

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK A. PITZKA,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

APPENDIX

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2020CF001787

SUPREME COURT OF WISCONSIN

**SEAL OF SUPREME COURT
OF WISCONSIN**

NO. 2024AP650-CR STATE V. PITZKA L.C.#2020CF1787
February 12, 2026

The Court has entered the following order:

A petition for review pursuant to WIS. STAT. § 808.10
having been filed on behalf of defendant-appellant-petitioner,
Mark Pitzka, and considered by this court;

IT IS ORDERED that the petition for review is denied,
without costs.

Samuel A. Christensen
Clerk of Supreme Court

Distribution List:

Hon. Laura F. Lau (Electronic Notice)

Monica Paz, Clerk of Circuit Court (Electronic Notice)

Donald V. Latorraca (Electronic Notice)

Kristin Anne Leaf (Electronic Notice)

Court of Appeals
Decision
Dated and Filed
June 25, 2025
Sanuel A. Christensen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the official reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* Wis. Stat. § 808.10 and RULE 809.62.

Appeal No. 2024AP650-C¶R Cir. Ct. No. 2020CF1787

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK A. PITZKA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the
circuit court for Waukesha County: LAURA F. LAU,
Judge. *Affirmed.*

Before Neubauer, Grogan, and Lazar, JJ.

Per curiam opinions 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). [pg 2]

¶1 PER CURIAM. Mark A. Pitzka appeals from a circuit court judgment convicting him of arson and the court's order denying his postconviction motion.¹ Pitzka argues that he is entitled to a new trial on the bases of the court's admission of other-acts evidence, cell phone mapping evidence at trial, and trial counsel's alleged ineffectiveness. For the reasons that follow, we disagree with Pitzka and affirm.

¹ The Hon. Laura F. Lau presided over Pitzka's pretrial proceedings and jury trial and entered the judgment of conviction currently under appeal. The Hon. Paul F. Reilly presided over Pitzka's postconviction hearing and issued the order denying the motion.

BACKGROUND

¶2 A jury found Pitzka guilty of arson in connection with a June 29, 2018 fire at a house in Hartland that his former girlfriend Amy was renovating.² The case against Pitzka was circumstantial, including other-acts evidence related to a July 1, 2018 fire in the Dodge County garage of Amy’s boyfriend David (“the garage fire”), Pitzka’s purchase of fire-starter logs similar to those found at both fires, and Pitzka’s social media posts following several of the incidents recounted at trial.

¶3 Pitzka filed a postconviction motion pursuant to WIS. STAT. RULE 809.30(2)(h) (2023-24)³ in which he moved for a new trial on two grounds. First, he argued

² We use pseudonyms to protect the privacy of the victims.

³ All references to the Wisconsin Statutes are to the 2023-24 version unless otherwise noted.

that his newly-retained expert's opinion regarding the cell phone location data presented at trial constituted newly discovered evidence. Second, Pitzka asserted that his trial counsel's handling of evidence surrounding cell phone [pg 3] location data and other acts constituted ineffective assistance. The circuit court denied the postconviction motion after a *Machner*⁴ hearing at which both trial counsel and Pitzka's cell phone expert testified. Pitzka appeals.

¶4 We include additional facts in our discussion as necessary.

DISCUSSION

¶5 Pitzka raises three general arguments on appeal, all of which he claims entitle him to a new trial. First, he asserts that the circuit court erred in allowing

⁴ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

testimony at trial of other-acts evidence related to the garage fire. He also objects to the admission of evidence of what he calls “[c]ollateral ‘[o]ther [a]cts’” related to the garage fire, including evidence regarding a red pick-up truck similar to Pitzka’s following David from Amy’s house one night (“the red-truck incident”) and testimony concerning the route of a motorcycle ride Pitzka participated in on the day of the garage fire (“the motorcycle route”). Pitzka next argues that he is entitled to a new trial due to the court’s admission of a demonstrative cell phone mapping exhibit that trial counsel did not receive until the day before trial. Pitzka further argues that his expert’s testimony concerning the exhibit is “newly discovered evidence.” Finally, Pitzka maintains that his trial counsel was ineffective in its representation of Pitzka, and the cumulative effect of counsel’s errors entitle Pitzka to a new trial. We address each argument in turn below. [pg 4]

Other Acts Evidence

¶6 Prior to the trial in this case, the State filed a motion seeking to admit other-acts evidence of Pitzka's criminal behavior toward a former girlfriend following a break-up and evidence related to the garage fire. The garage-fire evidence included a Facebook post Pitzka made the day after that fire. Pitzka had posted a photo of a burning bridge with a caption: "Sometimes burning bridges is awesome. It prevents you from going back to places you should never have to visit to begin with." The State also filed a motion in limine seeking to admit evidence related to the red-truck incident, as well as evidence surrounding an incident just days before the fire at Amy's in which Pitzka dumped the contents of a dumpster on Amy's driveway and posted about it on Facebook afterwards ("the dumpster incident"). The State also moved to prohibit any evidence regarding a fire in

2020 in the apartment of Amy's next-door neighbor because that fire was ruled accidental and was started by a faulty hair dryer ("the hair dryer fire").

