COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP523-CR **Cir. Ct. No. 2006CF4053**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALVERNEST FLOYD KENNEDY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Alvernest Floyd Kennedy appeals the judgment convicting him of homicide by intoxicated use of a vehicle, contrary to WIS. STAT.

§ 940.09(1)(a) (2005-06).[1] He also appeals the order denying his postconviction motion. Kennedy argues that: (1) the trial court erred in denying his motion to suppress; (2) newly-discovered evidence warrants a new trial; and (3) the trial court erred in denying him an evidentiary hearing on his ineffective assistance of counsel claim. We reject Kennedy's arguments and affirm.

BACKGROUND

¶2 Kennedy was involved in an automobile accident near the intersection of 24th Street and Fond du Lac Avenue in Milwaukee. He drove the car that hit, and ultimately killed, a pedestrian who was crossing Fond du Lac Avenue shortly after midnight on August 3, 2006.

¶3 Officer Marcey Asselin was one of the first police officers to arrive on the scene. She was dispatched to the scene at about 12:15 a.m. As she was just around the corner when she received the dispatch, it took less than a minute for her to arrive. When Officer Asselin got to the scene, she saw a white Chevy Impala facing westbound in the eastbound lane. Skid marks about a block long led to where the Impala was stopped. The car was damaged, and blood was smeared along the passenger side doors. Officer Asselin also saw the victim lying under the passenger side of the car. The victim appeared to be very severely injured, and was unable to talk. A woman and two men were standing nearby.

¶4 After assessing the victim's injuries and radioing for an ambulance, Officer Asselin asked the people standing nearby what had happened. Kennedy

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

handed Asselin his driver's license and answered that he was driving. Asselin instructed Kennedy to stand on the sidewalk while she waited for an ambulance to come.

¶5 After the victim was put into an ambulance, Officer Asselin went back to talk with Kennedy and his passenger, Anthony Jones, about the accident. Kennedy stated that he was driving eastbound on Fond du Lac Avenue when the pedestrian "jumped out in front of him," and he hit her. Jones said that he did not remember what happened and that he was injured, so Asselin called for an ambulance and then continued her conversation with Kennedy.

¶6 Officer Asselin asked Kennedy to explain what happened again, to make sure she understood him. At this point, about 12:30 to 12:40 a.m., she noticed that Kennedy was swaying back and forth, his eyes were glassy and bloodshot, his speech was slurred, and he smelled strongly of alcohol. Based upon her observations of and conversations with Kennedy at this time, as well as her experiences in life and as an officer who had made other arrests for drunk driving, Asselin believed that Kennedy was intoxicated. Officer Asselin relayed her suspicions about Kennedy's inebriation to Sergeant Roberto Hill, who had arrived on the scene.

¶7 Officer Asselin then asked Kennedy to sit in a squad car. She did so because she was concerned about Kennedy's safety. Approximately thirty to forty people had gathered on the sidewalk and they were "yelling and screaming," and "there was lots of media around." Also, the victim's boyfriend was still nearby and he was extremely upset about what had happened. Consequently, Asselin did not perform any field sobriety tests on Kennedy. She testified that her goal was to get him to sit in the car so that she and the other officers could secure the scene

and gather as much information as possible. She was troubled about keeping the defendant on the scene without having anyone do any field sobriety tests or chemical tests, but did not do anything about it because she was still investigating the scene as instructed by her sergeant.

¶8 While Officer Asselin was initially unsuccessful in persuading Kennedy to sit in the back of the squad car, another officer, Officer Scott Randow, convinced Kennedy to do so. Kennedy went into the squad car at about 12:45 a.m., and was not handcuffed or restrained in anyway. Shortly thereafter, at about 1:00 a.m., Asselin's partner, Officer Jeffrey Hoffman, informed Asselin that an eyewitness to the accident stated that while sitting in her car, she saw two cars flying by her, driving extremely fast—over sixty miles per hour, in her estimation. The posted speed limit on the portion of Fond du Lac Avenue where the accident occurred was thirty miles per hour. The witness stated that the cars drove by her so quickly that her own car shook.

