**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

January 30, 2001

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**

## NOTICE



**No. 00-0033-CR**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**LOREN L. LEISER,**

**DEFENDANT-APPELLANT.**

---

APPEAL from judgments and an order of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., and ELSA C. LAMELAS, Judges. *Affirmed.*

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

¶1 PER CURIAM. Loren Leiser appeals the judgments, entered following a jury trial, convicting him of four counts of second-degree sexual assault, contrary to WIS. STAT. § 948.02(2); three counts of physical abuse of a

child, contrary to WIS. STAT. § 948.03(2)(b); and one count of exposing a child to harmful material, contrary to WIS. STAT. § 948.11(2)(a).[1] Leiser asserts that the trial court erred when, without a hearing, it denied his postconviction motion claiming ineffective assistance of his trial attorney. He argues that the trial court was obligated to hold an evidentiary hearing to determine if counsel was ineffective for failing to: (1) present crucial testimony; (2) object to identically-worded instructions and verdict forms; and (3) ask for a specific unanimity instruction. Leiser also believes he is entitled to a new trial in the interest of justice, pursuant to WIS. STAT. § 752.35, because of his attorney's alleged ineffectiveness and claimed juror misconduct. We affirm.[2]

## I. BACKGROUND.

¶2 Leiser was originally charged with two counts of second-degree sexual assault of a child. Each count alleged that Leiser sexually assaulted one of his two stepsons, Jonathan and James. Both were, at the time of the assaults, under the age of sixteen. Later, the State filed an information adding three additional counts of second-degree sexual assault and an additional count charging Leiser with exposing Jonathan to harmful material. One of the additional counts of second-degree sexual assault named Jonathan as the victim, and the other two counts of second-degree sexual assault named James as the victim. Another

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise indicated.

[2] We are in receipt of Leiser's *pro se* motion objecting to our deciding this case without oral argument. We have not considered Leiser's motion because Leiser is represented by counsel and, thus, he cannot also represent himself *pro se*. ***State v. Redmond***, 203 Wis. 2d 13, 18, 552 N.W.2d 115 (Ct. App. 1996) (there is no hybrid representation).

complaint was filed several months later charging Leiser with three counts of physically abusing James.

¶3 The charges stem from accusations made by Leiser's stepsons. James testified that, in the summer of 1998, Leiser "pulled down my pants and he started sucking my penis as I still tried squirming away." James claimed that this activity occurred approximately twenty times. As to the physical abuse charges, James alleged that, on three separate occasions, Leiser threw a stool at him, which hit him in the head; kneed him in the stomach; banged his head on the floor; socked him in the face; and poked him in the neck with a pen. He testified this physical abuse all occurred in January 1998. Jonathan testified that in the same month, January 1998, Leiser ordered Jonathan to take off all of his clothes and rub Leiser's back, and Leiser began touching Jonathan's penis while they watched a pornographic movie that Leiser selected.

¶4 The two cases were consolidated for trial. Before trial, one of the sexual assault charges concerning Jonathan was dismissed. After a trial, the jury convicted Leiser of the remaining eight counts. He was sentenced to twenty years' imprisonment on two of the counts, to be served consecutively, and the trial court withheld sentence on all the remaining counts and placed Leiser on probation, to be served consecutively to the prison sentences. Leiser brought a postconviction motion that was denied without a hearing.

## II. ANALYSIS.

### A. *Ineffective assistance of counsel claims*.

¶5 Leiser contends that the trial court should have conducted an evidentiary hearing because his trial attorney was ineffective in several areas. He

submits that he was entitled to a hearing because his attorney was ineffective when he failed to: (1) present crucial testimony at trial; (2) object to the identically-worded instructions and verdict forms; and (3) request a specific unanimity instruction as to each count. We are not persuaded by his arguments.

¶6 The seminal case outlining the requirements for a successful ineffective assistance of counsel claim is ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Strickland*** established a two-prong test that must be met to prevail on a ineffective assistance of counsel claim. First, a party is required to prove that the attorney's representation fell below prevailing professional norms and, second, a party must also prove that the deficient performance of counsel resulted in actual prejudice. ***Id.*** at 687.

¶7 In determining whether defense counsel's performance was deficient, a reviewing court must engage in a "highly deferential" review of counsel's performance. ***Id.*** at 689. It "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." ***Id.***

¶8 With respect to the "prejudice" component of the test, the defendant must affirmatively show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." ***Id.*** "Further, this court need not address both components of the test if the defendant makes an insufficient showing on either one." ***Id.*** at 697.

¶9 Ordinarily, when we review the denial of a postconviction motion, the postconviction motion court's factual findings are conclusive. However, as is

the situation here, when the postconviction-motion court did not preside over the trial, we examine the record *de novo*. *See* ***State v. Herfel***, 49 Wis. 2d 513, 521, 182 N.W.2d 232 (1971).