¶7 Applying the *Sullivan*⁵ factors to the proffered other-acts evidence, the circuit court denied the State's motion to allow any evidence regarding Pitzka's relationship with the former girlfriend. The court concluded that despite the facts that Pitzka was criminally convicted of several crimes resulting from his post-relationship conduct and the State was offering the evidence for a permissible purpose, the court determined it was not "of consequence" to the present arson allegation. [pg 5]

¶8 In addition to denying the State's motion to

⁵ *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

present evidence regarding Pitzka's relationship with the former girlfriend, the circuit court also accepted the parties' stipulation to allow evidence of the garage fire at trial, and to allow the cell phone records and Facebook posts to come in at trial without the testimony of records custodians. The court further ruled that David would be allowed to testify about the red-truck incident, and disallowed evidence at trial regarding the hair dryer fire based on counsels' stipulation. As previously stated, the postconviction court upheld the ruling.

¶9 On appeal, Pitzka raises concerns with three of the "other acts" described above, arguing that allowing testimony at trial regarding the garage fire, the red-truck incident, and the motorcycle route violated his right to a fair trial.⁶ Other-acts evidence is properly admissible if: it

⁶ Pitzka raises no issues on appeal related to the dumpster incident. He challenges trial counsel's decision to stipulate to

is offered for a permissible purpose, pursuant to WIS. STAT. § 904.04(2); it is relevant under the two relevancy requirements in WIS. STAT. § 904.01; and its probative value is not substantially outweighed by the risk of unfair prejudice under WIS. STAT. § 904.03. *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). “Unfair prejudice” does not mean mere damage to a party’s cause but “a tendency to influence the outcome by improper means.” *Christensen v. Economy Fire & Cas. Co.*, 77 Wis. 2d 50, 61-62, 252 N.W.2d 81 (1977).

¶10 Determining whether the evidence of Pitzka’s other acts was properly admitted under WIS. STAT. § 904.04(2)(b)1. requires us to review an [pg 6] exercise of

the inadmissibility of evidence of the 2020 fire as ineffective assistance of counsel. We address the 2020 fire in our discussion regarding trial counsel’s representation of Pitzka.

discretion by the circuit court. See *State v. Jackson*, 2014 WI 4, ¶43, 352 Wis. 2d 249, 841 N.W.2d 791 (“This court will not disturb a circuit court's decision to admit or exclude evidence unless the circuit court erroneously exercised its discretion.”. (Citation omitted.)) “A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record.” *Id.* (Citation omitted.)

¶11 Pitzka first protests the fact that the circuit court admitted evidence of the garage fire on the parties’ stipulation without first conducting a *Sullivan* analysis. First, we observe that trial counsel did not stipulate to the garage fire as being proper other-acts evidence, but stipulated that it was relevant information based on a court ruling from Dodge County, where the garage fire occurred. In addition, the State set forth the similarities between the garage fire and the fire at Amy’s just days

before, in light of *Sullivan*, including the facts that the same type of fire-starter logs were used in both fires (four at Amy’s fire and two in the garage fire), and the defendant had bought a six-pack box of fire-starter logs the day before the Waukesha fire. It was also brought to light that whoever started the fire at both scenes had used water bottles filled with incendiary liquids in them affixed to the logs.

¶12 Pitzka alleges the circuit court failed to provide a detailed *Sullivan* analysis for admitting other-acts evidence. However, when that is the case, we will independently “review the record to determine whether it provides an appropriate basis for the circuit court’s decision.” *State v. Hunt*, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. Accordingly, we reject Pitzka’s argument as to this point and turn to our analysis of the evidence, starting first with the admission of the garage fire evidence, then briefly addressing the other challenged

testimony. [pg 7]

¶13 Based on our review of the Record and the parties' arguments, we conclude that the circuit court did not erroneously exercise its discretion in allowing other-acts evidence of the garage fire. The court first determined that the State was offering the evidence for the permissible purposes of primarily showing motive and intent, but also demonstrating plan, scheme, knowledge, and identity. This was a conclusion that a reasonable judge could reach. Under WIS. STAT.

§ 904.04(2)(a), "motive" and "intent" are listed as permissible purposes. Thus, there is no doubt that the State offered the evidence for a permissible purpose. *See State v. Payano*, 2009 WI 86, ¶63, 320 Wis. 2d 348, 768 N.W.2d 832 (citing WIS. STAT. § 904.04(2) (2007-08)) ("As long as the proponent identifies one acceptable purpose for admission of the evidence that is not related to the

forbidden character inference, the first step is satisfied. Consequently, this ‘first step is hardly demanding.’” (Footnote omitted.) (Citations omitted.)); *see also State v. Marinez*, 2011 WI 12, ¶29, 331 Wis. 2d 568, 797 N.W.2d 399 (noting that permissible purposes under *Sullivan* are not limited to those listed in the statute or to those recognized in previous cases).

¶14 There also is no question that the garage fire incident is relevant evidence with significant probative value as to who committed the arson at Amy’s house. The similarities in time, the relationship between the victims and Pitzka, and the similar manner in which both fires were started make the evidence relevant and were crucial evidence for the State to prove the intent element of arson. *See Sullivan*, 216 Wis. 2d 768, 772-73.

