COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 1999

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. 98-0248-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM STRONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed.*

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

PER CURIAM. William Strong appeals from a judgment of conviction entered after a jury found him guilty of first-degree reckless homicide. *See* § 940.02(1), STATS. He also appeals from an order denying his motion for postconviction relief. Strong argues: (1) that the trial court erred in refusing to dismiss a juror for cause, and that Strong is, therefore, entitled to automatic

reversal; (2) that the trial court erred in admitting "other acts" evidence; (3) that he received ineffective assistance of trial counsel; (4) that the trial court erred in denying his motion for a new trial on the basis of newly discovered evidence; and (5) that he is entitled to a new trial in the interest of justice. We affirm.

BACKGROUND

On March 16, 1995, Strong's girlfriend, Marie Witz, left her niece, twenty-eight-month-old Kelly Witz, in Strong's care while she went to work. That afternoon, Strong called Marie Witz at work and told her that he was trying to wake Kelly from her afternoon nap, but that Kelly was not responding normally; he told her that Kelly earlier had fallen out of her crib and had hit her head on a plastic toy that was on the floor. Strong said that although Kelly had cried when she hit her head, she had seemed okay and had been playing before he put her down for her nap. Marie Witz then returned home, and she and Strong took Kelly to get medical attention. Kelly died on March 21, 1995, as a result of the head injuries she sustained while under Strong's care.

Strong was charged with first-degree reckless homicide. At trial, the State presented expert testimony that the injuries Kelly suffered could not have resulted from the crib fall that Strong had reported. The experts testified that a greater force of impact was necessary to cause Kelly's injuries, and that her injuries were consistent with shaken baby syndrome, possibly accompanied by an impact to her head. In other words, the experts testified that Kelly's injuries indicated that she had been violently shaken and that she also may have sustained a blow to her head, perhaps from being thrown down after she was shaken.

The State also presented evidence that Kelly was not capable of pulling herself up so that she could fall from her crib. Kelly had Cornelia de

Lange Syndrome, and, as a result, was severely developmentally disabled. Persons who had been working with Kelly to develop her motor skills and her cognitive skills testified at trial that Kelly did not have the ability to crawl out of her crib. They testified that Kelly could not fully extend her arms, that she was not yet crawling on her hands and knees, and that she moved about by either rolling or pulling her body along with her forearms. They also testified that Kelly displayed a low level of motivation.

Additionally, the State presented evidence that, twelve years before Kelly's death, another child, Patrick Costigan, had died from head injuries sustained while under Strong's supervision. The State presented testimony that the injuries that Costigan had suffered were consistent with shaken baby syndrome. Strong had claimed that the child had fallen down some stairs while his mother was at work, and that the child had also hit his head on the kitchen floor. At the time of Costigan's death, it had been ruled a probable accident, and his injuries had been attributed to the reported fall down the stairs.

The jury found Strong guilty, and the trial court entered judgment accordingly. Thereafter, Strong filed a motion for postconviction relief, arguing, among other things, that he was entitled to a new trial because of newly discovered evidence. After a hearing, the trial court denied Strong's motion for postconviction relief.

DISCUSSION

1. *Refusal to dismiss juror for cause.*

Strong asserts that he is entitled to a new trial because, he claims, the trial court erred in refusing to dismiss a prospective juror for cause and that he was thus forced improperly to use a peremptory challenge. *See* ***State v. Ramos***, 211 Wis.2d 12, 14, 564 N.W.2d 328, 329 (1997) ("[T]he use of a peremptory challenge to correct a trial court error is adequate grounds for reversal because it arbitrarily deprives the defendant of a statutorily granted right."). He asserts that the trial court erred in concluding that the prospective juror could be fair and impartial. We disagree.

A trial court's determination that a prospective juror can be impartial should be upheld on appeal unless the juror's bias is manifest. *See* ***State v. Ferron***, 219 Wis.2d 481, 485, 579 N.W.2d 654, 655–656 (1998).

> A juror's bias can appropriately be labeled as "manifest" whenever: (1) the record does not support a finding that the prospective juror is a reasonable person who is sincerely willing to put aside an opinion or prior knowledge; or (2) the record does not support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge.

Id., 219 Wis.2d at 485, 579 N.W.2d at 656.

