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DISTRICT IV

June 21, 2016

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

2015AP909-CR State of Wisconsin v. Michael J. Klawitter (L.C. # 2013CF1031)

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

Michael Klawitter appeals a judgment that convicted him of child abuse—intentionally causing harm, and an order that denied his postconviction motion seeking a new trial based on an allegation of ineffective assistance of counsel. After reviewing the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm for the reasons discussed below.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

The child abuse charge arose out of a domestic dispute in which Klawitter intervened in an argument between his then sixteen-year-old daughter and her mother by dragging his daughter about sixty feet downstairs to her room as she twisted and struggled and grabbed the doorjamb and handrail of the stairs. Klawitter testified that he placed his daughter's jaw in the crook of his elbow in a "headlock" with her arms locked in a "half nelson" position to lead her, because "[w]here the head goes, the body goes."

The daughter testified that she was yelling for her father to let her go as he was dragging her with his arm around her neck because she could not breathe, thought she was going to lose consciousness, and felt so much pressure in her face that she felt like her eyes were going to pop out of her head. By the time Klawitter released her, the daughter testified that she was coughing, trying to catch her breath, and felt like she was going to throw up. That evening, the daughter noticed that her face was beginning to show signs of injury. By the next day, the discoloration in her face and right eye was so prominent that people at school noticed it even under her makeup, and the school counselor notified authorities. The daughter then went to the hospital, where the doctor told her that she had petechia (broken blood vessels) and subconjunctival hemorrhages (bleeding in the eye), which were symptoms of strangulation.

The State presented a SANE nurse as an expert witness at trial who testified that petechia and subconjunctival hemorrhages are typically caused by strangulation when the jugular veins in the neck are compressed to the point that blood flowing into the head through arteries cannot drain back out, and the building pressure ruptures blood vessels—which can occur with about four and a half pounds of pressure for as little as ten seconds. The nurse noted that it could take up to twenty-four hours for petechia and subconjunctival hemorrhages to show, depending on the degree and length of time of the compression of the veins. The nurse further explained that other

symptoms of strangulation such as nausea, and dizziness or loss of consciousness, could result from cutting off the blood flow through the carotid artery (at about eleven pounds of pressure), or restricting the air flow through the trachea (requiring about thirty-three pounds of pressure).

Klawitter presented several defense theories at trial, including defense of others and an argument that his daughter's airway could not have been cut off since she was screaming and never lost consciousness—which Klawitter argued showed that he was not employing enough pressure to impede the carotid artery or trachea and that any strangulation that he did cause was accidental, not intentional. Alternatively, Klawitter posited that his daughter's petechia and subconjunctival hemorrhaging was caused not by the headlock at all, but rather by the pressure on blood vessels stemming from his daughter's screaming and highly emotional state.

Klawitter did not, however, present any expert testimony about how petechia or subconjunctival hemorrhages could also be caused by mechanisms other than strangulation. Defense counsel had consulted an expert, who had coached counsel to cross-examine the State's expert about other potential causes of petechia and subconjunctival hemorrhages such as sneezing, coughing, constipation, viral infection, medication side effects, hard sobbing, screaming, childbirth, or other actions that temporarily raise blood pressure in the veins—but counsel forgot to pursue that line of questioning at trial.

We will assume for the sake of argument that counsel's cross-examination of the State's expert witness constituted deficient performance. We agree with the circuit court, however, that Klawitter has failed to demonstrate prejudice stemming from counsel's omission. In particular, there are two flaws in Klawitter's theory that expert testimony about other causes of petechia and subconjunctival hemorrhages would have altered the outcome of the trial.

First and foremost, the jury did not need to find that Klawitter had intentionally strangled or otherwise caused his daughter's petechia and subconjunctival hemorrhages in order to find him guilty of intentional child abuse—and the fact that the jury acquitted Klawitter on an additional charge of strangulation suggests that they did not find such intent. Rather, the jury needed to find only that Klawitter was aware that his conduct—namely, putting his daughter in a headlock and dragging her to her room while she was struggling—was practically certain to cause her physical pain or injury, illness, or impairment of physical condition. Additional testimony about what may have caused the daughter's petechia and subconjunctival hemorrhages would not have undermined the daughter's testimony about the pain she suffered while she was being dragged. Thus, it would be entirely consistent with the testimony and the jury's verdicts to conclude that Klawitter was aware that dragging his struggling daughter in a headlock would cause her pain, even if he was not aware that the headlock could have caused his daughter to suffer petechia and subconjunctival hemorrhages or other symptoms of strangulation.

Secondly, even if counsel had presented additional evidence that had convinced the jury that the daughter's petechia and subconjunctival hemorrhages could have been caused by her own screaming and struggling, the vast majority of that behavior had been in response to Klawitter's headlock, and was therefore still attributable to him. Moreover, the daughter testified that she felt the intense pressure in her head that made her feel like her eyes were going to pop out of her head while she was being dragged downstairs—not during the argument with her mother that had preceded her father's intervention.

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS.
STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals