COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1960-CR **Cir. Ct. No. 2011CF1262**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARIA CASTILLO-DOMINGUEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: JULIE GENOVESE, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Maria Castillo-Dominguez appeals a judgment of conviction for first-degree reckless homicide, *see* WIS. STAT. § 940.02(1) (2011-12), and an order denying her motion for postconviction relief. Castillo-Dominguez contends that the circuit court erred in denying her motion to suppress

incriminating statements made by her to law enforcement officers during a noncustodial interrogation. She also contends that she is entitled to a new trial on the basis of ineffective assistance of counsel. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Castillo-Dominguez was charged with first-degree reckless homicide following the death of her three-year-old son, L.A.V. The complaint alleged that on June 30, 2011, L.A.V. was admitted to the hospital with a subdural hematoma, dozens of hemorrhages in each eye, and bruising on L.A.V.'s back, left arm, left leg, left hip, and under his chin. The complaint alleged that L.A.V. died on July 3 from "complications following abusive head trauma with subdural hematoma." The complaint further alleged that Castillo-Dominguez admitted to law enforcement that she had hit L.A.V. across the face and "pushed him against the wall … hard," and that shortly after that, L.A.V. complained that his head hurt, began vomiting, and became unresponsive.

¶3 Prior to trial, Castillo-Dominguez moved the circuit court to suppress incriminating statements made by her to law enforcement officers on July 1, 2011, during a five and one-half hour interrogation at the hospital where L.A.V. was admitted, arguing in part that her statements were involuntary.[1] Specifically, Castillo-Dominguez told detectives that she "shoved/threw [L.A.V.]

[1] Castillo-Dominguez also moved the circuit court to suppress her statements on the basis that they were obtained in violation of various other constitutional rights. The circuit court denied her motion in this regard, concluding that Castillo-Dominguez was not in custody at the time she made the statements. Castillo-Dominguez has abandoned any challenge of that ruling on appeal.

… [a]gainst the wall … in the living room." Castillo-Dominguez repeated to detectives that she had "shoved/threw" L.A.V. who then "hit the wall" in a manner she described as "a hard blow." Following evidentiary hearings, the court concluded that Castillo-Dominguez's statements were voluntary under the totality of the circumstances and denied the motion.

¶4 The case was tried before a jury. Relevant to this appeal, was testimony regarding statements made by Castillo-Dominguez in Spanish, which were translated by an unidentified interpreter. Dr. Thomas Brazelton, a pediatric intensive care physician, performed the final examination of L.A.V. and pronounced L.A.V. to be clinically and legally deceased. Dr. Brazelton testified that using an interpreter, he notified Castillo-Dominguez by telephone of L.A.V.'s death. Dr. Brazelton testified that upon hearing that L.A.V. had died, Castillo-Dominguez "became very, very emotional and tearful" and that Castillo-Dominguez "exclaimed many times, I killed my baby, I killed my baby." Dr. Brazelton testified that he was "impressed with how quickly and passionately … and how many times [Castillo-Dominguez] said I killed my baby." On cross-examination, Dr. Brazelton testified that he "[did not] remember exactly what [Castillo-Dominguez's] words were," but that he remembered her saying that she had killed L.A.V. based on both his knowledge of Spanish and what the interpreter translated to him.

¶5 Tina Robertson, a nurse, testified that she was present when Dr. Brazelton notified Castillo-Dominguez that L.A.V. was brain dead. Robertson testified that after Castillo-Dominguez was informed of L.A.V.'s condition, Castillo-Dominguez "repeated three times … I just killed my baby." Robertson testified that she did not understand Spanish, but that she heard what the interpreter translated Castillo-Dominguez as having said.

¶6 A jury found Castillo-Dominguez guilty. Castillo-Dominguez filed a motion for postconviction relief in which she sought a new trial on the basis of ineffective assistance of counsel. The circuit court denied Castillo-Dominguez's motion. Castillo-Dominguez appeals.

DISCUSSION

¶7 Castillo-Dominguez contends that the circuit court erred in denying her pretrial motion to suppress incriminating statements, and in denying her postconviction motion for a new trial based on alleged ineffective assistance of trial counsel. We address each contention in turn below.

A. Suppression of Incriminating Statements

¶8 Castillo-Dominguez contends that the circuit court erred in denying her motion to suppress incriminating statements that she made to law enforcement, which she asserts were not voluntary. As summarized above, Castillo-Dominguez told detectives during a noncustodial interrogation that she "shoved/threw [L.A.V.] … [a]gainst the wall … in the living room," and that L.A.V. had "hit the wall" in a manner that she described as "a hard blow."