¶9 Shortly after 2:00 a.m., Kennedy, who was still sitting in the back of the squad car unrestrained, was informed that he was under arrest. He was arrested by Detective Paul Formolo, who arrived on the scene shortly before 2:00 a.m. When Formolo arrived, officers had established a perimeter about two blocks long on Fond du Lac Avenue, and within the perimeter was the white Impala, which had a significant amount of blood on it. Formolo talked with the officers on the scene and learned that Kennedy was suspected to be the driver and suspected to be intoxicated. He was also informed that an eyewitness had told police that she saw the Impala traveling at speeds of what seemed to be in excess of sixty miles per hour, and that the Impala appeared to be drag racing another car. Formolo went to the squad car where Kennedy had been sitting for more than an

hour and immediately smelled alcohol. According to Formolo, Kennedy was arrested at about 2:05 a.m.

¶10 After Kennedy was arrested, he was taken to the hospital for blood-alcohol testing. The testing was performed at about 3:18 a.m., approximately three hours after the accident. Kennedy's blood-alcohol level at 3:18 a.m. was .216. A toxicologist hired by the State used this information to estimate that Kennedy's blood-alcohol level at the time of the accident was likely somewhere between .246 and .291.

¶11 Kennedy was charged with homicide by intoxicated use of a vehicle and homicide by operation of a motor vehicle with a prohibited alcohol concentration. He pled not guilty, and filed a motion to suppress all evidence obtained as a result of his arrest on the basis that there was no probable cause to arrest him. The trial court denied the motion, finding that the period of time between the stop—i.e., when Kennedy was asked to sit in the squad car, about 12:45 a.m.—and the arrest, which occurred shortly after 2:00 a.m., was reasonable, and that there was probable cause to arrest Kennedy for, at the very least, operating an automobile while intoxicated.

¶12 A jury trial was held and the jury found Kennedy guilty of homicide by intoxicated use of a vehicle. The homicide by operation of a motor vehicle with a prohibited alcohol content charge was dismissed.

¶13 Kennedy now appeals. Further facts will be developed as necessary below.

ANALYSIS

¶14 On appeal, Kennedy argues that: (1) the trial court erred in denying his motion to suppress; (2) newly-discovered evidence warrants a new trial; and (3) the trial court erred in denying him an evidentiary hearing[2] on his ineffective assistance of counsel claim.[3] We discuss each argument in turn.

I. The trial court properly denied Kennedy's motion to suppress.

¶15 Kennedy's first argument on appeal is that the trial court erred in denying his motion to suppress. In reviewing a trial court's denial of a defendant's motion to suppress, we review its findings of fact under the clearly erroneous standard, but review its application of constitutional principles to the findings of fact *de novo*. ***State v. Smiter***, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920 (Ct. App. 2010).

¶16 Specifically, Kennedy argues that his motion to suppress should have been granted because the length of time he was detained in the squad car before being told he was under arrest was unreasonable. Kennedy concedes that his initial detainment in the squad car was a valid ***Terry*** stop, *see* ***Terry v. Ohio***, 392 U.S. 1, 22 (1968) ("a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest"), but

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[3] In his brief-in-chief, Kennedy additionally argues that he is entitled to a new trial in the interests of justice. In his reply brief, however, Kennedy concedes "that this argument is more aptly considered under the test for ineffective assistance of counsel." Consequently, any arguments regarding whether a new trial is warranted in the interests of justice will be considered in our discussion of whether Kennedy is entitled to a ***Machner*** hearing.

because approximately seventy-five minutes elapsed between the time that police asked him to sit in the squad car and the time they told him that he was under arrest, the stop transformed into an illegal arrest. Kennedy argues that the stop-turned-arrest was illegal because there was no probable cause to arrest him.

¶17 We conclude, first, that the length of Kennedy's detainment in the squad car was not too long in light of the circumstances. While Kennedy correctly notes that during a ***Terry*** stop the "investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time," *see* ***Florida v. Royer***, 460 U.S. 491, 500 (1983), we disagree with his contention that asking a suspect to wait in a squad car for approximately seventy-five minutes while police investigate a traffic death is unreasonable. Officer Asselin initially asked Kennedy to sit in the squad car because at the time there were thirty to forty people standing in the area causing a disturbance and because she was not sure about Kennedy's safety as the victim's boyfriend was still nearby and was, quite understandably, agitated. Additionally, by the time Kennedy got into the car, members of the crowd standing on the sidewalk were yelling and screaming and the accident had garnered significant media attention. Also, though we need not repeat the details here, the crime scene was, sadly, a gruesome one, that required a significant amount of investigative attention by police.