¶10 Leiser vigorously argues that the trial court should have held a evidentiary hearing. However, a trial court has the discretion to deny a postconviction evidentiary hearing if the motion on its face is deficient because it fails to allege sufficient facts or presents only conclusory allegations, or the record conclusively shows that the defendant is not entitled to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996). Whether the motion sufficiently alleges facts, which, if true, would entitle the defendant to relief, is a question of law to be reviewed *de novo* by this court. ***Id.***

¶11 We are satisfied that the trial court was not obligated to conduct an evidentiary hearing regarding Leiser's assertions. We conclude that Leiser's allegations regarding his attorney's conduct probably do not amount to deficient performance, but even if the actions of his attorney fell below the prevailing professional standard, Leiser has failed to show that he was prejudiced by his attorney's acts or omissions.

¶12 Leiser submits that his attorney deprived him of his due process right to present a defense because crucial testimony was not presented to the jury. He argues that his attorney failed to introduce testimony that would have provided him with an alibi. Specifically, Leiser argues that his attorney's failure to enter into evidence the dates of Jonathan's final examinations prevented him from establishing an alibi defense.

¶13 At trial, Jonathan testified that Leiser assaulted him on a date in early January 1998, after Jonathan returned home from taking his examinations in

mathematics, ROTC and English. Leiser's trial attorney subpoenaed a school official, but this person refused to come to court to testify and Leiser's attorney made no attempt at obtaining a body attachment to compel the witness's attendance. Instead, trial counsel attempted to call an investigator to testify to a conversation the investigator had with a school employee who told him the three days on which examinations were held at the school. The trial court prohibited this testimony after the prosecutor objected on hearsay grounds. Leiser now contends that his attorney, either by way of a hearsay exception permitting the investigator to testify or by securing the presence of a school official, should have introduced the examination dates to confirm the date Jonathan took his exams. In any event, he asserts he was severely prejudiced by the omission.

¶14 While an argument could be made that Leiser's attorney's performance in failing to secure the exact dates of Jonathan's examinations, was deficient, Leiser has failed to show that he was prejudiced by this omission as is required by ***Strickland***. When a party alleges ineffectiveness of counsel because of a failure to investigate, the party "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case." ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126. Here, Leiser has not submitted any information concerning the actual date of Jonathan's examinations in mathematics, ROTC or English. He has offered little beyond the three days that the examinations were held. Thus, we are forced to speculate how this evidence would have assisted Leiser. Further, his work records admitted at trial reflect that he was off work on one of the three dates that the school examinations were given. Consequently, without knowing the actual date of Jonathan's exams, Leiser could have committed the crimes on his day off. Moreover, even if the date of the examinations occurred on a date Leiser

claimed to be working, other testimony in the record suggested that his work records did not accurately reflect the actual times he was at work.

¶15 As noted, Jonathan testified that Leiser assaulted him at approximately 1:00 p.m. on the day he returned home from taking three examinations. Leiser contends that had his attorney secured the actual dates of Jonathan's examinations or even the three examination dates that he would have been able to prepare an alibi defense. We disagree. Leiser has not advised us on what days Jonathan's examinations were held. Further, had the date Jonathan took his exams been known, this evidence would not have resulted in "undermin[ing] confidence in the outcome" of the trial. Leiser was unable to account for his whereabouts on one of the three dates, suggesting the crime could easily have occurred on that date. Also, both Leiser's wife and Jonathan testified that Leiser often came home during work hours. Leiser himself confirmed that contention. While denying much of his wife's testimony, Leiser did concede that he often would drop off and pick up his other children from school and go home for lunch without his work records noting his absence. Thus, even if Jonathan's examinations took place on a date Leiser was working, this fact would not have created an airtight alibi defense. Consequently, we conclude that, under ***Strickland***, Leiser cannot show that evidence of the examination dates or the actual date Jonathan took his exams would have altered the outcome of the trial.

¶16 Next, relying principally on ***State v. Marcum***, 166 Wis. 2d 908, 480 N.W.2d 545 (Ct. App. 1992), Leiser posits that his attorney was deficient when he failed to object to the identically-worded verdicts and jury instructions. Moreover, he claims his attorney compounded this deficiency by failing to request a jury instruction on juror unanimity.

¶17 Leiser claims that he was deprived of his right to a unanimous verdict on several of the counts because: (1) the charges were worded identically; (2) the court read the same jury instruction for all three counts of sexual abuse and the same instruction on all three counts of physical abuse of a child; and (3) the wording on the verdicts was exactly the same for all three counts of sexual abuse and the same for all three counts of physical abuse. Leiser argues that counsel's failure to object to the identically-worded instructions and verdict forms or to request a specific unanimity instruction as to each count prevented the jury from being informed that they had to be unanimous about the specific act which formed the basis for each count. We disagree.