The challenged juror indicated on her jury questionnaire and during voir dire that she might not be a fair and impartial juror in this case because she had a "weak spot" for children, and because she had cared for many children and had never seen a child fall hard enough to cause a fatal injury. The trial court therefore asked the juror whether she could set aside her feelings and sympathies

for children and decide the case on the facts; the juror responded that she would try very hard, and that she thought she could do so.

The trial court further informed the juror that the evidence was going to show that, several years ago, a child who had been left in Strong's care "apparently, fell down some stairs and died as a result of injuries sustained in that fall." The trial court told the juror that this evidence was to be considered for what it called "a limited purpose," and asked her if she could follow the trial court's instruction and consider the evidence only for its limited purpose. The juror responded that she would try very hard to do so. She also indicated that she would not find Strong guilty merely because two children had died after being left in his care.

In response to a question from Strong's counsel, the juror said that if she were Strong, she probably would not want herself on the jury because of her original indication that she could not be a fair and impartial juror. Upon further questioning, however, she said that she thought she could be a fair and impartial juror. Strong's counsel continued to question the juror about whether her feelings for children would prevent her from being a fair and impartial juror. The juror indicated that she could not unequivocally say that her feelings would not influence her decision, but she said that she would try to be fair and impartial and that she hoped that she could be. The trial court followed up this line of questioning:

> THE COURT: Do you think you can try, to the best of your ability though, to push [your emotions] aside and just decide it upon the facts and that is what we are asking?
>
> A Yes, that is what I have been trying to say.

> THE COURT: Okay. Can you promise all parties, especially the defendant here, that that [sic] you will try your very best to do that?
>
> A Yes. I think, basically, I am a good person and I will try.

The record reveals that the challenged juror expressed a sincere desire to set aside her personal feelings and decide the case on the facts. The record also supports a finding that a reasonable person in the challenged juror's position could set aside the personal feelings expressed by the challenged juror. The juror's experience with and affection for children do not indicate a bias so strong that a reasonable person could not set those factors aside and decide the case on the facts. We therefore conclude that the challenged juror did not display a manifest bias, and that the trial court did not err in refusing to dismiss the juror for cause.

2. *Other acts evidence.*

Strong asserts that the trial court erred in admitting evidence regarding the death of Costigan, the other child who died from head injuries sustained while under Strong's supervision. Strong argues that the evidence improperly created an inference that he had a propensity to abuse children, and that the probative value of the evidence was substantially outweighed by the risk of unfair prejudice to the defense. Strong also asserts that the trial court's limiting instruction was improper, and that it was insufficient to reduce the risk of unfair prejudice to the defense.[1] Additionally, Strong asserts that the admission of the

[1] Prior to the presentation of the evidence, the trial court instructed the jury that the evidence regarding Costigan's death was to be considered "on the issue of knowledge, that is, whether the defendant was aware of facts that are required to make the [sic] criminal the conduct alleged as the offense and specifically how obvious the danger may have been or, if you find that conduct on his part contributed to the death of Kelly Witz, knowledge of how dangerous that conduct was." The trial court also instructed the jury that it could not consider the evidence "to conclude that the defendant has a certain character or a certain character trait and that the (continued)

other acts evidence improperly chilled his constitutional right to testify on his own behalf.

Trial courts are granted broad discretion in determining whether to admit or exclude proffered evidence. *See* ***State v. Larsen***, 165 Wis.2d 316, 319–320, 477 N.W.2d 87, 88 (Ct. App. 1991). Our review is limited to determining whether the trial court erroneously exercised this discretion. *See* ***id.***, 165 Wis.2d at 320 n.1, 477 N.W.2d at 89 n.1. We will not overturn a trial court's evidentiary ruling unless there was no reasonable basis for it. *See* ***State v. McConnohie***, 113 Wis.2d 362, 370, 334 N.W.2d 903, 907 (1983).

RULE 904.04(2), STATS., provides:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof

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defendant acted in conformity with that trait or character with respect to the offense caged in this case." The final jury instructions informed the jury that the evidence of Costigan's death was to be considered as follows:

> If you find by the greater weight of the credible evidence that WILLIAM STRONG caused the death of Patrick Costigan, you should consider it only on the issue of knowledge; whether he had an awareness of the risk his acts created to KELLY WITZ and absence of accident. You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.
>
> The evidence was received on the issue of knowledge, that is, whether the defendant was aware of facts that are required to make criminal the conduct alleged as the offense and specifically how obvious the danger may have been and the defendant's knowledge of how dangerous that conduct was.
>
> You may consider this evidence only for the purposes I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offense charged.

