COURT OF APPEALS
DECISION
DATED AND RELEASED

February 18, 1997

No. 96-0643-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Michael D. Sarnowski, Jr.

Defendant-Appellant.

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

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Michael D. Sarnowski, Jr. appeals from a judgment of conviction for physical abuse of a child and from an order denying his motion for postconviction relief. Sarnowski argues that the evidence was insufficient to support the jury's guilty verdict. Sarnowski also claims that he received ineffective assistance of counsel when his trial counsel allegedly failed to: (1) investigate and formulate a "proper theory of defense" by presenting a

more effective expert witness; and (2) call him as a witness in his own defense. We reject Sarnowski's arguments and, accordingly, we affirm.

I. BACKGROUND

On March 10, 1993, Brittany B., while under the care and supervision of her uncle, Michael Sarnowski, incurred injuries which left her with a perforated eardrum and permanent hearing loss. Following an investigation into the cause of Brittany's injuries, Sarnowski was charged with physical abuse of a child, contrary to § 948.03(2)(c), STATS. After a five-day trial, the jury convicted Sarnowski. The court sentenced him to the maximum term of ten years' imprisonment. Sarnowski then filed a postconviction motion alleging that he received ineffective assistance of counsel. After a ***Machner***[1] hearing, the trial court denied Sarnowski's motion concluding that Sarnowski's trial counsel was not ineffective.

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

II. SUFFICIENCY OF THE EVIDENCE CLAIM

Sarnowski first argues that the evidence was insufficient to support the jury's guilty verdict. We disagree.

The rules governing appellate review of the sufficiency of evidence to support a conviction are well-established.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted). We employ this standard for reviewing a challenge to the sufficiency of the evidence regardless of whether the evidence presented at trial was direct or circumstantial. ***Id.*** at 503, 451 N.W.2d at 756. We will not substitute our judgment for that of the trier of fact unless the fact-finder relied on evidence that was "inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

The jury clearly had sufficient evidence upon which to find Sarnowski guilty. Testimony established that Sarnowski was the only person who had the opportunity to inflict injury on the child. The victim's mother, Sandra B., testified that when she left the apartment at 5:45 p.m. on March 10, Brittany was sleeping and nothing was wrong with her ear. Robert Petrie, the

first person to babysit for Brittany that evening, testified that nothing was wrong with the child when he left her alone with Sarnowski at 7:00 p.m. Minutes later, however, something was terribly wrong with Brittany. Lisa Sarnowski, the defendant's wife, testified that when Sarnowski returned to their apartment at approximately 7:15 p.m., Brittany was crying inconsolably and had a green substance coming out of her ear. From this evidence, the jury could have reasonably concluded that Brittany was injured while she was alone with Sarnowski.

The jury also heard testimony about a previous injury Brittany had suffered while in Sarnowski's care. Sandra B. testified that when she left Brittany alone with Sarnowski a few months earlier, she returned to find her with a hand print and scratches on her face. Sarnowski subsequently admitted responsibility, but claimed the injuries were accidental.

Sandra B. testified that as a result of that first incident, she no longer trusted Sarnowski and refused to leave Brittany alone with him. Consequently, on the evening of March 10, 1993, Sandra B. specifically requested that her aunt, Lisa Sarnowski, come downstairs and watch Brittany after Robert Petrie departed. Michael Sarnowski, however, volunteered to babysit that evening and even came downstairs earlier than necessary to do so. Thus the jury could have inferred that he was looking for another opportunity to be alone with Brittany so he could hurt her.

Dr. Conley, an expert in pediatric otorhinolaryngology, testified that Brittany suffered serious burns that destroyed 95% of her right eardrum and caused a 50% hearing loss in her right ear. Dr. Conley stated that Brittany's injuries were caused by a caustic chemical poured directly into her ear canal, not by an accident or an ear infection.