¶9 We review a circuit court's decision resolving a motion to suppress statements under the following two-part standard of review: we will uphold the circuit court's factual findings unless those findings are clearly erroneous, but review *de novo* whether those facts warrant suppression under the applicable law. ***State v. Hampton***, 2010 WI App 169, ¶23, 330 Wis. 2d 531, 793 N.W.2d 901. The facts surrounding Castillo-Dominguez's statements are not disputed. We, therefore, focus our analysis on whether suppression is warranted based upon those facts.

¶10 "Where a defendant raises a voluntariness challenge, the State must prove by a preponderance of the evidence that the statements made by the defendant were voluntary." ***State v. Lemoine***, 2013 WI 5, ¶17, 345 Wis. 2d 171, 827 N.W.2d 589. "A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation which the pressures brought to bear on the defendant by representatives of the State exceed the defendant's ability to resist." ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407.

¶11 The determination of whether a defendant's statements were voluntary is made based on the totality of the circumstances, taking into account the facts surrounding the interview and balancing the defendant's relevant personal characteristics with the pressures imposed by the police. ***Id.***, ¶38. Our supreme court explained in ***Hoppe*** that the personal characteristics of the defendant that we consider "include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement." ***Id.***, ¶39. Examples of police pressures and tactics that we balance against the defendant's personal characteristics can include:

> the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination.

Id. We must also keep in mind "that the amount of police pressure that is constitutional is not the same for each defendant." ***Id.***, ¶40.

¶12 In assessing the totality of the circumstances, we first examine Castillo-Dominguez's relevant personal characteristics. *See* ***id.***, ¶39. Castillo-

Dominguez asserts that at the time of the interview, the following five personal characteristics made her susceptible to police pressure: (1) she had been awake for twenty-four hours when she made the statements; (2) she had learned "just prior to police interviewing her" that "doctors did not think [L.A.V.] was going to survive" and she was "distraught" over L.A.V. when she made the statements; (3) was twenty-two years old at the time and she had only nine years of schooling; (4) she did not speak English and "had some difficulty reading in Spanish"; and (5) she had limited prior experience with law enforcement.

¶13 Castillo-Dominguez places much emphasis on her mental state during the interview, which she describes as "fragile … and desperat[e]." The transcript of the interview shows that Castillo-Dominguez cried at various times during the interview, though not throughout the entire interview.[2] The court found that during the interview Castillo-Dominguez was "clearly upset by the fact that [L.A.V.] was injured." However, the court found that Castillo-Dominguez was nevertheless "articulate" during the interview, was able to provide detectives with varying explanations as to how L.A.V. was injured. Castillo-Dominguez does not dispute that she generally answered questions appropriately and in detail. Castillo-Dominguez also points to the fact that she could not speak English. However, there is no indication that her language barrier interfered with her ability to communicate with officers. Detective Gloria Reyes' native language is Spanish and throughout the interview, Detective Reyes and Castillo-Dominguez communicated together solely in Spanish.

[2] A video recording of the interview is not part of the record on appeal.

¶14 Castillo-Dominguez points to her limited education and the fact that she did not work in a managerial position. However, she does not point to any facts showing that she possessed anything less than average intelligence. Castillo-Dominguez, who was twenty-two when L.A.V. died, also points to her age. Our supreme court has recognized the importance of age in determining whether a confession is voluntary. *See* ***In re Jerrell C.J.***, 2005 WI 105, ¶¶25-26, 283 Wis. 2d 145, 699 N.W.2d 110. However, age is generally a more important factor when the defendant is a minor. *See* ***id.***, ¶26. Finally, Castillo-Dominguez points to her limited experience with law enforcement. We agree that this weighs in favor of her susceptibility to police pressure.

¶15 We next turn to the pressures imposed by police during the interview. *See* ***Hoppe***, 261 Wis. 2d 294, ¶38. Castillo-Dominguez argues that although the detectives were not "overtly aggressive or oppressive" in their tactics when questioning her, the following tactics were nevertheless coercive: (1) detectives questioned Castillo-Dominguez for nearly five hours before Castillo-Dominguez made the incriminating statements at issue; (2) detectives did not "offer[] to stop the questioning so that [Castillo-Dominguez] could go see [L.A.V.]"; (3) detectives "cause[d] her to believe that admitting that she caused L.A.V.'s injuries would save his life" even though officers were aware that doctors did not expect L.A.V. to survive; and (4) she was not advised of her rights to remain silent or to an attorney. We are not persuaded.