¶15 Pitzka also argues the unfair prejudice created by admitting the garage-fire evidence far outweighed its

probative value, particularly because he asserts that his motive and intent could be proven through other less prejudicial means. Pitzka's argument ignores the fact that the State bears the burden of [pg 8] proving at trial each element of the charged offense. A reasonable judge could certainly find that the garage fire went to proving an element of the charged arson. Whether other-acts evidence is "of consequence" depends on whether it is logically related to an element of the offense; that is, whether under the substantive law, it is related to "the ultimate facts and links in the chain of inferences that are of consequence to the case." *Sullivan*, 216 Wis. 2d at 786.

¶16 Intent and motive are "of consequence." WIS. STAT. § 904.01. Intent is an element of the charged crime at issue here. See WIS. STAT. § 943.02(1)(a). "[A]n element of a crime constitutes a consequential fact that the State must prove even if the defendant does not dispute the element." *State v. Veatch*, 2002 WI 110, ¶¶61,

77, 255 Wis. 2d 390, 648 N.W.2d 447; *see also State v. Plymesser*, 172 Wis. 2d 583, 594-95, 493 N.W.2d 367 (1992). Similarly, although motive is not specifically an element of a crime that the State must prove, here it is logically related to the element of intent. “Intent” is defined as having a requisite “mental purpose.” *See, e.g.,* WIS JI—CRIMINAL 1220 (2015). Motive is relevant to establishing purpose. *See, e.g., Davidson*, 236 Wis. 2d 537, ¶65 (quoting *Plymesser*, 172 Wis. 2d 583, 594-95). “Evidence relevant to motive is therefore admissible, whether or not defendant disputes motive.” *Id.* Given these standards and definitions, the garage-fire evidence was clearly admissible at trial.

¶17 For the foregoing reasons, we conclude that the circuit court did not erroneously exercise its discretion in admitting the garage fire evidence. We similarly conclude that the court properly exercised its discretion

in admitting testimony regarding the red-truck incident and the motorcycle route. In fact, these were not other acts as contemplated by WIS. STAT. § 904.03. Rather, the evidence around these issues explained the context in which Pitzka learned both the type of vehicle David drove as well as where David lived. The challenged evidence was [pg 9] admissible because it was relevant as “part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime.” See *State v. Dukes*, 2007 WI App 175, ¶28, 303 Wis. 2d 208, 736 N.W.2d 515.

¶18 Finally, Pitzka complains that the cautionary jury instruction given by the circuit court regarding the other-acts evidence was insufficient because it provided the jury with potential purposes for consideration of the evidence beyond motive or intent. Again, we are unpersuaded. Pitzka points to no errors of significance on the part of the State or the court in this regard. The

Record reveals no improper propensity argument from that testimony by the State, and the WIS. STAT. § 904.04(2) list of permissible purposes for which other-acts evidence is admissible is illustrative, not exhaustive. **Marinez**, 331 Wis. 2d 568, ¶18. The court presented the jury with a complete and accurate statement of the law in Wisconsin when it gave the entire standard other-acts instruction. Pitzka fails to persuade us that the court erred in so doing. See **Grube v. Daun**, 213 Wis. 2d 533, 549, 570 N.W.2d 851 (1997) (explaining the purpose of a jury instruction is to fully and fairly inform the jury of a rule or principle of law applicable to a particular case).

Cell Phone Mapping Evidence

¶19 Before trial, Pitzka's counsel stipulated to the admissibility of Facebook and cell phone records without testimony from a record custodian, but objected to the

State's proposed mapping exhibit that would show the approximate location of Pitzka's cell phone during the red-truck incident and around the time of the June 28-29 fire. Trial counsel argued against admitting the exhibit at trial, noting that the State had provided it with the mapping exhibit on the day before [pg 10] the scheduled trial. The prosecutor stated that the maps were simply demonstrative evidence based on an officer's analysis of the "stipulated data," and the State was offering this evidence to show when Pitzka's phone was in a particular area. The circuit court found the map to be a demonstrative exhibit and ruled that its admissibility would "hinge on the foundation that's laid." However, the court offered Pitzka's counsel an adjournment of the trial to review the mapping exhibit. Counsel declined the adjournment and proceeded to trial, later testifying at the *Machner* hearing that trial counsel had done so on Pitzka's wishes.

¶20 To set aside a judgment of conviction, the newly discovered evidence must demonstrate that a manifest injustice occurred. *State v. Watkins*, 2021 WI App 37, ¶42, 398 Wis. 2d 558, 961 N.W.2d 884. We approach claims of newly discovered evidence with great caution. *State v. Morse*, 2005 WI App 223, ¶14, 287 Wis. 2d 369, 706 N.W.2d 152. To prevail, the defendant “must prove, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant 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.” *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997), *holding modified by State v. Kivioja*, 225 Wis. 2d 271, 592 N.W.2d 220 (1999). If the defendant satisfies those four requirements, “the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.” *Id.*

¶21 We agree with the circuit court and conclude that Pitzka was not entitled to a new trial based on the court's admission of the mapping exhibit. Neither the exhibit nor Pitzka's expert's testimony regarding its significance was newly discovered evidence as defined by Wisconsin law. As the court correctly [pg 11] explained in its postconviction decision, the mapping exhibit and the expert's interpretation of it were both based on data that Pitzka received from the State early on in discovery. The evidence amounts to nothing more than a "new appreciation of the importance of evidence previously known but not used" and does not constitute newly discovered evidence. *See State v. Bembenek*, 140 Wis. 2d 248, 256, 409 N.W.2d 432 (Ct. App. 1987). Pitzka has not demonstrated that he is entitled to relief for issues he raises surrounding this evidence.