Additional evidence also strongly suggested that Sarnowski poured a caustic chemical into Brittany's ear. The investigation revealed that the clothing Brittany was wearing the night she was injured was stained on the neck and front areas by sulfuric acid with a pH of two. When the investigating officers searched the victim's residence, they found no products containing sulfuric acid. Shortly after Brittany was injured, however, her father found a bottle of drain cleaner on a shelf in Sarnowski's side of the shared basement.

Only a small amount of the liquid was missing from the bottle; the drain cleaner contained sulfuric acid.

Based on this evidence, the jury, acting reasonably, could have concluded beyond a reasonable doubt that Sarnowski intentionally caused great bodily harm to Brittany B. The evidence was sufficient.

III. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Sarnowski next argues that his trial counsel was ineffective. To demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. ***State v. Moffett***, 147 Wis.2d 343, 352, 433 N.W.2d 572, 575 (1989). Whether counsel's performance was deficient and prejudicial are questions of law, which we review *de novo*. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990). We need not address both the deficient performance and prejudice prongs if the defendant fails to make a sufficient showing regarding one of them. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). In deciding an ineffective-assistance-of-counsel claim, the trial court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." ***Id.*** at 690. At the postconviction hearing on the claim, the trial court is the ultimate arbiter of the credibility of trial counsel and all other witnesses. *See* ***Dejmal v. Merta***, 95 Wis.2d 141, 152, 289 N.W.2d 813, 818 (1980). We will reverse a trial court's findings of fact only if they are "clearly erroneous." ***Pitsch*** at 634, 369 N.W.2d at 714.

A. Investigation and Preparation for Trial

Sarnowski argues that counsel failed to adequately investigate and formulate a "proper theory of defense" for trial. He contends that counsel was deficient for failing to locate an expert witness who could counter the opinion of the State's medical expert. Sarnowski also claims that counsel's performance was deficient because counsel agreed "that the child was injured by the application of some acidic or caustic substance to its ear." Thus, Sarnowski

concludes, "trial counsel conceded the prosecution's theory of the case, leaving the jury with no alternative but to find him guilty."

Denying Sarnowski's postconviction motion, the trial court found that defense counsel's "performance ... was above an objective standard of reasonableness. Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable, professional judgment on the basis of the information that he had at the time and on the posture of the case." We agree.

According to his testimony at the ***Machner*** hearing, counsel hired an investigator, consulted with several medical experts, and regularly communicated with Sarnowski. He also explained how and why he selected the particular defense strategy. As the trial court stated in its findings:

> [Defense counsel] testified ... that their strategy was that this case was a caustic substance case[,] but the defendant was not the one who did, [or] if [he] was, it ... was an accident.
>
> ....
>
> [The] defense was oriented around how that material got in the child's ear since the defendant denied that he placed it there, and the focus was going to be that it was probably the result of an accident somehow, particularly involving the washcloth that might have been used to wipe the child's ear.

To bolster this theory and to counter the opinion offered by the State's expert, defense counsel called Dr. Thomas Schneider, Director of St. Mary's Hospital Burn Center. Dr. Schneider testified that although he agreed that a caustic substance came in contact with Brittany's outer ear, he did not believe that this substance was poured into her ear canal. Dr. Schneider testified that he believed an infection caused the perforated eardrum.

At the postconviction hearing, Sarnowski's appellate counsel called Dr. Frederick Horwitz who, like Dr. Schneider, opined that the perforated eardrum was caused by an ear infection. Dr. Horwitz's opinion differed from Dr. Schneider's only in that he dismissed caustic chemicals as the cause of the outer ear abrasions. Dr. Horwitz's opinion was based on his assumption that it would be impossible to pour a caustic chemical into a child's ear without dripping it "all over" the child. In offering this opinion, however, Dr. Horwitz apparently was unaware that traces of sulfuric acid were found on Brittany's clothing.

As the trial court explained in denying Sarnowski's motion, Dr. Horwitz's postconviction hearing testimony was not very different from Dr. Schneider's trial testimony. Both physicians believed the perforated eardrum was caused by an ear infection, not by a chemical burn. Their opinions differed only on the cause of the external ear injury.

