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DISTRICT II

May 28, 2025

To:

Hon. Laura F. Lau
Circuit Court Judge
Electronic Notice

Sarah Burgundy
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Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Richard J. Weczera #177064
Fox Lake Correctional Institution
P.O. Box 147
Fox Lake, WI 53933

You are hereby notified that the Court has entered the following opinion and order:

2024AP324

State of Wisconsin v. Richard J. Weczera (L.C. #2019CF1527)

Before Gundrum, P.J., Neubauer, and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Richard J. Weczera, pro se, appeals the circuit court's order denying his collateral attack on his conviction pursuant to WIS. STAT. § 974.06 (2023-24).¹ He contends that he received ineffective assistance because his counsel did not challenge a jury instruction. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

The factual and procedural history is set forth at length in our prior decision in this matter so we will not repeat it here. *See State v. Weczera*, No. 2022AP1613-CR, slip op. (Sept. 20, 2023). Briefly, Weczera was convicted after a jury trial of operating while under the influence of an intoxicant or other drug (OWI), eighth offense. On direct appeal, Weczera’s appointed appellate counsel argued that there was insufficient evidence to convict him. We rejected the argument and affirmed the conviction. The Wisconsin Supreme Court denied Weczera’s petition for review.

Weczera then filed a pro se postconviction motion arguing the jury was not properly instructed, and he received ineffective assistance because his trial and appellate counsel did not raise this argument. The circuit court denied Weczera’s motion without a hearing, and this appeal follows.

Weczera contends that the circuit court should not have instructed the jury using pattern instruction WIS JI—CRIMINAL 2666 and should have instead used WIS JI—CRIMINAL 2664. Whether the jury was properly instructed is a question of law that we review de novo. *See State v. Beamon*, 2013 WI 47, ¶18, 347 Wis. 2d 559, 830 N.W.2d 681.

Weczera was charged under WIS. STAT. § 346.63(1)(a),² which provides three distinct options for prosecuting a person for operating a vehicle while under the influence of an

² The statute provides:

Operating under influence of intoxicant or other drug

(1) No person may drive or operate a motor vehicle while:

(continued)

intoxicant or other drug: (1) driving “[u]nder the influence of an intoxicant, a controlled substance, a controlled substance analog, or any combination of an intoxicant, a controlled substance and a controlled substance analog;” (2) driving “under the influence of any other drug *to a degree which renders him or her incapable of safely driving*;” or (3) driving “under the combined influence of an intoxicant and any other drug *to a degree which renders him or her incapable of safely driving*.” See *id.* (emphases added); see also WIS JI—CRIMINAL 2600, Operating While Intoxicated: Introductory Comment at 25-26. The first option requires that the State prove only that the defendant was “under the influence,” while the second and third options require the State to prove that the defendant was “under the influence ... to a degree which renders him or her incapable of safely driving.” See § 346.63(1)(a). There are two separate pattern jury instructions to reflect the varying elements of charges that can be brought under the statute: WIS JI—CRIMINAL 2664 for clause (1), and WIS JI—CRIMINAL 2666 for clauses (2) and (3).

The State prosecuted Weczera under the second clause of WIS. STAT. § 346.63(1)(a). Consistent with that election, the circuit court properly instructed the jury with WIS JI—CRIMINAL 2666. The instruction asked the jury to determine: (1) whether Weczera operated a motor vehicle on a highway; and (2) whether, at that time, he “was under the influence of an amphetamine, opiate, benzodiazepine, or any combination thereof to a degree which render[ed]

(a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving[.]

him incapable of safely driving.” *Id.* The jury instruction given was the correct instruction for this case.

Weczera argues that WIS JI—CRIMINAL 2664 should have been given instead, but that instruction applies to the first clause of WIS. STAT. § 346.63(1)(a), which does not require proof that the drug use made the driver incapable of safe driving. This instruction would have omitted an element that the State was required to prove pursuant to its theory of prosecution under the second clause of § 346.63(1)(a).

Weczera next argues that WIS JI—CRIMINAL 2666 is flawed because, unlike WIS JI—CRIMINAL 2664, it does not separately define what being “under the influence” means. However, once the State elected to prosecute under a theory requiring proof of incapacity to drive safely, that element is more demanding than the generic “under the influence” standard, and so subsumes it. *See* WIS JI—CRIMINAL 2666 footnote 7.

Weczera also argues that the State should have prosecuted him under the first clause of WIS. STAT. § 346.63(1)(a) because that clause refers to “controlled substances,” while clauses two and three refer to “drugs.” Weczera contends that the substances in his blood were controlled substances, but they were not “drugs.” This is a distinction without a difference. The definition of “drug” under WIS. STAT. § 346.63(1) includes controlled substances. *See* WIS. STAT. § 340.01(15mm) and WIS. STAT. § 450.01(10). Moreover, the instruction to the jury did not use the word “drug,” instead asking the jury to determine whether Weczera was “under the influence of an amphetamine, opiate, benzodiazepine, or any combination thereof”

In summary, the instruction given correctly stated the elements the State was required to prove. Accordingly, trial counsel had no viable basis to request a different instruction, and the

circuit court properly rejected Weczera's claim of ineffective assistance of counsel predicated on trial counsel's failure to do so. *See State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for not raising a claim that lacks merit).

As for the other arguments Weczera raised in his postconviction motion, he has failed to adequately develop them. We will not address his arguments because they are not adequately developed. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review issues that are inadequately briefed).

Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals