Gehrman's status as a deputy sheriff, we reverse the obstruction conviction. However, we affirm the conviction for eluding an officer.

Our review for sufficiency of the evidence supporting a criminal conviction is limited. It is the State's burden to prove the elements of each allegation beyond a reasonable doubt. We may not reverse a conviction "unless

the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). We do not substitute our judgment for the jury's. ***Id***. at 507, 451 N.W.2d at 757-58. The jury determines the credibility of the witnesses, resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from the evidence. ***Id***. at 503, 506, 451 N.W.2d at 756, 757. Our review is the same whether the evidence is direct or circumstantial. ***Id***. at 503, 451 N.W.2d at 756. "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we may not overturn a verdict even if we believe that the trier of fact should not have found guilt based on the evidence before it. ***Id***. at 507, 451 N.W.2d at 758.

A. Obstructing an Officer

We first address the sufficiency of the evidence to support Minniecheske's conviction for obstructing an officer. The elements of § 946.41, STATS., are: (1) the defendant obstructed the officer; (2) the officer was doing an act in an official capacity; (3) the officer was doing an act with lawful authority; and (4) the defendant knew or believed he or she was obstructing the officer while the officer was acting in an official capacity and with lawful authority. *See* ***State v. Grobstick***, 200 Wis.2d 242, 248, 546 N.W.2d 187, 189 (Ct. App. 1996); *see also* WIS J I-CRIMINAL 1766. Minniecheske's sole argument regarding her obstruction conviction is that insufficient evidence supports the fourth element, so we focus only on that element.

Because this incident occurred on land outside the village limits, the State must prove that Minniecheske knew or believed Gehrman was acting as a deputy sheriff for Shawano County where the alleged obstruction occurred. To determine if Minniecheske had knowledge, her subjective intent must be ascertained, based on the totality of the circumstances, including what she said or did, what Gehrman said or did, and any objective evidence available.[5] *See* ***State v. Lossman***, 118 Wis.2d 526, 542-43, 348 N.W.2d 159, 167 (1984); ***Grobstick***, 200 Wis.2d at 250-51, 546 N.W.2d at 190. "The accused may not have believed the deputy was acting with lawful authority, but the question is whether a jury, acting reasonably, could be so convinced that the defendant knew the officer was acting with lawful authority." ***Lossman***, 118 Wis.2d at 544, 348 N.W.2d at 168.

The State argues that the jury could reasonably infer that Minniecheske knew that Gehrman was acting as a deputy based on: (1) the

[5] As is apparent from our analysis, we reject the State's argument that under ***State v. Barrett***, 96 Wis.2d 174, 291 N.W.2d 498 (1980), Minniecheske's knowledge that Gehrman was acting in his official capacity and in his lawful authority as Tigerton police chief when he sought to arrest her is sufficient to sustain the conviction. Relying on the following language, the State argues that ***Barrett*** implicitly recognizes that there may be particular circumstances of an officer's employment which "extend his duty to act":

> If a deputy sheriff crosses the county line of his employment and if there are no circumstances of his employment extending his duty to act, then the attempt to exercise his powers as a peace officer outside of his county of employment is not within the scope of his employment.

Id. at 181, 291 N.W.2d at 501. Gehrman's dual authority, the State reasons, presents such a circumstance. We disagree.

Barrett does not address the situation in which an officer wears two hats. Significantly, the ***Barrett*** court expressed "no opinion regarding the lawful authority of a deputy sheriff to act either within or outside of his county and to make arrests or carry out the duties of his employment outside his county." ***Id***. Further, the State in ***Barrett*** conceded that the officer had no legal right or duty to perform any police functions in the county in which he made the arrest. ***Id***. at 179, 291 N.W.2d at 500. Even if Gehrman's dual status extended both his official capacity and lawful authority, the critical point is Minniecheske would need knowledge of that extension.

parties' "ongoing relationship";[6] (2) Minniecheske's "half-hearted" and "lukewarm" denial that she knew Gehrman also worked as a deputy sheriff; and (3) her fleeing Gehrman. Minniecheske contends that there is no evidence from which the jury could reasonably conclude that she knew Gehrman was acting in his capacity and under his authority as deputy sheriff of Shawano County. She points out, for example, that Gehrman never testified that she knew he was a deputy sheriff, that Gehrman never told her he was one, and that no evidence was presented that it is common knowledge village constables are deputized as sheriffs.