¶16 Castillo-Dominguez points to the length of the interview and the fact that detectives did not stop the interview to allow her to see L.A.V. The interview took place during the day in the "comfortable hospital family room" in the hospital where L.A.V. was being treated. Castillo-Dominguez does not direct this court to a time in the interview where she asked detectives to stop the interview so she

could be with L.A.V., and she does not develop an argument that the length and circumstances of this interview were unduly coercive.

¶17 Castillo-Dominguez asserts that detectives led her to believe that if she admitted to causing L.A.V.'s injuries, L.A.V. would be saved. The circuit court found, however, that the detectives "tried a number of ways to convince her to tell them what happened, arguing that she would feel better if she disclosed what happened …. They emphasized the need to tell the truth." Certain portions of the interview relied upon by Castillo-Dominguez support the court's determination. During the first 90 minutes of the interview, Detective Reyes told Castillo-Dominguez, "I'm sure that I can help you, but we need the truth," and that "if we don't know the truth, we cannot help you." Later, Detective Reyes told Castillo-Dominguez that, "It's in your hands," after telling her it was "very important" for her to start telling them about how L.A.V.'s injuries really occurred. Castillo-Dominguez points to two occasions in particular in support of her assertion that detectives led her to believe that by confessing to causing L.A.V.'s injuries, L.A.V. would live. Approximately three hours into the interview, detectives told Castillo-Dominguez "we can still fix this … [L.A.V.] is still here with us," and "we have to know what happened. We can still help and fix this." However, we conclude that these statements by the detectives could not reasonably be interpreted as the detectives telling Castillo-Dominguez that L.A.V. would live if she confessed to causing L.A.V.'s injuries. Rather, it appears to us that the detectives are telling Castillo-Dominguez that she could give them information that would be valuable to L.A.V.'s treatment.

¶18 Finally, Castillo-Dominguez points to the fact that she was not advised of her rights to remain silent or to an attorney. ***Miranda*** warnings were not required in this case, since the circuit court's determination that she was not in

custody is not before us on appeal, but the lack of warning is nevertheless relevant in determining the voluntariness of a defendant's statements to police. ***Lemoine***, 345 Wis. 2d 171, ¶33.

¶19 Turning to a consideration of all the factors in their totality, Castillo-Dominguez argues that when her "fragile state and desperation over the circumstances" are balanced against the detectives' coercive tactics, her ability to end the questioning was overcome and her statements were, therefore, not voluntary. However, we agree with the circuit court that the tactics of the police in this case did not overcome Castillo-Dominguez's will or her ability to resist. The interview took place in what the circuit court found was the "comfortable hospital family room." With her throughout most of the interview was her younger child, whom she was permitted to care for and feed. While the interview was lengthy, Castillo-Dominguez does not direct this court to any point in the interview where she asked for it to stop. She also does not direct this court to any time during the interview that she asked to be with L.A.V. but was denied. The court found that Castillo-Dominguez was "clearly upset" during the interview, and she told detectives at one point that she would take the blame if it would help her son. However, the court found that detectives "were clear with [Castillo-Dominguez] that they simply wanted the truth." Under the totality of the circumstances, we conclude that the circuit court properly denied her motion to suppress.

B. Postconviction Motion for New Trial Based on Ineffective Assistance of Counsel

¶20 Castillo-Dominguez contends that the circuit court erred in denying her postconviction motion for a new trial based on the alleged ineffective assistance of her trial counsel.

¶21 To establish ineffective assistance of counsel, Castillo-Dominguez bears the burden of proving that counsel's performance was deficient and that such performance prejudiced her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove that counsel's performance was deficient, the defendant must point to specific acts or omissions that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." ***Id.*** Because a defendant must show both deficient performance and prejudice, an appellate court need not consider one prong if the defendant has failed to establish the other. ***State v. Chu***, 2002 WI App 98, ¶47, 253 Wis. 2d 666, 643 N.W.2d 878. Whether counsel's performance was deficient or prejudicial are questions of law that we determine *de novo*. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694.

¶22 Castillo-Dominguez asserts that her trial counsel was ineffective for four reasons: (1) failing to object to testimony by Dr. Brazelton and Robertson regarding statements made by Castillo-Dominguez; (2) failing to effectively cross-examine Florencio Ramirez, Castillo-Dominguez's boyfriend whom she lived with at the time of L.A.V.'s injuries; (3) failing to refresh the recollections of two defense witnesses; and (4) failing to call a defense witness who would have given testimony that contradicted the testimony of Ramirez.