Ineffective Assistance of Trial Counsel

¶22 In addition to the arguments we address above, Pitzka also asserts that trial counsel was ineffective on several fronts. He specifically takes issue with trial counsel's failures to object to evidence of the garage fire and to proceed to trial after being presented with the cell phone mapping exhibit. He also argues that trial counsel rendered ineffective assistance in stipulating that evidence of the 2020 fire was not relevant to the case.

¶23 To prevail on an ineffective-assistance-of-counsel claim, Pitzka must show that trial counsel performed deficiently and that he was prejudiced by the deficiency. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *State v. Mayo*, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115. "The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness." *State v. McMahan*, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App.

1994). The test for prejudice is whether “our confidence in the outcome is doubted such that the conviction is fundamentally unfair or unreliable.” *Id.* We will uphold the circuit court’s findings of fact unless they are clearly erroneous, but review de novo whether counsel’s performance was deficient and prejudicial. *Mayo*, 301 Wis. 2d 642, ¶32. This court presumes [pg 12] counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Strickland*, 466 U.S. at 690.

¶24 Bearing these standards in mind, we reject Pitzka’s ineffective assistance of counsel arguments. We have already concluded that both the garage fire and cell phone mapping exhibit were properly admitted at trial and, as to trial counsel’s failure to request an adjournment on the first day of the trial, we accept the circuit court’s

finding that Pitzka himself declined an adjournment, and trial counsel's performance in handling the mapping exhibit at trial and failing to retain an expert were objectively reasonable because there was no new information presented by the State in the mapping exhibit. There was no ineffective assistance in this regard.

¶25 Lastly, we are unpersuaded by Pitzka's argument that trial counsel was ineffective in failing to move to admit evidence of the 2020 fire. As previously stated, the parties and the circuit court determined that the 2020 fire was not relevant to the case because of its timing, the fact that it was ruled accidental and the other two fires were intentionally set, and the differences in the materials responsible for the 2020 fire was dramatic compared to the materials in the garage fire, which were identical to those used to start Amy's house fire. As trial counsel testified at the *Machner* hearing, he did not attempt to move in evidence of the 2020 fire because he

knew it would be a frivolous motion. An attorney does not perform deficiently by failing to file a motion that would have been properly denied. *See State v. Berggren*, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110. To prevail on this claim, Pitzka must offer “proof to support a conclusion that such a motion would have been successful,” which he has not done. *See State v. Jackson*, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999). [pg 13]

CONCLUSION

¶26 Pitzka has failed to demonstrate that he is entitled to a new trial. As explained, we conclude that the circuit court did not erroneously exercise its discretion in admitting the other-acts evidence and related acts at trial. We further conclude that neither the court nor trial counsel committed error with respect to the cell phone mapping exhibit or in proceeding to trial as scheduled. Finally, Pitzka has failed to demonstrate that

his trial counsel rendered ineffective assistance. Accordingly, we affirm the judgment of conviction and the circuit court's order denying the motion for postconviction relief.

By the Court.—Judgment and order affirmed.

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

Case 2020CF001787 Document 249 Filed 03-14-2024

Filed 03-14-2024 Clerk of Circuit Court Waukesha County
2020CF001787

BY THE COURT:

DATE SIGNED: March 14, 2024

Electronically signed by Hon. Paul F. Reilly
Reserve Judge

STATE OF WISCONSIN,

Plaintiff,

v.

Case no. 2020-CF-1787

MARK A. PITZKA,

Defendant.

Decision on Post-conviction Motion

A jury found Mark Pitzka guilty of arson. Mr. Pitzka seeks an Order vacating his conviction on grounds of newly discovered cell phone evidence, and ineffective assistance of counsel. (Doc. 203, p1; Doc.219)

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A ***Machner***¹ hearing² was held on November 17, 2023, and February 13, 2024, with testimony taken from trial counsel and from Nicholas Schiavo, a cell phone data/map expert, who offered opinions regarding the State's cell phone evidence offered at trial and who proffered "new" evidence in the form of maps which he created from the State's cell phone [pg 2] data.

As trial counsel were not constitutionally deficient, and as Mr. Schiavo's cell phone maps and opinions are not newly discovered evidence this court denies Mr. Pitzka's postconviction motion.

Summary Statement of Facts

¹***State v. Machner***, 92 Wis. 2d 797 (Wis. Ct. App. 1979).

² The Hon. Laura Lau presided over the jury trial and pre-trial motion hearings, this court presided over the post-conviction motion..

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Pitzka and the victim had been in a relationship. On June 25, 2018, the victim ended the relationship. Daniel Lentz was the victim's new boyfriend. Three fires occurred after June 25, 2018;

1. **June 28-29, 2018:** A fire occurred at the victim's residence located in Hartland Wisconsin. Mark Pitzka was charged with arson and was found guilty by the jury.