We agree with Minniecheske that no evidence was presented to support the inference that Minniecheske knew of Gehrman's deputy status, and based on the totality of the circumstances, *see* ***Lossman***, 118 Wis.2d at 542-43, 348 N.W.2d at 167, no jury acting reasonably could make that inference. *See* ***Poellinger***, 153 Wis.2d at 507, 451 N.W.2d at 757-58. Contrary to the State's contention, ***Lossman*** does not support its argument that sufficient evidence supports the obstruction conviction. Unlike ***Lossman***, there is no evidence "independent of the defendant's disbelieved claim of innocence, on which a reasonable jury could base its conclusion that the defendant knew, or believed, the officer was acting with lawful authority." ***Id***. at 545 n.3, 348 N.W.2d at 168 n.3.[7]

[6] Gehrman has known Minniecheske in a nonsocial relationship for 28 years and has had contact with Minniecheske numerous times since 1988 in connection with the land dispute.

[7] In her reply brief, Minniecheske argues that under § 175.40(6)(a)1-3, STATS., Gehrman acted outside his territorial jurisdiction as Tigerton police chief when he initially told Minniecheske she was under arrest for disorderly conduct on land located outside village limits. The State argues that we should not address this argument because it was not raised in the trial court or in Minniecheske's brief-in-chief on appeal. Minniecheske replies that she implicitly raised this argument in her postconviction motions and in her brief, and that, in any event, the argument is a response to the State's argument on appeal. We agree with the State that Minniecheske failed to raise the argument before the trial court and has therefore waived it. *See* ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992).

Here, there is no independent basis for the jury to infer Minniecheske had knowledge of his deputy status, nor could it reasonably infer such knowledge based on her fleeing and her testimony that she would have stopped if she had heard Gehrman say that she was under arrest.[8]

B. Eluding

Minniecheske also contends that the evidence was insufficient to support her conviction for eluding a traffic officer under § 346.04(3), STATS., which provides, in part:

> No operator of a vehicle, after having received a visual or audible signal from a traffic officer, *or marked police vehicle*, shall knowingly flee or attempt to elude any traffic officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle. (Emphasis added.)

Minniecheske seems to argue that under § 346.04(3), STATS., the State must show that she knowingly fled a deputy sheriff and fled a police vehicle with markers and decals signifying this status. Based on this contention, Minniecheske reasons that the definition of "marked police vehicle" is ambiguous. She further argues that under the rule of lenity and consistent with legislative intent, which she states obviously was to prevent motor vehicle operators from fleeing officers that the operator knew or should have known had the lawful authority to stop them, "marked police vehicle" means a police vehicle with markings and decals signifying Gehrman's status as a deputy sheriff. Any other

[8] The State also suggests that Minniecheske's counsel's testimony at the ***Machner*** hearing that village constables are routinely deputized by county sheriffs supports the obstruction conviction. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979). Such evidence was not before the jury and provides no basis for an inference of Minniecheske's knowledge. *See* ***id***.

reading, she insists, would be absurd. We are not persuaded. Contrary to Minniecheske's contention, under § 346.04(3), the State does not have to show that she knowingly fled a Shawano County deputy, which is necessary to prove the fourth element under § 946.41, STATS. We discern no basis to read an element of § 946.41, obstructing an officer, into § 346.04(3), eluding an officer. Her argument is better addressed to the legislature.