> of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To determine if evidence of other acts is admissible, the trial court must engage in a three step analysis. First, the trial court must determine if the proffered evidence fits within one of the exceptions of RULE 904.04(2), STATS.; second, the trial court must determine if the other acts evidence is relevant under RULE 904.01, STATS.; third, pursuant to RULE 904.03, STATS., the trial court must decide whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *See* ***State v. Sullivan***, 216 Wis.2d 768, 772–773, 576 N.W.2d 30, 32–33 (1998).

In order to prove that Strong was guilty of first-degree reckless homicide, the State had to prove that Strong recklessly caused Kelly's death "under circumstances which show utter disregard for human life." Section 940.02(1), STATS. In order to show that Strong's conduct was reckless the State had to prove that Strong's conduct "create[d] an unreasonable and substantial risk of death or great bodily harm to [Kelly] and [that Strong was] aware of that risk." Section 939.24(1), STATS.

The jury instructions indicate that the trial court, consistent with RULE 904.04(2), STATS., admitted the evidence regarding Costigan's death on the issue of knowledge.[2] As noted, the trial court instructed the jury that the evidence

[2] The trial court instructed the jury that the evidence of Costigan's death was "received for your consideration of the second and third elements of this offense." In an undeveloped argument, Strong asserts that the evidence should not have been considered with respect to the third element–whether Strong's conduct showed an utter disregard for human life. We disagree. Strong's prior experience and knowledge are relevant to whether his conduct toward Kelly showed an utter disregard for human life. Although the State was not required to prove that Strong had a subjective disregard for human life, *cf.* ***State v. Blanco***, 125 Wis.2d 276, 277, 371 N.W.2d 406, 407 (Ct. App. 1985), Strong's subjective awareness of the danger that his conduct posed to Kelly is a relevant factor in determining whether his conduct objectively evidenced an utter disregard for human life. Indeed, the trial court instructed the jury that in determining (continued)

was to be considered "on the issue of knowledge; whether he had an awareness of the risk his acts created to KELLY WITZ and absence of accident."[3] The trial court also instructed the jury:

> [B]efore you can use this evidence [regarding Costigan's death] for the limited permitted purpose admitted, you must first decide if the death of Patrick Costigan was caused by any act of the defendant as asserted by the State. If he did not commit the acts as alleged by the State, then the defendant could not have obtained any knowledge from this incident concerning an awareness of the risk such acts may present to a young child. Accordingly, before you can use this evidence for the limited permitted purpose, the evidence presented by the State must satisfy you to a reasonable certainty by the greater weight of the credible evidence that Patrick Costigan died of the shaken baby syndrome through acts committed by William Strong….
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> ….
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> If the State fails to meet its burden in proving that Patrick Costigan died of the shaken baby syndrome through acts committed by William Strong, then you cannot use any of this evidence for any purpose in determining the guilt or innocence of William Strong to the charges concerning the death of Kelly Witz.

The evidence regarding Costigan's death was relevant to show that Strong had knowledge that violently shaking Kelly created an unreasonable and substantial risk of death or great bodily harm to Kelly. Evidence that Strong had

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whether Strong's conduct showed an utter disregard for human life, it should consider "all of the factors relating to the conduct," including "what the defendant was doing; why he was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for human life."

[3] Strong asserts that the inclusion of the phrase "absence of accident" in the jury instruction allowed the jury to improperly use the evidence of Costigan's death as propensity evidence. We disagree. As indicated in footnotes 1 and 4, the trial court consistently instructed the jury not to use the evidence of Costigan's death as propensity evidence. Moreover, the trial court's instructions contained only this single reference to absence of accident, and the instructions consistently informed the jury to consider the evidence of Costigan's death to determine whether Strong was aware of the danger that his conduct presented to Kelly.

previously killed a child by violently shaking the child tends to make more probable that Strong knew that he created an unreasonable and substantial risk of death or great bodily harm to Kelly by violently shaking her.

The evidence regarding Costigan's death was not substantially outweighed by the danger of unfair prejudice to the defense. The evidence was highly probative as to Strong's knowledge of the risk to Kelly that his conduct created. The danger of unfair prejudice to the defense was limited by the trial court's repeated instructions to the jury that it could not use the evidence of Costigan's death to conclude that Strong was guilty either because he was a bad person or because he had a propensity to harm children and he had acted in conformity with that trait.[4] The trial court properly admitted the evidence regarding Costigan's death and gave appropriate instructions limiting the jury's use of that evidence.