2. **July 1, 2018:** A fire occurred in the garage of Daniel Lentz' residence located in Hustisford Wisconsin. Mark Pitzka was charged with arson in Dodge County. Mark Pitzka plead not guilty and this matter remained pending at the time of the jury trial in this case.

3. **May 27, 2020:** A fire occurred at a townhouse owned by the victim. No criminal charges were filed as fire experts determined the cause of the fire was a faulty hairdryer owned by a tenant in the townhouse.

Trial counsels' trial strategy was that as the State had no direct evidence that Mark Pitzka started the fire, i.e., no dna, no video, and no inculpatory statements from

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Mark Pitzka, the State could not prove arson beyond a reasonable doubt. (Doc. 186, p30-1; Def's Closing argument; "Who started this fire") Trial counsel asked the jury to take into account "the motive of the person that owned the house" (Doc.186, p32) [pg3] and to infer that the victim was the cause of the fire(s) for purposes of her own financial gain. (See Ex. 6 *Machner* hearing; also, Doc.186, p15) The State, in contrast, offered circumstantial evidence that the fires on June 28-29, 2018 and July 1, 2018, were both ignited in the same method; four firestarter logs used at the June 28-29, 2018, fire and two firestarter logs used at the July 1, 2018 fire and that Mark Pitzka purchased a six pack of firestarter logs on June 27, 2018.

The State obtained the cell phone data of Mr. Pitzka, the victim and Mr. Lentz for the time periods relating to when the fires occurred to presumably see who was near/in

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the vicinity of the fires when they occurred. There is no dispute that the defense was provided with the cell phone data long before trial. (the Criminal Complaint and Ex. 6 ***Machner*** hearing reference the data; Doc.2, p.4) It was undisputed that the State had informed the defense that the cell phone data did not show Mr. Pitzka's phone in the vicinity of the fires at the relevant times. The State informed the defense that they would argue that Mr. Pitzka must have turned his phone off at the time of the fires on June 28-29, and July 1, 2018. The State made such an argument in their closing to the jury. (Doc.186, p.21)

The wrinkle in this case occurred when the State notified trial counsel the day before the jury trial was to start that their cell phone data expert had prepared maps which showed where the defendant's, the victim's and Mr. Lentz's phones were during the relevant times of the fires. The State informed the defense on the eve of

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[pg 4] trial that they would offer the *mapping* evidence as demonstrative evidence on the grounds that the mapping evidence simply displayed the underlying data in a visual format. Trial counsel for Mr. Pitzka, while vigorously objecting to the *mapping* evidence acknowledged that it did not show anything different from what they had expected going into trial, i.e., that Mark Pitka's phone was not in the vicinity of the fires at the relevant times.

Trial counsel objected to the mapping evidence on the grounds of fundamental fairness and that it was "new evidence" which the defense did not have time to fully review or prepare for. The trial court found that the *mapping* evidence was not new evidence as it was "demonstrative" evidence³ and that the court would allow

³ Demonstrative evidence, whether a model, a chart, a photograph, a view, is used simply to lend clarity and interest to oral testimony. Illustrative exhibits may often properly and

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the map evidence at trial. The trial court, however, acknowledged that the map evidence was disclosed to the defense in an untimely manner and offered Mr. Pitzka an adjournment and allowed Mr. Pitzka to meet with his counsel in private to address the adjournment offer.

Trial counsel testified that they met in private with Mr. Pitzka to address the adjournment offer. They advised Mr. Pitzka that the mapping evidence did not show Mr. Pitzka at the scene of either fire and that the mapping evidence would not change [pg 5] their trial strategy in any way and that they were ready to move forward with the jury trial. Mark Pitzka agreed with his counsel and did not

satisfactorily be used in lieu of real evidence. Whether demonstrative evidence is to be received rests largely in the discretion of the trial judge. *Anderson v. State*, 66 Wis. 2d 233, 248-49 (Wis. 1974)

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request an adjournment.

Trial Counsel Was Not Constitutionally Deficient

A defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland*** , [466 U.S. at 687](#). "A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one." ***State v. Smith*** , [2003 WI App 234](#), ¶15, [268 Wis. 2d 138](#), [671 N.W.2d 854](#). To prove constitutional deficiency, a defendant must establish that counsel's conduct fell below an objective standard of reasonableness." ***State v. Love*** , [2005 WI 116](#), ¶30, [284 Wis. 2d 111](#), [700 N.W.2d 62](#).

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and we give "great deference" to trial counsel's decision on strategy. ***State v. Balliette*** , [2011 WI 79](#), ¶26,

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336 Wis. 2d 358, 805 N.W.2d 334. Even if a decision of counsel is "made with less than a thorough investigation," it "may be sustained if reasonable, given the strong presumption of effective assistance and deference to strategic decisions." *Balliette*, 336 Wis. 2d 358, ¶26.