¶18 Second, even assuming, *arguendo*, that Kennedy had been under arrest at some point between 12:45 a.m. and 2:00 a.m., *see* ***id.***, at 501-02 (describing circumstances in which a valid ***Terry*** stop morphed into an illegal arrest), our conclusion would not change because there was probable cause to arrest Kennedy when he was asked to sit in the squad car. As noted, police found Kennedy's car facing westbound in the eastbound lane. Skid marks leading to

where the car was stopped were about a block long. The car was damaged, and blood was smeared along the passenger side doors. Kennedy admitted that he was driving the car that hit the pedestrian, and was observed to have a strong odor of alcohol on his breath, and was swaying, had glassy and bloodshot eyes, and slow and slurred speech. Moreover, Kennedy claimed that the victim had just "jumped out in front of him." We agree with the State that Kennedy's failure to see the victim until he actually hit her gave police reason to believe that he was intoxicated, and that this, combined with all of the facts above, constituted probable cause.

¶19 Moreover, we are unpersuaded by Kennedy's contention, citing ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), *abrogated on other grounds by* ***State v. Sykes***, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277, that absent the administration of field sobriety tests confirming the officers' suspicion of intoxication, there was no probable cause to arrest him. We acknowledge, as we have previously, that "***Swanson*** contains certain language which supports this argument." *See* ***State v. Kasian***, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (1996); *see also* ***Swanson***, 164 Wis. 2d at 453 n.6. However, ***Swanson*** "'does not mean that under all circumstances the officer must first perform a field sobriety test, before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant.'" *See* ***Kasian***, 207 Wis. 2d at 622 (citation omitted). Rather, "the question of probable cause is properly assessed on a case-by-case basis." ***Id.*** As detailed above, police had more facts to rely upon in Kennedy's case than in ***Swanson***, where police had only (1) erratic, unexplained driving, (2) an odor of intoxicants, and (3) the timing of the accident, which was close to when the bars closed, to make them suspect that the defendant was intoxicated. *See* ***id.***, 164 Wis. 2d at 453 n.6. In the case before us, police had additional information,

including that Kennedy identified himself as the driver of the car involved, and was swaying, had glassy and bloodshot eyes, and claimed that the victim had just "jumped out in front of him" when there was evidence—including skid marks a block long—that he had been speeding.

¶20 Indeed, we conclude that the case before us is analogous to ***Kasian***, another instance where we found probable cause for an arrest even though the arresting officer did not perform a field sobriety test. In ***Kasian***, police found a damaged van with the engine running and smoking. ***Id.***, 207 Wis. 2d at 622. The defendant, who was injured, was lying next to the van. ***Id.*** The police smelled a strong odor of intoxicants and observed that his speech was slurred. ***Id.*** We concluded that this evidence, even in the absence of field sobriety tests, was sufficient to establish probable cause to believe that the defendant operated a vehicle while intoxicated. ***Id.*** While Kennedy argues that ***Kasian*** is inapposite because it appears that the defendant was transported immediately to the hospital before field sobriety tests could have been administered, *see* ***id.***, we note that the facts of each specific case will be unique, and that our role is to evaluate them on a case-by-case basis, *see* ***id.***; *see also* ***State v. Wille***, 185 Wis. 2d 673, 682-84, 518 N.W.2d 325 (Ct. App. 1994) (finding probable cause to arrest in the absence of field sobriety tests when sheriff smelled intoxicants on driver and driver said "he had 'to quit doing this'"). Based on the facts of the case before us, we conclude that the police did have probable cause to arrest Kennedy at the time they asked him to sit in the squad car.

¶21 Therefore, for all of the foregoing reasons, we conclude that the trial court did not err in denying Kennedy's suppression motion. *See* ***Smiter***, 331 Wis. 2d 431, ¶9.

II. The trial court properly denied Kennedy's postconviction motion for a new trial because there was no newly-discovered evidence.