As noted, Strong also argues that the admission of evidence regarding Costigan's death improperly chilled his constitutional right to testify on his own behalf. As further explained below, the supreme court has previously

[4] In addition to instructing the jury as set forth in footnote 1, the trial court protected Strong against the alleged unfair prejudice by instructing the jury:

> The first element requires that the relation of cause and effect exists between the death of KELLY WITZ and the conduct of the defendant. Before the relation of cause and effect can be found to exist, it must appear that the defendant's conduct was a substantial factor in producing the death. In making this determination, you cannot consider any of the evidence that relates to the death of Patrick Costigan. For purposes of determining whether any act of the defendant caused the death of Kelly Witz, that event never occurred.
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> ….
>
> …[T]he State is required to prove, beyond a reasonable doubt, that the defendant committed the act charged; not that he may have acted in the same manner as he did in the past.

rejected this argument, and has determined that there is no constitutional barrier to subjecting a defendant to cross-examination on other acts that are reasonably related to the crime being tried. *See* ***Neely v. State***, 97 Wis.2d 38, 50–53, 292 N.W.2d 859, 866–868 (1980).

3. *Ineffective assistance of counsel.*

Strong asserts that under ***Neely*** and ***Haskins v. State***, 97 Wis.2d 408, 294 N.W.2d 25 (1980), he was not subject to cross-examination regarding the other acts evidence. Strong asserts that he received ineffective assistance of counsel because his attorney did not advise him that he could not be cross-examined about the death of Costigan, and thus his decision not to testify was not an informed one.

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance produced prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis.2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996). To prove deficient performance, a defendant must identify specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Counsel's performance is to be evaluated from counsel's perspective at the time of the challenged conduct. *See* ***id.***. Counsel is strongly presumed to have rendered effective assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *See* ***id.*** To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694.

Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633–634, 369 N.W.2d 711, 714 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See* ***Pitsch***, 124 Wis.2d at 634, 369 N.W.2d at 715.

We conclude that Strong was subject to cross-examination on the death of Costigan. We therefore reject Strong's claim that he received ineffective assistance of counsel.

"It is well established that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination." ***Neely***, 97 Wis.2d at 45, 292 N.W.2d at 864; *see also* ***Haskins***, 97 Wis.2d at 417, 294 N.W.2d at 32.

> "Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime."

Neely, 97 Wis.2d at 46, 292 N.W.2d at 864 (emphasis omitted) (quoted source omitted). A defendant also "may 'be compelled to answer as to any facts ... relevant to his direct examination.'" ***Id.*** (quoted source omitted). When a

defendant who did not testify at trial raises a claim that he was not subject to cross-examination on other acts evidence, the appropriate inquiry is whether the defendant "was entitled to assert his privilege against self-incrimination as to *any* question asked him regarding those incidents." ***Haskins***, 97 Wis.2d at 418, 294 N.W.2d at 33.

We conclude that the circumstances of Costigan's death directly related to Strong's knowledge of the risk he was creating to Kelly by violently shaking her. Strong was not entitled to assert privilege in response to questions regarding whether he violently shook Costigan because the knowledge Strong would have gained from that conduct and its results was relevant to Strong's awareness of the risk that similar behavior posed to Kelly. Therefore, the evidence regarding Costigan's death is reasonably related to the circumstances surrounding Kelly's death, and Strong was subject to cross-examination regarding Costigan's death if he chose to testify regarding Kelly's death. Strong's counsel was not deficient in advising Strong that if he testified, he would be subject to cross-examination on Costigan's death.

Moreover, Strong has failed to explain how he was prejudiced by counsel's alleged deficiency. Indeed, Strong does not even assert that there is a reasonable probability that his testimony would have resulted in an acquittal. The jury was presented with Strong's explanation of Kelly's injuries through several witnesses. We therefore have no basis on which to conclude that there is a reasonable probability that Strong's testimony would have resulted in an acquittal. Strong's claim that his counsel was ineffective is without merit.