1. Testimony of Dr. Brazelton and Robertson

¶23 As summarized above, Dr. Brazelton testified at trial that after he informed Castillo-Dominguez that L.A.V. had died, Castillo-Dominguez "became

very, very emotional and tearful" and that, as translated by the interpreter, Castillo-Dominguez "exclaimed many times I killed my baby, I killed my baby." On cross-examination, Dr. Brazelton testified that although he could not recall Castillo-Dominguez's exact words, he understood her to be saying that she had killed L.A.V. based on both what the interpreter was saying and Dr. Brazelton's knowledge of Spanish. Robertson similarly testified that through an interpreter, she heard Castillo-Dominguez repeat three times "I just killed my baby" after learning that L.A.V. had died.

¶24 Castillo-Dominguez asserts that her trial counsel failed to object to the testimony of Dr. Brazelton and Robertson repeating statements made by Castillo-Dominguez through a translator, on the basis that they were inadmissible double hearsay. Specifically, Castillo-Dominguez argues that: (1) the testimony through a translator was hearsay because the translator was not Castillo-Dominguez's agent; and (2) the words Dr. Brazelton testified he heard did not mean, "I killed my baby." We address each argument in turn.

¶25 "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3) (2015-16). We have stated that generally when a non-native defendant speaks through an interpreter, the interpreter generally acts as the defendant's agent, ***State v. Robles***, 157 Wis. 2d 55, 61-63, 458 N.W.2d 818 (Ct. App. 1990), and "the statements of the translator [are] regarded as the statements of the [defendant] without creating an additional layer of hearsay. Like any other out-of-court statement, the translated statements are admissible—if qualified by an exception to the hearsay rule—without calling the translator as a witness." ***State v. Patino***, 177 Wis. 2d 348, 370-71, 502 N.W.2d 601 (Ct. App. 1993). In some instances, however, the facts will negate the agency

relationships, such as, for example, when the interpreter is unqualified, harbors a motive to falsify, or gives an inaccurate translation. ***Robles***, 157 Wis. 2d at 61-62.

¶26 Relying on ***Robles***, Castillo-Dominguez argues that before a translator can be considered an agent of a defendant, the circuit court must first determine that the translator is qualified, that the translator does not have a motive to falsify, and that the translation is accurate. Castillo-Dominguez argues that her trial counsel failed to ask the circuit court to address these factual issues and that if trial counsel had pursued the topic, the court could not have made sufficient factual findings because the identity of the translator was unknown.

¶27 Castillo-Dominguez misreads ***Robles***. In ***Robles***, we stated that "[a]bsent evidence to the contrary, a suspect's choice to communicate through an interpreter [makes the interpreter] the suspect's agent." ***Id.*** at 63. Thus, unless there is evidence that would negate the agency's relationship, we presume that the interpreter is the defendant's agent.

¶28 Castillo-Dominguez points out that at trial she testified that she did not state "I killed my baby" after Dr. Brazelton informed her of L.A.V.'s death. She argues that the discrepancy between what Dr. Brazelton and Robertson testified they heard her say through the interpreter and her denial that she said that creates a doubt as to the accuracy of the translation negates the presumption of an agency relationship between herself and the unknown interpreter, and that her trial counsel should have objected to the admission of Dr. Brazelton and Robertson's testimony on hearsay grounds. However, the interpreter is presumed to be her agent. To overcome this presumption, Castillo-Dominguez needs to point to credible evidence negating the agency relationship. *See* ***id***. The only evidence proffered by Castillo-Dominguez is her own after-the-fact recollection of what she

said. This raises a preliminary credibility question that the circuit court must resolve to address the admissibility of the translation evidence. *See* WIS. STAT. § 901.04(1) (2015-16). The circuit court implicitly resolved this preliminary credibility issue against Castillo-Dominguez and we defer to that determination.

¶29 Castillo-Dominguez does not direct this court to any other evidence that would negate the presumed agency relationship between her and the interpreter. As we stated above, in the absence of such evidence, the interpreter is treated as her agent. Accordingly, we conclude that a hearsay objection to the testimony of Dr. Brazelton and Robertson would have been meritless. Trial counsel's performance was, therefore, not deficient, as counsel cannot be faulted for failing to make an objection that would have been meritless. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶30 Castillo-Dominguez also contends that her trial counsel was ineffective because trial counsel did not take affirmative steps to inform the jury that Dr. Brazelton's testimony as to the words he himself heard Castillo-Dominguez state in Spanish after learning that L.A.V. died do not literally mean "I killed my baby." Castillo-Dominguez argues that counsel's failure to do so "allowed the jury to believe that [she] confessed" to causing L.A.V.'s injuries.