Defense counsel is not required to dilute a chosen defense by presenting alternative theories as well. *See* ***Kain v. State***, 48 Wis.2d 212, 221, 179 N.W.2d 777, 783 (1970). The theory of defense selected by trial counsel need not be the one which looks best either to appellate counsel or to the reviewing court. *See* ***State v. Felton***, 110 Wis.2d 485, 501-02, 329 N.W.2d 161, 168 (1983). Defense counsel's performance is not measured by the success of the defense strategy; the fact that the strategy did not work does not mean counsel was ineffective for selecting it. ***State v. Teynor***, 141 Wis.2d 187, 212, 414 N.W.2d 76, 85 (Ct. App. 1987).

Here, counsel's failure to find an expert to testify that Brittany's injuries were not caused by a chemical substance was not deficient performance. In the first place, such testimony would have conflicted with Sarnowski's chosen theory of defense. In the second place, such testimony would not have been credible in light of the testimony of three experts—the State's pediatric ear specialist, a dermatologist consulted by the State's expert, and Sarnowski's own expert, Dr. Schneider—who all stated that a caustic chemical was involved in injuring Brittany. Thus counsel's performance in locating experts and selecting a defense strategy was not deficient.

B. Defendant's Right to Testify

Finally, Sarnowski argues that counsel was ineffective because he did not call him to testify and, further, that counsel's conduct denied him his constitutional right to testify. Sarnowski points out that in trial counsel's opening statement he promised the jury that Sarnowski would testify. Thus, he claims,"the jury had an expectation that [he] would testify and present his version of what happened." Denying Sarnowski's postconviction motion, the trial court concluded that: (1) counsel reasonably advised his client not to testify; and (2) Sarnowski knowingly and voluntarily waived this right.[2]

A defendant's right to testify is fundamental. ***State v. Simpson***, 185 Wis.2d 772, 778, 519 N.W.2d 662, 663 (Ct. App. 1994). We recognize, however, that a defendant may waive the right to testify. ***Id.*** at 778, 519 N.W.2d at 664. To determine whether Sarnowski knowingly and voluntarily waived his right to testify, we must consider the totality of the record. ***Id.*** at 778-79, 519 N.W.2d at 664.

At the postconviction hearing, Sarnowski's trial counsel testified:

> Q:And at the time you gave the opening statement, you anticipated that he would in fact testify. Is that correct?
>
> A:Yes, I did.
>
> Q:You indicated during the course of the trial, ... that [Sarnowski] became very tense and at some point did not become a candidate for taking the witness stand. Is that correct?
>
> A:He began to act in a strange manner, ... he was showing signs that if he got on the stand, that everything we talked about would be out the window,...

[2] Again, we remind the trial court to engage in an on-the-record colloquy with a defendant regarding the right to testify. ***State v. Simpson***, 185 Wis.2d 772, 779, 519 N.W.2d 662, 664 (Ct. App. 1994); *see also* ***State v. Wilson***, 179 Wis.2d 660, 672 n.3, 508 N.W.2d 44, 48 n.3 (Ct. App. 1993), *cert. denied*, 115 S. Ct. 100 (1994).

....

Q:Did he concur in the decision not to take the stand or was it his decision alone....

A:Well I told him of my concerns ... I certainly didn't tell him that he couldn't testify or that it was my decision and he had to go along with it or get a new lawyer or something like that. He agreed, and quite frankly, he was very compliant.

Counsel further explained that he did not want Sarnowski to testify because he was afraid Sarnowski would volunteer very damaging information. Specifically, counsel knew that Sarnowski had conducted experiments on laboratory rats—experiments in which he poured acid into laboratory rats' ears to observe its effects. Counsel justifiably feared that if the jury learned of these experiments, the result would be devastating.

When Sarnowski testified at the postconviction motion, he told the court that he had wanted to take the stand at the trial but did not do so because his attorney advised against it. He did not dispute, however, that ultimately he agreed with counsel's advice. Accordingly, we conclude that Sarnowski waived his right to testify.

By the Court.—Judgment and order affirmed.

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