COURT OF APPEALS
DECISION
DATED AND FILED

FEBRUARY 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0429-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY M. KLUWE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Affirmed.*

Before Cane, P.J., Myse and Curley, JJ.

PER CURIAM. Gary Kluwe appeals a judgment and an order convicting him of intentionally causing bodily harm to a two-year-old child and denying his postconviction motion in which he alleged ineffective assistance of counsel. Because Kluwe has established neither deficient performance nor prejudice resulting from his counsel's conduct, we affirm the judgment and order.

A jury convicted Kluwe of injuring his live-in girlfriend's son. The State presented four witnesses. The child's mother testified that she did not see what caused her son to begin crying because she was in another room. The State then offered prior inconsistent statements in which she told a police officer and a social worker that Kluwe slapped the child across the face causing his head to snap back and hit the wall and cutting his lower lip. The State also presented testimony from the police officer who testified that the child told him, "Gary hit me," and from the social worker who testified that the victim's mother and siblings told her that Kluwe struck the child. Finally, the State called a medical doctor who testified that the victim's mother and grandmother, when giving him the medical history, said that Kluwe struck the child. On cross-examination, he admitted that, although the injuries were consistent with being slapped by an adult, they were also consistent with being struck by another child as suggested by the defense.

Kluwe argues that the performance of his trial counsel was constitutionally defective and prejudicial because counsel conducted a short voir dire, made a one-page opening statement and approximately a one-page closing argument. Kluwe has established neither deficient performance nor prejudice from counsel's brevity. To establish ineffective assistance of counsel, Kluwe must overcome the strong presumption that counsel acted reasonably within professional norms and must establish that counsel's errors were so serious as to deprive him of a fair trial whose result is reliable. *See* ***Strickland v. Washington,*** 466 U.S. 668, 687-88 (1984). Kluwe does not identify any question that should have been asked of prospective jurors. Kluwe faults trial counsel for not being repetitious in her opening and closing statements. Trial counsel's brevity does not constitute constitutionally deficient performance or undermine this court's confidence in the outcome of the trial.

Kluwe faults his trial counsel for incompetently cross-examining the State's witnesses. Trial counsel explained that the only State's witness who was present at the time of the offense was the child's mother. The other State witnesses' versions of the battery came from the child's mother. Trial counsel emphasized that at trial, the child's mother withdrew her accusations against Kluwe. Trial counsel succeeded in securing testimony from the State's medical witness that the injuries were consistent with Kluwe's innocence. Kluwe again identifies no specific questions that trial counsel failed to ask when cross-examining the State's witnesses.

Kluwe faults trial counsel for failing to call other available witnesses. Counsel did not call a medical doctor because she succeeded in eliciting the same testimony from the State's medical witness. She did not call family members and a clergyman as character witnesses because she did not want to open the door for the State to call witnesses that could have established Kluwe's history of violent character traits. She did not call a private detective who had gathered information regarding the mother's numerous prior inconsistent statements because the mother cooperated with the defense and her prior inconsistent statements were already reported to the jury.

Kluwe raises issues regarding the investigator's fee or trial counsel's demand for additional money just before the trial began. These issues are not sufficiently developed to require a response. Counsel's motivation is not at issue unless Kluwe can identify deficient performance and prejudice. He has established no nexus between the money questions and counsel's performance. Kluwe also requests that this court independently review the demeanor of the trial attorney and judge her credibility at the postconviction hearing. The credibility of witnesses is exclusively committed to the trier of fact. *See* ***State v. Hubanks,*** 173

Wis.2d 1, 27, 496 N.W.2d 96, 105 (Ct. App. 1992). Kluwe also argues that the trial court should have allowed post-trial discovery of his trial counsel's records as well as depositions or interrogatories in order to assist him in establishing ineffective assistance. He acknowledges that the trial court "relied upon long-established law that the standard type of discovery permitted in civil cases was not permissible in criminal cases." He provides no authority to support his argument that this court should expand the rules of discovery in criminal cases. Criminal discovery is a matter of statute and should not be expanded on an individual case-by-case basis. *See* ***Cheney v. State,*** 44 Wis.2d 454, 466, 171 N.W.2d 339, 345 (1969), *overruled on other grounds,* ***Byrd v. State,*** 65 Wis.2d 415, 425, 222 N.W.2d 696, 702 (1974). This court has no authority to modify § 971.23, STATS., to provide additional discovery in criminal cases.

Trial counsel concisely presented a defense that the only State's witness with first-hand knowledge of the offense now denied that the offense took place. The defense established that the child's mother made inculpatory statements about Kluwe's conduct because she was afraid that her children would be taken from her. The social worker testified that a CHIPS petition had in fact been filed. The defense also established that the State's medical expert could not say that the injuries were caused by Kluwe striking the child. Trial counsel presented a plausible defense. The jury's rejection of that defense does not establish deficient performance or prejudice.

By the Court.—Judgment and order affirmed.

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