4. *Newly discovered evidence.*

"[A] motion for a new trial upon the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and [an appellate] court will reverse the trial court only for an [erroneous exercise] of discretion." ***State v. Sarinske***, 91 Wis.2d 14, 37, 280 N.W.2d 725, 735–736 (1979). In order to obtain a new trial based on newly discovered evidence, a party must establish by clear and convincing evidence that the following factors are met: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. McCallum***, 208 Wis.2d 463, 473, 561 N.W.2d 707, 710–711 (1997).[5] If the defendant proves these criteria by clear and convincing evidence, the court must determine whether there is a reasonable probability that a different result would be reached in a new trial. *See* ***id.***, 208 Wis.2d at 473, 561 N.W.2d at 711.

Strong asserts that the trial court erred in denying his motion for a new trial on the basis of newly discovered evidence. After trial, Strong sought the opinion of Dr. Frank Coccia regarding Strong's explanation of how Kelly was injured. At the postconviction hearing, Dr. Coccia was asked whether Kelly's injuries were consistent with a short fall from a crib. Dr. Coccia testified that, in his opinion, Kelly's injuries were caused by an impact that could have been the result of a fall from several feet. Dr. Coccia also testified that he was aware of two children who had suffered serious head injuries from short falls.

[5] The supreme court recently modified the test announced in ***State v. McCallum***, 208 Wis.2d 463, 561 N.W.2d 707 (1997), for application in cases where the defendant's conviction results from a plea and the defendant moves for plea withdrawal prior to sentencing. *See* ***State v. Kivioja***, 225 Wis.2d 271, 592 N.W.2d 220 (1999). That modification has no application here.

The postconviction court concluded that Strong was negligent in discovering Dr. Coccia's opinion and that Dr. Coccia's testimony was cumulative to the evidence presented at trial. We agree.

Prior to trial, Strong had used Dr. Coccia to locate expert medical witnesses. Strong failed, however, to ask Dr. Coccia for his expert opinion regarding the cause of Kelly's death. Strong was therefore negligent in failing to discover Dr. Coccia's opinion prior to trial.

Additionally, Dr. Coccia's testimony that Kelly's injury was caused by an impact that could have been the result of a fall from several feet was cumulative to testimony elicited at Strong's trial. Strong presented testimony from other expert witnesses who opined that Kelly's injuries could have resulted from a short fall. Strong also presented testimony that Kelly's injuries were consistent with an impact, and not consistent with shaken baby syndrome. Significantly, Dr. Mary Edwards-Brown testified that, in her opinion, Kelly "did not suffer shaken baby with impact," rather Kelly "suffered blunt force trauma," and died from injuries caused by that trauma. Dr. Coccia's testimony regarding the two children who suffered serious head injuries from short falls was also cumulative to evidence presented at trial. Many of the experts testified at trial that short falls could possibly cause serious head injuries, and one expert gave an example of a boy who had died as a result of a head injury caused by a short fall. The trial court properly rejected Strong's request for a new trial on the basis of newly discovered evidence.

5. *New trial in the interest of justice.*

Section 752.35, STATS., provides:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

If we conclude that the real controversy has not been fully tried, we may grant a request for a new trial based upon that conclusion alone, *see* ***State v. Betterley***, 191 Wis.2d 407, 424–425, 529 N.W.2d 216, 223 (1995); if we conclude that it is probable that justice has miscarried, however, we must also determine that there is a substantial probability that that a new trial would produce a different result, *see* ***State v. Martinez***, 210 Wis.2d 396, 403, 563 N.W.2d 922, 925 (Ct. App. 1997).

Strong asserts that he is entitled to a new trial in the interest of justice. He asserts that the real controversy was not tried because the jury did not hear testimony from him or from Dr. Coccia. Strong reiterates his earlier arguments regarding his claimed right to testify without facing cross-examination regarding Costigan's death and regarding the allegedly newly discovered evidence. We have already concluded that these arguments lack merit; Strong is thus not entitled to a new trial on these grounds.

Strong also asserts that the real controversy was not tried because the jury did not hear evidence indicating that Strong had "tried to assist in preventing child abuse in a particular situation." Brief of Defendant-Appellant at 54.

Contrary to Strong's assertion, however, Marie Witz's brother-in-law testified that his children had been abused, that Strong was very concerned about the abused children, and that Strong was helping him get his children back. Moreover, the evidence regarding Strong's concern for the abused children was not so central to the issues in controversy that it was necessary for the real controversy to be tried. Strong is not entitled to a new trial in the interest of justice.

By the Court.—Judgment and order affirmed.

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