¶31 On cross-examination, Dr. Brazelton testified that he understands Spanish and that he understood Castillo-Dominguez to have said, "I killed my baby" based on both his knowledge of Spanish and the interpreter's translation. Dr. Brazelton testified that he could not "remember exactly what [Castillo-Dominguez's] words were," but that he recalled her saying "Y-o l-e m-a-t-o … with an accent over the O."

¶32 At the ***Machner*** hearing, Castillo-Dominguez's trial counsel, a native Spanish speaker, testified that "Yo le mato," does not "literally" mean "I just killed my baby." Counsel testified that he did not "think there is a comprehensible or a literal [translation] that would be comprehensible or … grammatically correct." Counsel testified that "I killed my baby" is stated "Yo mate mi bebe" in Spanish.

¶33 Trial counsel testified that he was surprised when Dr. Brazelton stated in Spanish the words he remembered Castillo-Dominguez saying. Counsel explained why he did not draw attention to Dr. Brazelton's recollection of the words Castillo-Dominguez stated: "I interpreted it as being grossly bad Spanish. I didn't want to give [Dr. Brazelton] an opportunity to try to correct himself or maybe change the words to fit more—the context a little bit better," and "[a]t the moment I put it … in the category of a little nugget that I would save for later if I needed it." Counsel further explained that "Dr. Brazelton came off as a very strong witness for the State, and toward the end of my cross-examination I felt as though I had accomplished my goal with [Dr. Brazelton] in getting him to concede … that the window of time [when L.A.V. was injured] could have been up to 24 hours before [L.A.V.] was presented to the hospital" when Dr. Brazelton's testimony on direct examination was that L.A.V. was injured twelve to fourteen hours before L.A.V. was taken to the hospital.

¶34 "Counsel's decisions in choosing a trial strategy are to be given great deference." ***State v. Balliette***, 2011 WI 79, ¶26, 336 Wis. 2d 358, 805 N.W.2d 334. We will sustain counsel's strategic decisions as long as they were reasonable under the circumstances. ***Id.*** Dr. Brazelton did not testify that he recalled with 100-percent certainty that Castillo-Dominguez stated "yo le mato." Rather, Dr. Brazelton said he could not remember "exactly the [Spanish] words" said by

Castillo-Dominguez. We conclude that trial counsel's strategy not to provide Dr. Brazelton an opportunity to correct his recollection of what Castillo-Dominguez said was not objectively unreasonable. Accordingly, we conclude counsel was not deficient for failing to draw the jury's attention to the fact that the words Dr. Brazelton recalled Castillo-Dominguez saying did not translate grammatically to "I killed my baby."

2. Failure to Impeach Ramirez on Cross-Examination

¶35 Castillo-Dominguez contends that her trial counsel was ineffective for failing to impeach Ramirez, Castillo-Dominguez's live-in boyfriend at the time of L.A.V.'s death, on cross-examination.

¶36 Castillo-Dominguez's defense was that she did not cause the injuries that resulted in L.A.V.'s death. It is undisputed that at the time L.A.V. was injured, L.A.V. was in the exclusive care of Castillo-Dominguez and/or Ramirez. Thus, her trial strategy was to present to the jury the possibility that L.A.V.'s injuries had been caused by Ramirez. Castillo-Dominguez argues that central to this strategy was impeaching the credibility of Ramirez.

¶37 Castillo-Dominguez asserts that there were inconsistencies between what Ramirez initially told police and his testimony at trial as to L.A.V.'s condition before L.A.V. was taken to the hospital and as to when and under what circumstances Ramirez and Castillo-Dominguez decided to seek medical treatment for L.A.V. Castillo-Dominguez argues that because impeaching Ramirez's credibility was "critical" and "essential" to her defense theory that she did not cause L.A.V.'s injuries, trial counsel was deficient for failing to do so.

¶38 At the ***Machner*** hearing, trial counsel testified that his trial strategy was to prove that Castillo-Dominguez did not cause L.A.V.'s injuries and to "paint[] [Ramirez] as the bad guy." Counsel acknowledged that Ramirez made statements to police that were inconsistent with his subsequent testimony at trial. However, counsel testified that he did not attempt to impeach Ramirez with those earlier statements because those statements could have been interpreted by the jury as Ramirez, the loving boyfriend, attempting to cover for Castillo-Dominguez, which was contrary to his trial strategy.