The statute is written in the disjunctive and contains *two distinct alternative elements* of the offense. ***State v. Oppermann***, 156 Wis.2d 241, 244-46, 456 N.W.2d 625, 627 (Ct. App. 1990). Under the statute, the State must show that the "defendant received a signal *either* from a police officer *or* from a marked police vehicle and that the defendant knowingly attempted to flee the officer." ***Id***. (emphasis added); *see also* WIS J I-CRIMINAL 2630. "[I]f a citizen does not observe that it is an 'officer' pursuing the person, that citizen will still be held to knowledge if the vehicle has decals or other markers identifying the auto as a law enforcement vehicle." ***Oppermann***, 156 Wis.2d at 244, 456 N.W.2d at 627. Here, the evidence is sufficient to show that Minniecheske knowingly fled a marked police vehicle after receiving a visual or audible signal.

A "marked police vehicle" is one having decals or other markers identifying the automobile as a law enforcement vehicle. ***Id***. at 244, 456 N.W.2d at 626-27. The record contains evidence that two-by-two-and-a-half foot markers reading Tigerton Police Department were on the side of the orange and brown vehicle. The record also contains evidence to suggest that Minniecheske saw the markers, as the squad car was parked perpendicular to the road when Minniecheske drove up. While Minniecheske testified that she did not hear or see the vehicle's sirens and lights because she was upset, the jury, as the final arbiters of witness credibility, could choose to disbelieve her. *See* ***Poellinger***, 153 Wis.2d

at 503, 506, 451 N.W.2d at 756, 757. It makes no difference whether she knowingly fled after receiving a signal from a traffic officer, let alone a Shawano County officer, because the jury could convict her on the alternate basis of knowingly fleeing a marked police vehicle.[9] *See* ***Oppermann***, 156 Wis.2d at 244, 456 N.W.2d at 627. Because sufficient evidence supports her conviction for eluding an officer, we will not disturb it on appeal.

2. Ineffective Assistance

Next, Minniecheske contends that her counsel was ineffective for: (1) discussing the Posse Comitatus and failing to request individual voir dire; (2) failing to file motions in limine to exclude references to the Posse at trial; (3) failing to object to and also soliciting damaging testimony which was irrelevant, improper hearsay and/or unduly prejudicial; and (4) failing to utilize Gehrman's May 7, 1996, testimony about his conversation with Berg on September 13. While her trial counsel's performance was questionable, we cannot conclude that his strategy was unreasonable under the circumstances. Therefore, we reject Minniecheske's ineffective assistance argument.

[9] If Minniecheske is arguing that the statute requires that the marked vehicle contain a Shawano County sheriff's department decal, she cites no authority for that proposition, and we reject the argument on that basis. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995). Further, her reliance on ***State v. Van Meter***, 72 Wis.2d 754, 242 N.W.2d 206 (1976), for her knowledge argument is misplaced. In ***Van Meter***, the issue was whether the defendant could be convicted in both Portage and Wood Counties under § 346.04(3), STATS., when Portage County officials chased her until she crossed into Wood County, where Wood County officials then pursued her. ***Id***. at 756, 242 N.W.2d at 207. In concluding that double jeopardy did not bar both prosecutions, the ***Van Meter*** court focused on whether the defendant received a signal from a traffic officer, not whether a signal was received from a marked squad car. Minniecheske's argument ignores the alternative elements of § 346.04(3) set forth in ***State v. Oppermann***, 156 Wis.2d 241, 244-46, 456 N.W.2d 625, 627 (Ct. App. 1990).

To establish that she did not receive effective assistance of counsel, Minniecheske must prove that her trial counsel's conduct was deficient and that the deficient performance prejudiced her defense. *See* ***State v. Moats***, 156 Wis.2d 74, 100-01, 457 N.W.2d 299, 311 (1990). Minniecheske must overcome a strong presumption that her counsel acted reasonably within professional norms. *See* ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990). The performance and prejudice prongs present mixed questions of fact and law. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not disturb the trial court's factual findings unless they are clearly erroneous, but the ultimate determination of whether counsel's performance was deficient and prejudicial are questions of law we review de novo. *See* ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 715 (1985).

An attorney's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 847 (quoting ***Strickland***, 466 U.S. at 687). Even if Minniecheske can show that her counsel's performance was deficient, she is not entitled to relief unless she can also prove prejudice. *See* ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 848. To prove prejudice, she must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). A reasonable probability is a probability sufficient to undermine our confidence in the outcome. *See* ***id***. In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697.