¶22 Kennedy's next argument on appeal is that the trial court erred in denying his motion for a new trial based on newly-discovered evidence. The new evidence, according to Kennedy, is a statement made by Anthony Summerville—the victim's boyfriend—that, on the night of the accident, the victim "ran right out in front of Kennedy's vehicle." According to Kennedy, Summerville made the statement to an officer while under the officer's supervision at the County Jail "shortly after the night of Mr. Kennedy's accident." As proof of this statement, Kennedy offers the affidavit of his civil attorney, Joshua Levy, who alleges that he had a phone conversation with the police officer in which the officer told him that Summerville had stated that the victim "was walking across the street without paying attention to traffic shortly before the accident."

¶23 "'Motions for a new trial based on newly-discovered evidence are entertained with great caution.'" ***State v. Morse***, 2005 WI App 223, ¶14, 287 Wis. 2d 369, 706 N.W.2d 152 (citation omitted). On appeal, we review the trial court's determination for an erroneous exercise of discretion, affirming the trial court so long as the decision has a reasonable basis and is made in accordance with accepted legal standards and facts of record. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992).

¶24 To obtain a new trial based on newly-discovered evidence, Kennedy must establish, by clear and convincing evidence, that: "'(1) the evidence was discovered after conviction; (2) [he] was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" *See* ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590 (citation omitted). If those four criteria have been established, we

then determine "'whether a reasonable probability exists that a different result would be reached in a trial.'" ***Id.*** (citation omitted). "The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof." ***Id.***

¶25 Summerville's alleged statement is not newly-discovered evidence, first, because it is inadmissible double hearsay. The record contains no affidavit by Summerville testifying that he saw his girlfriend "run right out into the street." There is no affidavit by any witness who heard Summerville say that he saw his girlfriend "run right out into the street." Rather, as noted, the record merely contains the affidavit of Kennedy's civil attorney, who avers that one of the officers on the scene of the accident told him—on the phone and on an unknown date and time—that, on the night of the accident, she overheard Summerville say that his girlfriend "was walking across the street without paying attention to traffic shortly before the accident."

¶26 The statement of an attorney regarding what a police officer overheard an accident witness say is double hearsay that does not fall under any exception. *See* WIS. STAT. § 908.05 (hearsay within hearsay only admissible if each part of the statement conforms with a hearsay exception). Even assuming for the sake of argument that Summerville's statement to the officer was a present sense impression, *see* WIS. STAT. § 908.03(1), or an excited utterance, *see* WIS. STAT. § 908.03(2), the officer's alleged statement to the attorney certainly does not fall into either category. The affidavit gives us no clue as to when the attorney spoke with the officer; therefore, we cannot say that the statement was made while the officer was "perceiving the event or condition, or immediately thereafter" or "under the stress of excitement caused by the event or condition." *See* WIS. STAT. §§ 908.03(1)-(2). Moreover, the fact that the affiant is an attorney and one of the

statements came from a police officer does not mean that it falls under the "catch all" hearsay exception described in WIS. STAT. § 908.03(24). Kennedy's argument regarding the "catch all" exception is inadequately briefed and we will not consider it. *See* ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322 ("we may choose not to consider arguments unsupported by references to legal authority, arguments that do not reflect any legal reasoning, and arguments that lack proper citations to the record").

¶27 Furthermore, there is simply nothing in the record that would allow us to conclude that the alleged statement was discovered after Kennedy was convicted. *See* ***Edmunds***, 308 Wis. 2d 374, ¶13. As noted, the affidavit gives us no clue as to when Levy spoke with the officer who allegedly overheard Summerville make the statement the night of the accident. Indeed, the relevant statement was allegedly made the night of the incident, and Kennedy does not explain why the officer who heard the statement was not interviewed prior to trial.

¶28 Likewise, Kennedy does not sufficiently explain how he was "'not negligent'" in seeking out the statement. *See* ***id.*** (citation omitted). He only tells us that the "evidence did not materialize until after trial." Again, however, according to Kennedy, Summerville allegedly made the statement to the officer on the night of the incident, but there is no way for us to know, given Kennedy's brief and the record, why Kennedy could not have procured the statement before trial.

¶29 Consequently, we do not agree with Kennedy that Levy's affidavit "speaks for itself and provides more than sufficient grounds for this court to hold an evidentiary hearing on this issue alone." *See* ***id.*** (all four criteria must be established to prove that evidence is newly-discovered). We conclude that no newly-discovered evidence warrants a new trial.