¶18 In ***Marcum***, the defendant was charged with six counts of sexual assault. He was accused in six separate counts of performing hand-to-vagina, hand-to-breast, and penis-to-vagina contact with the victim in two different months. ***Id.*** at 912-13. A preliminary hearing was held at which the victim testified. At trial, however, the victim testified to Marcum's sexually assaulting her, but her testimony did not match that given at the preliminary hearing. ***Id.*** at 913. The information charging Marcum with six counts of sexual assault used the same wording for each charge. ***Id.*** The instructions for each count were the same. Also, the verdicts contained identical language for each count. The jury returned a verdict finding Marcum guilty of only two counts. ***Id.*** at 915, n.1. As this court explained, in finding that Marcum's lawyer's unprofessional performance prejudiced him:

> From the state of the record, we do not know which of the several alleged acts led to his conviction on count six. Nor do we know which acts the jury acquitted him of in counts four and five….
>
> [I]n the instant case, there was nothing to focus the jury on a specific act or alternative forms of a specific act. Nor

> does the unanimity instruction tell the jurors that they have to agree on which act forms the basis for their verdict. From this instruction, the jury would have known only that they had to be unanimous about Marcum's guilt or innocence of any criminal conduct in September. They would not have known that they had to be unanimous on the specific act for which he was guilty.
>
> The standard instruction when applied to unspecific verdicts, as in this case, left the door open to the possibility of a fragmented or patchwork verdict. For instance, there was nothing to prevent three jurors from thinking there was hand-to-vagina contact, three thinking hand-to-breast contact, three thinking penis-to-vagina contact, and three thinking penis-to-mouth contact when they agreed to find him guilty of count six. Yet, those same acts could already have formed the basis for the jurors' agreement to find Marcum not guilty of counts four and five. Such an outcome would violate the due process requirement that the prosecution prove each essential element of the offense beyond a reasonable doubt. It is this which the unanimous jury requirement is designed to protect.

***Id.*** at 919-20 (citation omitted).

¶19 The problems presented in ***Marcum*** do not exist here. First, unlike ***Marcum***, where the jury determined that Marcum was not guilty of several counts, Leiser was convicted of all counts. Thus, the jury had to unanimously agree that he committed all the crimes alleged in the complaint. Further, unlike ***Marcum*** where the victims' testimony differed from the preliminary hearing to the trial, here the victims' testimony was consistent. Thus, the possibility of juror confusion, while high in ***Marcum***, was nonexistent here. Here, James testified to three distinct acts of physical abuse. Although James testified that his stepfather abused him at other times, the jury only heard the details of three instances when Leiser physically abused James. Thus, there is no question that the jury reached agreement on the three specific allegations of physical abuse.

¶20 With regard to the sexual assault charges, James testified that Leiser sexually assaulted him in the identical manner at least twenty times. Under the circumstances presented here, where Leiser was only charged with three counts of sexual assault instead of twenty counts, it would have been impossible to make the charges any more specific. Moreover, here the jury was confronted with one basic question—did they believe James or not? If they believed James, then Leiser was guilty of the three sexual assault charges. If they disbelieved him, Leiser was guilty of nothing. As a consequence, even if Leiser's attorney should have objected to the wording of the information and the verdict forms or asked for a specific unanimity instruction, Leiser was not prejudiced by this failure.

B. *New trial request.*

¶21 Finally, Leiser argues that he is entitled to a new trial pursuant to WIS. STAT. § 752.35[3] as a result of the ineffectiveness of his attorney and juror misconduct. Section 752.35 permits this court to exercise its power of discretionary reversal and grant a new trial in the interest of justice. After reviewing the record, we are satisfied that the real controversy was tried and that justice has not miscarried. As we have already disposed of Leiser's contentions

[3] WISCONSIN STAT. § 752.35 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.

that his attorney's conduct requires a new trial, we turn to Leiser's complaint of juror misconduct. We conclude that the conduct of the jurors in this case does not require a new trial.

¶22 Leiser's contention that juror misconduct took place stems from several incidents. First, he points to a report by a deputy sheriff who overheard an argument between several of the jurors in which one juror stated, presumably to the other juror, "I'll kick your ass." While the parties were discussing this situation, the jury reached a verdict. Prior to a reading of the verdict, Leiser's attorney made a motion for a mistrial, which was denied. He contends that the trial court should have granted his request for a mistrial. Further, he argues that a juror's initial answer during polling, that the guilty verdict was not her verdict, combined with a later affidavit she gave in which she expressed regret at having voted to find Leiser guilty of the charges stemming from the older stepson's allegations, are sufficient to overturn the verdict. We disagree.

¶23 The jurors' heated words while deliberating were inappropriate, but this statement did not prevent the jurors from reaching a verdict. Indeed, the trial court polled the jurors separately, determining that no coercion had occurred as a result of the argument, and every juror ultimately stated that they agreed with the verdict rendered. There is no claim here that any juror was coerced into voting for Leiser's guilt. The fact that one juror now regrets her vote does not vitiate the verdict. As noted by the trial court, under WIS. STAT. § 906.06(2),[4] this juror's

[4] WISCONSIN STAT. § 906.06(2), provides:

> **(2)** INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions

(continued)

affidavit was not permissible to impeach the verdict. Thus, we are satisfied that justice did not miscarry.

¶24 For the reasons stated, the judgments of conviction are affirmed.

*By the Court*.—Judgments and order affirmed.

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

---

as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.