Mark Pitzka asserts that his trial counsels' conduct fell below an objective standard of reasonableness in numerous ways; [pg 6]

- trial counsel was deficient in stipulating to the admission of the cell phone data;
- trial counsel was deficient in proceeding to trial without a cell phone data expert;
- trial counsel was deficient in refusing to accept the trial court's offer to adjourn the trial;
- trial counsel was deficient in failing to object to the admission of the Dodge County "other acts" evidence;
- trial counsel was deficient in failing to cross-examine,

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impeach, and object throughout the trial, and abandoned evidence that the victim received insurance proceeds from the fire at her townhouse on May 27, 2020.

- trial counsel was deficient in allowing exhibits received into evidence to go back to the jury room;
- trial counsel was deficient in failing to object to the admission of the February 21, 2019, “other acts” evidence.

**Trial counsel Reasonably Objected To The
Admission of The Cell Phone Data/Mapping
Evidence**

Trial counsel stipulated prior to trial that the cell phone records could come into evidence. (4/25/22 p.10) That stipulation was strategically reasonable as the cell phone records did not place Mark Pitzka in the vicinity of the fires when they occurred and as such fell within trial counsel’s strategy that the State had no direct evidence that Mr.

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Pitzka committed the arson.⁴ Despite the pre-trial stipulation, the [pg 7] record clearly reflects that trial counsel did strenuously object to the cell phone data and mapping evidence on the first morning of the trial and again during the trial.

Attorney Powers objected on specificity and foundation grounds to Det. Jewell's testimony and the trial court sustained Attorney Powers foundation objection. (Doc.170, pp167-68) (See Doc.184, pp.10-11; p.15). At the State's completion of its examination of Det. Jewell, Attorney Powers renewed his objection to the State's use of the mapping software (Doc 170, pp190-92). The trial court denied the objection. Attorney Powers then vigorously cross-examined Det. Jewell. (Doc.170, p199-206)

⁴ The Criminal Complaint itself reflects that Mark Pitzka's phone was showing "no phone activity" during the relevant time on June 28-29, 2018.

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Mr. Pitzka alleges in his postconviction motion that Ex 23 & 24 show that “Mr. Pitzka did not cease phone usage for the day in “mid to late afternoon” on July 1, 2018, (because of two text messages) and that fact directly contradicts the testimony of Detective Robert Jewell and makes the State’s map evidence “misleading.” (Ex. 25) (Doc.203, p3) This court notes that the evidence presented at trial via Ex. 25, does not show any “cellular activity” on Mr. Pitzka’s phone during the afternoon of July 1, 2018. (Doc.238, p7) This court further agrees that Det. Jewell did not testify as to the two text messages made after 5:00 p.m. on July 1, 2018. However, both Det. Jewell in his trial testimony and Mr. Schiavo in his *Machner* testimony, testified that text messages do not show up on the cell towers and as such cannot be mapped. (4/26/22 pp188-89). This court notes from Det. Jewell’s trial testimony that he testified as to [pg 8] “cell tower activity” (4/26/22 pp188-89)

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which both experts acknowledge that text messages would not be reflected in “cell tower activity.”

Examining the failure (if one would consider it to be a failure on trial counsel’s part) of trial counsel to be aware of the two text messages, the question is would it have been objectively reasonable to cross examine Det. Jewell who had just testified that none of the cell phone data showed the defendant in the vicinity of the fires at the relevant times. This court finds that given trial counsel’s defense strategy it would have been objectively reasonable for Mr. Pitzka’s trial attorneys to have not addressed the two text messages with Det. Jewell. Any error on the part of trial counsel was harmless as it relates to the two text messages.

Trial Counsel’s Decision To Not Have A Cell Phone Expert Was Objectively Reasonable

Attorney Huppertz testified that there was no utility

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in getting a cell phone data expert at any time given that the cell phone data evidence did not show Mark Pitzka in the vicinity of the fires when they occurred. The mapping evidence produced on the eve of trial did not change trial counsel's strategy as the mapping evidence was consistent with the cell phone data and testimony of Det. Jewell. Mr. Schiavo's testimony did not materially differ from that of Det. Jewell and to the extent that it did, it did not impact trial counsel's trial strategy. It was objectively reasonable for trial counsel to not retain a cell phone data expert pre-trial. [pg 9]

Mark Pitzka Made The Decision To Not Accept The Trial Court's Offer Of An Adjournment.

Mark Pitzka argues that his trial counsel were deficient for not accepting the trial court's offer of an adjournment. Mark Pitzka's argument is flawed as the

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undisputed evidence at the ***Machner*** hearing is that Mark Pitzka made the decision to not accept the trial court's offer of an adjournment.

When the trial court offered an adjournment on the morning of the trial, the trial court gave trial counsel time to discuss the adjournment offer with Mark Pitzka. Trial counsel both testified at the ***Machner*** hearing that they explained to Mark Pitzka that the "mapping" exhibits did not change what the cell phone data showed and therefore the mapping exhibits did not change their trial strategy and would not change their trial strategy in the future if Mark Pitzka accepted the court's offer of an adjournment. Mark Pitzka, having been informed of his options and his trial counsel's advice made the decision to not accept the trial court's offer of an adjournment. No evidence offered at the ***Machner*** hearing contradicts Mark

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Pitzka's decision to decline the trial court's offer of an adjournment.