III. The trial court properly denied Kennedy's request for a ***Machner*** *hearing.*

¶30 Finally, Kennedy challenges the trial court's refusal to hold an evidentiary hearing on his ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). In ***State v. Allen***, 2004 WI 106, ¶¶12-24, 274 Wis. 2d 568, 682 N.W.2d 433, the Wisconsin Supreme Court reviewed the standard applied when defendants assert that they are entitled to a postconviction evidentiary hearing. Relying on ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), and ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), the ***Allen*** court repeated the well-established rule:

> First, [courts] determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that [appellate courts] review *de novo*. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.

Id., 274 Wis. 2d 568, ¶9 (emphasis added; citations omitted).

¶31 To succeed on this claim, Kennedy must allege a *prima facie* claim of ineffective assistance of counsel, showing that trial counsel's performance was deficient and that this deficient performance was prejudicial. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, Kennedy must show facts from which a court could conclude that trial counsel's representation was below objective standards of reasonableness. *See* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. To demonstrate prejudice, he "must show that there is 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." *See* ***Strickland***, 466 U.S. at 694 (1984). The issues of performance and prejudice present mixed questions of fact and law. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, but the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, *see* ***id.*** at 236-37.

¶32 Kennedy presents seven ways in which trial counsel was allegedly ineffective. We discuss each in turn.

a. Trial counsel was not ineffective for failing to procure an expert to rebut the State's toxicologist.

¶33 Kennedy argues that "[t]rial counsel's failure to call an expert to rebut the State's toxicologist effectively stripped Kennedy of presenting any defense regarding his actual level of intoxication at the time of the accident." According to Kennedy, "[t]he only way to properly present the defense that [he] was neither intoxicated nor had an illegal blood alcohol concentration would have been to produce and call an expert witness" to rebut the State's testimony that, because his blood-alcohol level at 3:18 a.m. was .216, at the time of the accident his blood-alcohol level was likely somewhere between .246 and .291.

¶34 Kennedy does not allege sufficient facts entitling him to a hearing on this issue. *See* ***Mayo***, 301 Wis. 2d 642, ¶33; ***Allen***, 274 Wis. 2d 568, ¶9. Most importantly, he submits no evidence to show that he "was neither intoxicated nor had an illegal blood alcohol concentration" at the time of the accident; therefore, we cannot say that trial counsel's decision not to hire an expert was deficient or

prejudicial. Additionally, while Kennedy challenges the testimony by the State's expert opining that his blood-alcohol level was likely somewhere between .246 and .291 at the time of the accident, he does not challenge the evidence that his blood-alcohol level at 3:18 a.m. was .216. Even without the State's expert testimony regarding Kennedy's blood-alcohol level at the time of the accident, the jury certainly could have determined on its own that someone who had been stopped by police at about 12:30 a.m., whose blood-alcohol levels were tested at nearly triple the legal limit at about 3:18 a.m., and who was sitting in the back of a squad car during the time in-between[4] was intoxicated at the time he hit the victim. Therefore, because Kennedy has not demonstrated deficiency nor prejudice, he is not entitled to a hearing on this issue. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

b. Trial counsel adequately argued the motion to suppress.

¶35 Kennedy next argues that trial counsel failed to adequately argue the motion to suppress. However, as we explained in Part I, above, there was probable cause to arrest Kennedy at the time he was asked to sit in the squad car, and the motion to suppress was properly denied. Trial counsel was not ineffective for failing to pursue a losing argument. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit). Therefore, Kennedy is not entitled to a hearing on this issue. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

[4] There is no evidence that Kennedy was drinking at any point between 12:30 a.m. and 3:18 a.m. on the night of the accident.

c. Trial counsel was not ineffective for belatedly notifying Kennedy about a potential conflict of interest.

¶36 Kennedy also argues that trial counsel was ineffective for belatedly informing him about a potential conflict of interest involving the trial court judge. Before trial, the trial court told counsel that the court's son was a member of the law firm hired to sue Kennedy in a civil wrongful death lawsuit arising from the accident. On the morning of the third day of trial, trial counsel explained that he had forgotten to relay this information to Kennedy. Consequently, Kennedy was provided with the opportunity to consult with trial counsel, his civil lawyer, and his family. After doing so, Kennedy personally decided not to ask the trial court to recuse itself, and decided to go forward with trial. On appeal, Kennedy argues that trial counsel "did not provide Kennedy with sufficient information to participate intelligently" in his decision to go forward with trial. Kennedy also argues that trial counsel threatened Kennedy "with the thought that a new trial, before a new judge, would cost Kennedy more money."