Counsel's strategic decisions do not constitute deficient performance unless they are not rationally based on the facts and the law. *See* ***State v. Elm***, 201 Wis.2d 452, 464-65, 549 N.W.2d 471, 476 (Ct. App. 1996). We will not hold counsel ineffective based on strategic decisions which in hindsight may not have been the most appropriate. *See* ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). Here, we conclude that counsel's strategic decisions were rationally based on the facts and the law.

At the ***Machner*** hearing, Minniecheske's counsel testified that his trial strategy was to show that due to the village's continuing problems with the Minniecheske family, Gehrman overreacted to a sixty-two-year-old grandmother on her way to the doctor:

> [M]y strategy was to show that the chief of police as an arm of the village was attempting to harass Mrs. Minniecheske by making unfounded arrests against her and … running around hollering … about a bulletproof vest and maybe the militia coming down, and driving this poor lady out of her mind so she had to leave the scene, in my opinion, which she did.

Indeed, her counsel began with this in opening, noting that the "high level of emotion" between the Posse and the village sparked the incident between Minniecheske and Gehrman and that Gehrman did not follow proper police procedures. During closing argument, her counsel compared Gehrman to deputy Barney Fife from *The Andy Griffith Show* and characterized Gehrman as someone who overreacted to a perceived threat of the armed militia and was "looking for trouble, and it's how trouble starts." He argued that the "foolishness" about the militia was a "cooked up story to put fear in your minds that … he had a right to be afraid." This defense was entirely consistent with Minniecheske's version of the events, and his tactical decisions during trial flowed from this reasonable

defense. While perhaps his tactical decisions may appear in hindsight not to have been the most appropriate, they were reasonable strategic decisions and, as such, are virtually unchallengeable. *See* ***Strickland***, 466 U.S. at 688-91.

First, as the trial court and Minniecheske's attorney-expert noted, a prudent attorney would inquire about the jury's biases and knowledge of the Posse to determine if the jurors could be fair and impartial. Minniecheske also insists that individual voir dire was necessary, but her counsel asked the jury panel if they were aware of the Posse. Five jurors raised their hands, and counsel then asked each juror if they had any bias or prejudice toward the Posse. The five jurors who testified that they had knowledge about the Posse were not part of the final jury panel and were apparently struck.[10] Second, counsel's failure to file motions in limine to keep references to the Posse out of the trial was consistent with his trial strategy that Gehrman's "foolishness" and overaction stemmed from the village's ongoing dispute with the Posse. Minniecheske's expert likewise testified that establishing Minniecheske as part of the Posse could establish Gehrman's bias against Minniecheske and support the argument that Gehrman overreacted.

Third, counsel's failure to object to the admission of evidence and his decision to elicit evidence was also consistent with his strategy. Minniecheske argues that her counsel should have lodged a hearsay objection to the alleged threat Donald made to Berg, but testimony regarding that alleged threat, in conjunction with Minniecheske's denial that such threat was ever made, showed that Gehrman and Berg overreacted to a discussion about roaming cattle and let

[10] The record does not indicate which jurors were struck, but the record lists the jurors who were sworn in, and the panel did not include the five who testified that they knew about the Posse.

their bias imply such a threat. Counsel's decision not to object to other evidence, including Minniecheske's association with The Life Science Church, her criminal record, and repeated conflicts between the Minniecheskes and the village were also consistent with the defense strategy.

Finally, Minniecheske complains about her counsel's failure to impeach Gehrman with what she regards as a prior inconsistent statement, a statement Gehrman gave on May 7, 1996, at an injunction hearing in which Gehrman discussed the conversation between himself and Berg. She insists that because the case hinged on credibility, her counsel should have impeached Gerhman to question his credibility. Her counsel testified that he regarded any inconsistencies between Gehrman's trial testimony and his previous statement as trivial and that in his opinion, the jury would have regarded any impeachment based on this statement as nit-picking. We agree. We will not second guess reasonable strategic decisions on appeal. *See* ***Elm***, 201 Wis.2d at 464-65, 549 N.W.2d at 476. Minniecheske also argues that her counsel should have used the statement as substantive evidence and that it would have been admissible for the truth of the matter asserted pursuant to § 908.01(4)(a), STATS. She fails to develop this argument, however, and we decline to do so for her. *See* ***Shannon v. Shannon***, 150 Wis.2d 434, 446, 442 N.W.2d 25, 31 (1989).