As Mark Pitzka made the adjournment decision after receiving advice from his counsel, he cannot now complain that his trial counsel were deficient. [pg 10]

Trial Counsel Was Not Deficient In Failing To Object To The Dodge County "Other Acts" Evidence.

This court agrees that the fact that the Dodge County Circuit Court found the Waukesha County June 27-28, 2018 fire to be proper "other acts" evidence in the Dodge County arson charge does not mean that a Waukesha County Circuit Court must find the July 1, 2018, Dodge County fire to be "other acts" evidence in Waukesha. Every "other acts" motion must be individually addressed under the *Sullivan* analysis.

This court does not agree with the defense that because the Dodge County fire occurred after the

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Waukesha County fire and because Mark Pitzka has a presumption of innocence that the Dodge County fire cannot as a matter of law be allowed as “other acts” evidence in this action. Every “other acts” motion must be individually addressed under the *Sullivan* analysis.

As a general rule propensity evidence is inadmissible. Wis Stat. § 904.04(1) However, evidence of other crimes, wrongs, or acts, pursuant to Wis Stat. § 904.04(2)(a) is admissible if (1) it is offered for a permissible purpose, (2) it is relevant under the requirements of Wis Stat. § 904.01, and (3) its probative value is not substantially outweighed by the risk of danger or unfair prejudice under 904.03. *State v. Sullivan*, 216 Wis. 2d 768 (1998).

The *Sullivan* analysis does not contain a temporal element. In *U.S. v. Davis*, 636 F.3d 1281, (10th Cir. 2011),

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the defendant was charged with cocaine possession. *Id.*, at 1288. At trial the government sought to admit a subsequent [pg 11] cocaine arrest under FRE 404(b). *Id.*, at 1297. The court noted that evidence admitted under FRE 404(b), (the Federal Counterpart to Wis Stat. § 904.04), may relate to conduct occurring either before or after the charged offense. *Id.*, at 1298. The court continued that as long as the uncharged offenses are similar to the charged crime and sufficiently close in time they are permissible. *Id.*

The trial court held an “other acts” motion hearing on April 4, 2022. (Doc. 180). The State was seeking permission to offer two “other acts” of Mark Pitzka; 1.) the Dodge County fire of July 1, 2018, and 2.) Mark Pitzka’s conviction in 2014, for knowingly violating a harassment restraining order against a former girlfriend. (Doc.180, p5)

Trial counsel told the trial court that he would

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not stipulate to the Dodge County fire being proper “other acts” evidence, but he would not contest the motion as the Dodge County judge found that the Waukesha charge of arson was proper “other acts” evidence in the Dodge County matter. (Doc.180, p3) Attorney Powers indicated that Attorney Huppertz was in agreement with his assessment that the Dodge County charge was proper “other acts” evidence in the Waukesha Court. (Doc.180. p.3)

The State advised the court that they met the Sullivan factors as to the Dodge County fire as the same type of fire starter logs were used and the defendant had bought a six pack box of fire starter logs the day before the Waukesha fire. (Doc.182, pp.5-6, see also Ex. 3, ***Machner*** hearing) Four logs were used at the Waukesha County [pg 12] fire and two logs were used at the Dodge County fire.

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Given the closeness in time, motive, plan, context and the similar manner of the ignition of the fires this court agrees that the *Sullivan* analysis being applied would allow for the Dodge County fire evidence to be “other acts” evidence in this action.

Trial counsel were not lazy, negligent or lacking in diligence in their handling of the “other acts” motions brought against Mark Pitzka. Trial counsel were successful in challenging the State’s “other acts” motion to bring in the 2014 conviction of Mark Pitzka for knowingly violating a restraining order. (See Doc. 180 & Doc. 36) In light of all the facts presented as to motive, context and similarity of the Dodge and Waukesha fires, this court finds that trial counsels’ decision to not contest the State’s “other acts” motion as to the Dodge County fire was not deficient.

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**Trial Counsel Was Not Deficient In Failing To
present Evidence That The Victim Started The May
27, 2020 Fire.**

Mark Pitzka argues that trial counsel were deficient for abandoning evidence that the victim received insurance proceeds from the May 27, 2020, fire at her townhouse. Mark Pitzka was not charged with anything related to the May 27, 2020, fire and therefore this is not a *Denny*⁵ question but simply one of relevance.

The State brought a motion in limine (Doc.40,# 12, p.2) which asked the trial court to prohibit the defense from bringing in any evidence of the May 27, 2020, fire on the grounds that the 2020 fire was an electrical fire in a tenant's unit that was [pg 13] caused by a defective

⁵ *St v. Denny*, [120 Wis. 2d 614, at 623-24](#), (Ct App 1984), to the extent that the defense implies a *Denny* challenge to the Waukesha fire, such an argument is undeveloped.