¶37 As the State aptly observes, however, "Kennedy does not even try to argue that he was prejudiced." *See* ***Strickland***, 466 U.S. at 694. Kennedy does not argue that if trial counsel had done something differently that the trial court would have recused itself, nor does he argue that the result of his jury trial would have been different if a different judge had been on the bench. Because Kennedy's argument as to this issue is woefully underdeveloped, particularly with regard to prejudice, we conclude that he is not entitled to a hearing. *See* ***id.*** at 697; ***Allen***, 274 Wis. 2d 568, ¶9.

d. Trial counsel was not ineffective for failing to introduce the statements of Lyndora and Deja Cleveland.

¶38 Kennedy's next argument is that trial counsel was ineffective for failing to introduce the statements of two potential trial witnesses, Lyndora and Deja Cleveland. Despite being subpoenaed, neither witness appeared for trial. On appeal, Kennedy argues that trial counsel was ineffective for not attempting to have the statements that these witnesses made to a private investigator admitted at trial.

¶39 Lyndora Cleveland's statement as told to, and reported by, the investigator, in its entirety, is as follows:

> I interviewed Lyndora and Deja (daughter) Cleveland on Sept. 17, 2006 at 4:35 PM. Lyndora stated she heard loud voices coming from the front of the bar but could not see what was going on. She then observed a lady (deceased) walk to the area of Wright St. and Fond Du Lac Ave., north side of the street. She then did not pay attention to the pedestrian. She then heard a car going east on Fond du Lac appear to strike the lady that was now walking across the street. Lyndora stated the pedestrian was walking at a diagonal angle to the crosswalk. She stated the pedestrian walked from about the street light at an angle to a tree that is on the south side of the street. I asked Lyndora if she observed the driver of the striking vehicle. She stated he was wearing a blue shirt[.] She stated that the driver appeared very worried and concerned about the incident. She stated he appeared normal, was not uncooperative or unruly, and was just walking around in a worried manner. Lyndora stated she later observed the driver just waiting around until she saw him being escorted to a police car. He was not being uncooperative.

¶40 Deja Cleveland's statement as told to, and reported by, the investigator, in its entirety, is as follows:

> I inter[viewed] Deja Cleveland at about the same time I interviewed Lyndora Cleveland. Deja stated she observed a man (Summerville) yelling, "They hit my [girlfriend."] She then observed the same man flirting with a female on

> the north side of the street while the investigation was being conducted. Deja stated Summerville was attempting to obtain a phone number from a lady that was a bystander at the scene. Deja stated her attention was on Summerville as she thought it was very bad that he was flirting with another woman as his girl was lying under the car at the scene.

Simply put, we fail to see exactly how either of these statements would "directly support[] Kennedy's affirmative defense that the accident would have occurred regardless of whether he was intoxicated or had a prohibited alcohol concentration." Deja's statement does not concern the accident at all. Lyndora's statement is confusing at best, and does not, in any event, describe a situation where, as Kennedy alleges, "the victim was responsible for her own death."

¶41 Moreover, neither statement would have been admissible at trial because both statements were hearsay. *See* WIS. STAT. § 908.01(3); WIS. STAT. § 908.02. The statements were not, as Kennedy argues, statements against interest under WIS. STAT. § 908.045(4) because a statement that a declarant saw a person get hit by a car as the person was walking down the street has no tendency to subject the declarant to "hatred, ridicule, or disgrace." *See* ***id.*** Additionally, they were not statements of recent perception under WIS. STAT. § 908.045(2) because the statements were made to an investigator over a month after the accident occurred. *See* ***id.*** For this same reason, the statements do not qualify as present sense impressions or excited utterances; they were not made while "perceiving the event or condition, or immediately thereafter" or "under the stress of excitement caused by the event or condition." *See* WIS. STAT. § 908.03(1)-(2).