¶39 An appellate court "will not second-guess a reasonable trial strategy, but [the] court may conclude that an attorney's performance was deficient if it was based on an 'irrational trial tactic' or 'based upon caprice rather than upon judgment.'" ***State v. Domke***, 2011 WI 95, ¶49, 337 Wis. 2d 268, 805 N.W.2d 364 (quoted source omitted). Castillo-Dominguez asserts that "[t]he strategic reasons [trial] counsel offered [for not impeaching Ramirez] [were] unreasonable" and that "[i]t was irrational for counsel to completely forego impeaching [] Ramirez with his own inconsistent statements." Castillo-Dominguez does not explain *why* trial counsel's strategy was unreasonable given her defense, and we conclude that it was not. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (this court generally does not consider conclusory assertions and undeveloped arguments).

3. Failure to Rehabilitate Defense Witnesses

¶40 Castillo-Dominguez asserts that Ramirez testified that on the night that L.A.V. was ill, he did not leave L.A.V. home alone. Castillo-Dominguez argues that trial counsel had planned to elicit testimony from Ashley Sutfin and Timothy Wilson that they saw Ramirez twice leave his and Castillo-Dominguez's

apartment without L.A.V. and once return with an unidentified woman. However, counsel failed to elicit this testimony when the witnesses had difficulty at trial remembering what they had stated in their statements to police. Castillo-Dominguez argues that counsel's failure to elicit this testimony "was deficient because this evidence went directly to [] Ramirez's credibility and would have furthered [Castillo-Dominguez's] theory of defense."

¶41 At the ***Machner*** hearing, trial counsel testified that Sutfin and Wilson were not very good witnesses for Castillo-Dominguez. Counsel testified that when Sutfin testified at trial, she was not able to "remember everything that [counsel] thought she would otherwise testify to." Counsel testified that Wilson also "[did not] remember much of anything." Counsel testified that at trial, he had to make a "split-second decision" as to whether he should try to refresh the witnesses' recollections as to their prior statements, but decided not to because "[a]t that point [he] had no confidence that [he] would be able to refresh their recollection."

¶42 Castillo-Dominguez complains that trial counsel failed to rehabilitate the witnesses, but fails to explain how counsel could have successfully done so. As pointed out by the State, if Castillo-Dominguez means to argue that the witnesses' memories should have been refreshed with police reports setting forth their statements, the record fails to include the police reports or any testimony describing their content. Without the police reports, it is not possible for this court to determine whether there is any basis to Castillo-Dominguez's assertion that trial counsel was deficient in failing to attempt to refresh the recollection of the witnesses.

C. Failure to Call a Defense Witness

¶43 Castillo-Dominguez contends that trial counsel was deficient for not calling Joy Rave as a witness for the defense at trial. Castillo-Dominguez argues that Rave, who had been subpoenaed for trial, would have testified that she saw Ramirez leave his and Castillo-Dominguez's apartment without L.A.V. She argues that Rave's testimony was "central to the defense's theory that [] Ramirez lied and that he caused [L.A.V.'s] injury" and that it was deficient for counsel not to call Rave as a witness. As to prejudice, while Castillo-Dominguez argues that the "cumulative weight of counsel's [alleged] errors" was prejudicial, Castillo-Dominguez does not argue that alone, counsel's failure to call Rave as a witness was prejudicial. As we explain, we conclude that even if counsel was deficient in not calling Rave as a witness, counsel's failure to do so was not prejudicial.

¶44 Evidence at trial included multiple instances in which Castillo-Dominguez admitted to having caused the injuries that led to L.A.V.'s death. She admitted to detectives that she had thrown L.A.V. against a wall shortly before he began to exhibit symptoms of his injuries, and Dr. Brazelton and Robertson testified that Castillo-Dominguez stated multiple times that she killed L.A.V. after she was informed of L.A.V.'s death. In addition, the court found that "the medical evidence was consistent with [Castillo-Dominguez's] description … of how and when she inflicted the injuries to [L.A.V.]," and it "was undisputed that she was home alone with [L.A.V.]" at the time those injuries occurred per her confession. Under the totality of the circumstances, we conclude that there is not a reasonable probability that had counsel called Rave to testify that she saw Ramirez leave the apartment alone, contrary to Ramirez's testimony that he did not leave L.A.V. home alone, the jury would have found Castillo-Dominguez not guilty.

CONCLUSION

¶45 For the reasons discussed above, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).