Even if her counsel's specific performance was deficient, Minniecheske has failed to prove that her attorney's decisions prejudiced her. She does argue that if her counsel had impeached Gehrman with his previous statement, the jury could "easily have found him … non-credible," and the result of the proceeding would have been different. We do not agree. Because any inconsistencies were trivial or insignificant, we are not persuaded the jury would have discounted Gehrman's testimony and thus changed the trial's result. Aside

from this contention, she does not further explain how the result of the proceeding would have been different but for her counsel's alleged errors. Without establishing prejudice, Minniecheske cannot prevail on her ineffective assistance of counsel claim. *See* ***Strickland***, 466 U.S. at 697.

3. Discretionary Reversal Under § 752.35, STATS.

Next, Minniecheske requests that we exercise our power of discretionary reversal under § 752.35, STATS. Section 752.35 allows us to reverse a judgment if the real controversy has not been fully tried or for any reason it is probable that justice has miscarried. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 16-17, 456 N.W.2d 797, 804 (1990).[11] To reverse on grounds that a miscarriage of justice has occurred, we must be satisfied that there is a substantial probability of a different result on retrial. ***Id***. at 19, 456 N.W.2d at 805. In contrast, to reverse when the real controversy has not been fully tried, we need not find a different result at a new trial. ***Id***.

Minniecheske first argues that justice was miscarried because her "conviction stems chiefly from the fact that her case was handled by an attorney who was either utterly incompetent or utterly cowered by the state." She further insists that the result of the proceeding would have been different if a competent attorney had defended her, rather than one who was "sleeping at the switch." Because her counsel was incompetent, Minniecheske argues, she was convicted

[11] Section 752.35, STATS., provides, in pertinent part:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record ….

based on her past conflicts with police and her associations. Minniecheske's argument for discretionary reversal simply recasts the ineffective assistance argument we have already rejected. Moreover, there was ample evidence in the record, aside from her past conflicts and associations, to convict her of eluding an officer.

Minniecheske also maintains that the real controversy was not fully tried because neither attorney told the jury during closing arguments that knowledge was an element of obstructing and eluding an officer. In other words, she argues, the jury was unaware that knowledge was an element because the attorneys did not point that out during closing arguments. Thus, Minniecheske reasons, the jury did not have the "slightest knowledge" that to convict her for obstruction and eluding, it had to find that Minniecheske knew that Gehrman was acting in his role as deputy sheriff. This argument is meritless for two reasons. First, as indicated, § 346.04(3), STATS., does not require the State to show Minniecheske had knowledge that Gehrman was acting in his role as deputy sheriff. Further, it erroneously presumes that the jury receives its instructions of the law from the attorneys during closing argument.

A jury's knowledge of the law comes from the jury instructions, not from the attorney's closing arguments. The jury was properly instructed on the elements of both obstructing and eluding an officer. Jurors are presumed to follow instructions. *See* ***Poellinger***, 153 Wis.2d at 507, 451 N.W.2d at 758. Minniecheske's trial counsel did not object to the instruction, and she does not argue on appeal that the jury instructions were erroneous.[12] Thus, the content of

[12] While Minniecheske argued in her postconviction motion brief that her counsel was ineffective for failing to object to the jury instructions, she did not raise that argument on appeal.

the attorney's closing arguments provide no basis to determine whether the jury was properly instructed.

4. Sentencing

Finally, Minniecheske contends she was improperly sentenced based on her ideological beliefs and associations. She argues that the trial court erroneously exercised its discretion when it based her sentence on a "preconceived connection" between her "difficult personality" and her ideological beliefs and failed to consider the gravity of the offense and the public's safety.

