

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2380-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN J. COERPER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: WILLIAM C. GRIESBACH, Judge. *Affirmed.*

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

PER CURIAM. Brian Coerper appeals a judgment convicting him of first-degree intentional homicide and a postconviction order denying his motion for a new trial. He argues that a new trial should be granted in the interest of justice because the real controversy was not fully tried and because he received ineffective assistance of trial counsel. In support of these arguments, Coerper

identifies two matters that he contends were not presented or were inadequately presented to the jury. First, Coerper contends that the jury should have been informed of evidence tending to show that the victim committed suicide. Second, he contends that discrepancies among three witnesses' testimony that Coerper admitted to the murder should have been brought to the jury's attention. We reject these arguments and affirm the judgment of conviction and the order denying a new trial.

Coerper was convicted of killing his girlfriend by manual strangulation. The defense attempted to establish that Coerper lacked the opportunity to commit the crime. At the postconviction hearing, Coerper presented evidence that the victim may have attempted suicide. This evidence included a note to the victim's father, an empty bottle of Nytol, the Nytol box that contained the bottle, and beer cans in the victim's garbage. Coerper established that the active ingredient in Nytol was found in the victim's urine and her blood alcohol content was .164. He also presented evidence of a past suicide attempt and financial problems.

We conclude that the controversy was fully and fairly tried and that Coerper's trial counsel was not ineffective for choosing to present the defense of lack of opportunity rather than the suicide defense. A judgment should not be reversed merely to enable a defendant to present an alternative defense after the defense offered at trial did not succeed. *See State v. Hubanks*, 173 Wis.2d 1, 29, 496 N.W.2d 96, 106 (Ct. App. 1992). Trial counsel's strategic choice is entitled to substantial deference and was reasonable under the circumstances. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984). None of the evidence relating to the possible suicide attempt contradicted the testimony of the forensic pathologist who conducted the autopsy who testified that the victim's death was due to manual

strangulation. The doctor testified that the fatal strangulation could not have been self-inflicted. Therefore, even if the evidence conclusively showed that the victim was attempting to commit suicide at the time she was strangled, it would not provide Coerper with a defense. The prosecution did not have to prove that Coerper's acts were the sole cause of death, only that they were a substantial factor in causing death. *See State v. Block*, 170 Wis.2d 676, 683, 489 N.W.2d 715, 718 (Ct. App. 1992). Because the proffered testimony and physical evidence would not have contradicted the pathologist's testimony and would not have created reasonable doubt that the death resulted from manual strangulation, we conclude that the controversy was fully and fairly tried and that Coerper's trial attorney reasonably chose to forego the suicide defense.

The State presented three witnesses who testified that Coerper confessed to them that he killed his girlfriend. Coerper argues that the real controversy was not fully tried and that his trial counsel was ineffective for failing to establish the discrepancies in the details of the three statements. These arguments fail because they are not supported by the facts. Coerper's trial counsel did note the discrepancies in the three confessions. The discrepancies regarding timing, location and surrounding events were described by the witnesses in their testimony and argued by counsel in his closing argument.

By the Court.—Judgment and order affirmed

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

