COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2439-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY H. WILCOX A/K/A PIK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Crawford County: MICHAEL T. KIRCHMAN, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Gregory A. Wilcox, a/k/a Pik, appeals a judgment convicting him of intentionally causing bodily harm to a child and an order denying his motion for postconviction relief. Wilcox contends: (1) requiring counsel to examine witnesses from a spot near the jury box infringed upon his rights to present evidence and to cross-examine witnesses by limiting his ability to

confer with counsel during the examination of witnesses; (2) counsel performed ineffectively by failing to make an offer of proof that a witness would have testified that the victim had made prior false allegations of abuse; and (3) the trial court erroneously exercised its discretion by refusing to instruct the jury on reasonable parental discipline. However, we conclude Wilcox has waived any objection to the placement of counsel while questioning witnesses; he has failed to establish that counsel's performance was ineffective; and the trial court's determination that the evidence did not warrant the requested instruction was a proper exercise of discretion. Accordingly, we affirm.

Wilcox was charged with intentionally causing bodily harm to a child after his son Ryan reported to a teacher and a school nurse that his elbow had been injured when his father threw a nearly full can of beer at him. Prior to trial, Ryan changed his story, claiming that he had injured his arm when he had fallen on his bike and that he had made up the story about his dad because he was angry about having been grounded.

At trial, in accordance with the trial court's customary procedure, counsel for both sides examined witnesses from a podium near the jury box, in such a way that the prosecution table separated the defendant from his attorney. As a result of this arrangement, the defendant was unable to prompt defense counsel, during the cross-examination of Ryan's teacher, to ask whether Ryan had once falsely accused the teacher of choking him. When defense counsel attempted to raise this issue on recross-examination, after having the opportunity to confer

with his client during the redirect-examination,[1] the trial court ruled that it was outside the scope of the redirect-examination. Counsel did not object to the ruling or make an offer of proof.

Wilcox first claims that the trial court failed to properly exercise its discretion by considering the possible prejudicial effect of separating the defendant from counsel during the examination of witnesses. However, the trial court is not required to exercise its discretion until called upon to do so. Because Wilcox never objected to the placement of counsel during the trial, he has waived his right to appellate review of that issue. *See, e.g.,* ***State v. Darcy N.K.***, 218 Wis.2d 640, 659-60, 581 N.W.2d 567, 576 (Ct. App. 1998).

Wilcox next claims that counsel performed ineffectively by failing to make an offer of proof that the teacher would have testified that Ryan had made a false accusation against the teacher after the teacher had disciplined him. Whether counsel's performance was ineffective is a mixed question of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). The circuit court's findings of fact will not be reversed unless they are clearly erroneous. Section 805.17(2), STATS; ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which this court decides de novo. ***Id***. at 634, 369 N.W.2d at 715.

[1] At the postconviction hearing Wilcox said that he had discussed the issue of prior false accusations with counsel prior to trial, while counsel said that he had known nothing of the alleged choking incident until Wilcox slid him a note during the redirect-examination of Schilling. Although the trial court did not explicitly resolve this conflict in the testimony, it stated that it was taking Wilcox's "exaggerated" testimony "with a grain of salt."

The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland***, 466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id***. at 688. Here, even assuming that counsel ought to have objected to the court's ruling and made an offer of proof, we conclude that Wilcox has failed to establish that he was prejudiced by counsel's actions.

To establish prejudice the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. ***Id***. at 687. Where counsel is alleged to have failed to present evidence favorable to the defendant, the defendant must identify the omitted evidence with particularity, demonstrate that it was available and admissible, and show how it would have affected the outcome of his case. *See* ***State v. Elm***, 201 Wis.2d 452, 464, 549 N.W.2d 471, 476 (Ct. App. 1996).

Wilcox argues that any evidence which would tend to show the victim had made false accusations in the past would have been extremely relevant to the victim's credibility. While that may be true, Wilcox has failed to show that Schilling would have offered such testimony. Schilling did not testify at the postconviction hearing. Wilcox testified only that he told his attorney that Ryan had made a prior accusation of abuse against Schilling, and that Schilling brought an attorney to a school meeting to discuss the allegation because he was upset. Wilcox never testified that Shilling had claimed that the accusation was false or that the accusation had been made in retaliation for discipline which Schilling had administered.

Finally, Wilcox claims that he was entitled to a jury instruction on parental discipline. A defendant is entitled to a requested instruction on any valid theory of defense that is supported by the evidence, as viewed most favorably to the defendant. ***State v. Dean***, 105 Wis.2d 390, 395-96, 314 N.W.2d 151, 155 (Ct. App. 1981). We will independently review whether there were sufficient facts to warrant a particular instruction. ***State v. Mayhall***, 195 Wis.2d 53, 57, 535 N.W.2d 473, 475 (Ct. App. 1995).

Wilcox asked that the jury be informed, based upon § 939.45(5), STATS., and WIS J I—CRIMINAL 950, that a person who is responsible for the welfare of a child has the right or privilege to use a reasonable amount of force to discipline the child when there is a need to do so. However, the defense theory was that Wilcox had never thrown the beer can at all. Although there was evidence that Ryan had misbehaved, Wilcox took the stand and testified that he had punished his son by grounding him. No one testified that Wilcox had thrown the can for any reason other than anger at having to leave a bar to come home and deal with his son. Therefore, there was no evidence which would have required the trial court to give an instruction on parental discipline.

By the Court.—Judgment and order affirmed.

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