¶42 In sum, Kennedy has not shown how trial counsel's performance was either prejudicial or deficient for not attempting to have the Clevelands' statements admitted at trial, and consequently, he is not entitled to a hearing on

this issue. *See* ***Wheat***, 256 Wis. 2d 270, ¶14 (failure to raise losing legal argument is not deficient performance); ***Allen***, 274 Wis. 2d 568, ¶9.

e. Trial counsel was not ineffective for failing to withdraw from the case.

¶43 Kennedy next argues that trial counsel was ineffective for failing to withdraw from the case "when it became clear that counsel was a material witness in the case."

¶44 Kennedy misstates the record. At no point during trial counsel's representation did it ever become "clear" that trial counsel "was a material witness." Rather, at the beginning of Kennedy's suppression hearing, trial counsel stated that it was possible that he might have to be a witness because something had just come up regarding a potential witness that had not yet been contacted:

> Something has come up today, Judge, and I just received some materials today that create kind of an issue with me, and it may, depending on what I find out, may be something I can fix or it may create problems that I can't fix…. It's possible I could become a witness. I'm hoping not, and I wouldn't know until I'm able to reach this witness, but I can tell you more if you want to know now.

(Some formatting altered.) After trial counsel relayed this information to the trial court, the court then asked to see counsel in chambers, and a discussion was had off the record. After the discussion in chambers, counsel never brought up the matter again.

¶45 Kennedy points to no evidence in the record suggesting that trial counsel ever became a witness in the case. Kennedy blames the trial court, the State's attorney, and trial counsel for the dearth of evidence regarding this issue. However, it is Kennedy's responsibility to allege and present facts sufficient to entitle him to relief. *See* ***Allen***, 274 Wis. 2d 568, ¶¶9, 15 (conclusory allegations

will not suffice). An evidentiary hearing is not a "fishing expedition" to discover facts to support a claim; it is a forum to prove the claim. *See* ***State v. Balliette***, 2011 WI 79, ¶68, 336 Wis. 2d 358, 805 N.W.2d 334. Kennedy has not made a prima facie showing that trial counsel was ineffective, and he is therefore not entitled to a hearing on this issue. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

f. Trial counsel's cross-examination of State witness Anthony Jones was not ineffective.

¶46 Additionally, Kennedy argues that trial counsel's cross-examination of his passenger at the time of the accident, Anthony Jones, was ineffective. Jones testified on the State's behalf at trial. Jones also, at one point, threatened to sue Kennedy for injuries he suffered during the accident. According to Kennedy, the fact that Jones at one time threatened to sue him gave him a motive to lie to the jury at trial, and trial counsel's failure to bring up the fact that Jones threatened to sue was consequently deficient because "the jury was left with no other choice but to believe Jones' testimony regarding Kennedy's driving and to convict Kennedy."

¶47 We disagree. Kennedy presents no evidence that Jones ever did sue Kennedy. As the State points out, a threat of litigation that is later withdrawn has little, if any, impeachment value. *See* ***Strickland***, 466 U.S. at 694. Because Jones did not, in fact, sue Kennedy, we fail to see why Jones would have any motivation to lie at Kennedy's criminal trial. Trial counsel was not ineffective for failing to pursue a line of questioning that would have nominal effect. *See* ***Wheat***, 256 Wis. 2d 270, ¶14.

g. Trial counsel sufficiently litigated the case with respect to Kennedy's affirmative defense.

¶48 Kennedy's final argument on appeal is that trial counsel was ineffective for failing "to present sufficient evidence to support Kennedy's affirmative defense and to present an overall defense in the case." Kennedy's argument is little more than a brief summation of his earlier, unsuccessful arguments regarding trial counsel's effectiveness. As our supreme court has explained, adding together numerous failed arguments does not create one successful one—"[z]ero plus zero equals zero." *See, e.g.*, ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

¶49 Evidence of Kennedy's guilt was overwhelming. He admitted to driving the car that hit the victim. Eyewitnesses saw him approach the victim at a very high rate of speed, even though the posted speed limit was thirty miles per hour. Kennedy evinced multiple signs of intoxication shortly after the accident, and was found to have a blood-alcohol concentration of .216 three hours after the accident occurred. As we discussed more fully above, trial counsel's performance was not ineffective regarding any of the issues Kennedy brings before us, and we consequently conclude that Kennedy is not entitled to a ***Machner*** hearing.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.