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hairdryer that had been fully investigated by fire marshals. (See Ex.4 & 5, ***Machner*** hearing) The State argued to the trial court that any evidence of the victim receiving insurance proceeds would not be relevant to the prosecution of Mark Pitzka for the 2018 fire at the victim's residence. (Doc.182, pp6-7)

Attorney Powers advised the trial court that he would not be pursuing any evidence suggesting that the victim started the fire at her townhouse on May 27,2020, and also would not be pursuing any ***Denny*** evidence against the victim or the boyfriend for starting the June 28-29, 2018 or July 1, 2018, fires. (Doc.184, p24-5) Attorney Powers informed the trial court that he and Mr. Huppertz had discussed the May 27, 2020, fire in depth and that they had no relevant evidence to present given the fire marshal reports. (Doc.182, pp.7-8) (Doc.182, pp2-3)

Having reviewed the record and the fire marshal

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reports this court finds that trial counsel was not deficient in failing to pursue a motion to admit evidence that the victim received insurance proceeds from the May 27, 2020, fire as any such motion would have been denied on relevancy grounds.

**Trial Counsel Was Not Deficient In Allowing
Exhibits To Go To Jury Room**

Mark Pitzka argues that trial counsel was deficient in not objecting to the jury's request during deliberations to review exhibits that had been received into evidence but does no more than saying the evidence was prejudicial. The fact that evidence is [pg 14] prejudicial is not proper grounds by itself to prevent a jury from reviewing the evidence during deliberations. This argument is not fully developed and will not be addressed.

**As The February 21, 2019, Evidence Was Proper
Evidence, Trial Counsel Was Not Deficient.**

Mr. Pitzka alleges that his counsel were deficient for

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not objecting to evidence that on February 21, 2019, Mark Pitzka drove to Janesville to buy a box of fire starter logs. Other acts evidence is admissible when it is offered for the purpose of establishing context. *St. v. Hunt*, 263 Wis.2d 35, ¶58. Other acts evidence is permissible to show the context of the crime and to provide a complete explanation of the case. *Id.*

On the afternoon of February 19, 2019, detectives interviewed Mr. Pitzka in order “to talk to Mr. Pitzka about all the evidence that we had found and ask him about the situation.” (Doc.174, p7) Mr Pitzka was shown photo’s of the fire logs found at both the Waukesha and Dodge County fires. Mr. Pitzka said that he had never seen those logs before and that he had never purchased such logs. (Doc.174, p7) The detectives then showed Mr. Pitzka a photo of him purchasing firestarter logs from the Waukesha Farm & Fleet the day prior to the Waukesha County fire

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as well as the receipt for the purchase and a video of Pitzka purchasing the logs. (Doc.174, p7) [pg 15]

Citations from counsel to the record for this issue are lacking but it appears from this court's review of the record that the State had evidence that on February 21, 2019, Mr. Pitzka purchased firestarter logs from a Janesville Farm & Fleet store. Mr. Pitzka then returned to the police with the box of six logs and told them that Damon Albers, a friend of his "found" the box of firestarter logs in one of his trucks and these logs were the logs he bought on June 27, 2018, at the Waukesha Farm & Fleet store and therefore the logs used at the June 28-29, 2018 and July 1, 2018 fires could not be the logs he purchased on June 27, 2018. While not fully developed, it is this court's understanding that the State seized the logs and used the February 21, 2019, Janesville purchase to

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impeach the defense arguments.

This court further finds that the February 19-21, 2019, evidence is not “other acts” evidence as all the evidence was brought about by Mark Pitzka bringing the “found” logs to the police as evidence that he did not commit the arson as he claimed that he still had the logs purchased from Farm & Fleet on June 27, 2018. The State used the “Janesville” logs to impeach Mr. Pitzka’s claim. Even if one examines the February 19-21, 2019, evidence as “other acts” evidence, it is admissible as showing the context of the crime and a explanation of the case against Mr. Pitzka.

Mr. Schiavo’s Opinions and Proffers Are Not New Evidence.

Mr. Pitzka argues that the testimony and exhibits offered by Mr. Schiavo are “newly discovered evidence.” In order to warrant a new trial, newly discovered [pg 16] evidence must meet the following criteria: "(1) the evidence was

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discovered after conviction; (2) the defendant 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." *Id.* , ¶32 (quoting ***State v. McCallum*** , 208 Wis. 2d 463, 473, 561

N.W.2d 707 (1997)). "If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." ***McCallum***, 208 Wis. 2d at 473.

Newly discovered evidence does not include the "new appreciation of the importance of evidence previously known but not used." ***State v. Bembenek*** , 140

Wis.2d 248, 256, 409 N.W.2d 432 (Ct.App. 1987) "¶ 12. In this matter the cell phone data used by Mr. Schiavo was not discovered after the conviction and this court further finds

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that Mr. Sciavo's testimony and proffers were not material as they were in line with Det. Jewell's testimony. At best, the evidence offered by Mr. Schiavo was cumulative to the testimony of Det. Jewell.

This court finds that Mr. Schiavo's testimony and mapping evidence does not constitute new evidence, as it was not discovered after the conviction and the evidence is not material to an issue in this case. [pg 17]

Conclusion

This court has considered all other claims of error raised by Mr. Pitzka and finds that they are not fully developed. This court need not search the record to try and develop such an argument.

As trial counsel were not deficient in their representation of Mr. Pitzka and as Mr. Schiavo's testimony and proffers are not new evidence this court denies Mr. Pitzka's motion to vacate his conviction.

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**THIS IS A FINAL ORDER FOR PURPOSES OF
APPEAL**