Our review of a sentence is limited to whether the circuit court erroneously exercised its discretion. ***State v. Macemon***, 113 Wis.2d 662, 667, 335 N.W.2d 402, 405 (1983). There is a strong public policy against interfering with the trial court's sentencing discretion, and we assume that its decision was reasonable. ***State v. Littrup***, 164 Wis.2d 120, 126, 473 N.W.2d 164, 166 (Ct. App. 1991). An erroneous exercise of discretion will be found only if the sentence is excessive, unusual, and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). To show that her sentence is excessive, Minniecheske must meet the heavy burden of showing that the record contains an unreasonable or unjustifiable basis for the sentence. *See* ***Elias v. State***, 93 Wis.2d 278, 281-82, 286 N.W.2d 559, 560 (1980).

The three primary factors a sentencing court should consider in sentencing are the gravity of the offense, the defendant's character and rehabilitative needs, and the need to protect the public. ***State v. Echols***, 175 Wis.2d 653, 682, 499 N.W.2d 631, 640 (1993). Elements of these factors include

a record of criminal offenses; history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the defendant's demeanor at trial; the defendant's age, educational background and employment record; and the defendant's remorse, repentance and cooperativeness. ***State v. Jones***, 151 Wis.2d 488, 495, 444 N.W.2d 760, 763 (Ct. App. 1989). The weight given to each factor is particularly within the sentencing court's discretion. ***State v. Wickstrom***, 118 Wis.2d 339, 355, 348 N.W.2d 183, 192 (Ct. App. 1984).

There are limits to the court's sentencing discretion. For example, a sentence may not be based on constitutionally invalid grounds such as activity or beliefs protected by the First Amendment. *See* ***State v. J.E.B.***, 161 Wis.2d 655, 663, 469 N.W.2d 192, 195 (Ct. App. 1991). However, if there is a reliable showing of an identifiable and sufficient link or relationship between the protected constitutional activity and the criminal conduct, a sentencing court may consider a defendant's associations and belief system in sentencing. ***Id***. at 671-72, 469 N.W.2d at 199-200; *see also* ***State v. Fuerst***, 181 Wis.2d 903, 912-14, 512 N.W.2d 243, 246 (Ct. App. 1994).

The sentencing transcript, when read as a whole, reflects that the sentencing court focused on Minniecheske's disrespectful attitude, lack of cooperativeness, lack of remorse, and potential for rehabilitation. The sentencing court expressed concern about her character as reflected in the presentence report. Additionally, the sentencing court articulated its concern that Minniecheske believes she can violate laws without consequence and that she believes she is "above the law." In sentencing Minniecheske, the court stated: "So I have to sentence you to jail. That's all that's available to the Court. You are not going to respond to anything else, so I have to put you in jail. We can't have people

running around disobeying the laws."[13] The sentencing court could have properly decided to give more weight to her character and rehabilitative needs. *See* ***Wickstrom***, 118 Wis.2d at 355, 348 N.W.2d at 192.

The sentencing court did not base its sentence on Minniecheske's beliefs and associations. While the court referred to her association with the Posse, the comments it made were in the context of considering personal deterrence and whether efforts at rehabilitation would be successful. *See* ***id***. at 356, 348 N.W.2d at 192. Further, the court inferred that Minniecheske's attitude was one of ignoring the law and that she had very little potential to be rehabilitated. As the court noted, her expression of this belief bears directly on the possibility of rehabilitation. *See* ***id***. at 356-57, 348 N.W.2d at 192. The sentencing court's comments relate to proper sentencing considerations and reflect a proper exercise of discretion.

By the Court.—Judgment and order affirmed in part and reversed in part.

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

[13] During sentencing, the court was very patient with Minniecheske when she interrupted the court on several occasions. Finally, the trial court asked her to stop interrupting: "Please don't interrupt the court, Ma'am. I'm not going to accept it, okay? You think that you can just butt in any time." Again, Minniecheske interrupted and replied, "No." Minniecheske's conduct during sentencing reflects her disrespect for the criminal justice system and her belief that she is above the law.