COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2019

Sheila T. Reiff
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2018AP1054-CR **Cir. Ct. No. 2015CF4543**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM LEE GRAUN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CYNTHIA MAE DAVIS, Judge. *Affirmed*.

Before Kessler, P.J., Kloppenburg and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Adam Lee Graun appeals the judgment entered after a jury convicted him of child neglect, misdemeanor battery as an act of domestic abuse, misdemeanor bail jumping, and four counts of physical abuse of a child by recklessly causing great bodily harm. *See* WIS. STAT. §§ 948.21(1)(c), 940.19(1), 968.075(1)(a), 946.49(1)(a), 948.03(3)(a) (2015-16).[1] He also appeals the order denying his motion for postconviction relief. The issue on appeal is whether the circuit court properly denied Graun's postconviction motion alleging that he received ineffective assistance of counsel when trial counsel did not move to dismiss count six on multiplicity or duplicity grounds.[2] Because Graun was not entitled to a ***Machner*** hearing, we affirm. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

I. BACKGROUND

¶2 In October 2015, Graun's three-month-old child, Maureen,[3] was taken to the hospital with multiple serious injuries. According to the trial testimony, the injuries included thirty-four different bone fractures along with bruising to Maureen's face, leg, and upper abdomen. At that time, the fractures

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] On appeal, Graun argues that his trial counsel was ineffective for failing to move to dismiss count six *and* count seven. However, in the postconviction motion that underlies this appeal, he focused only on his trial counsel's failure to move to dismiss count six. The State submits that Graun has forfeited any argument that both counts should be dismissed. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. We agree, and, in any event, Graun conceded the forfeiture by not addressing the State's contention in his reply brief. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (stating that a failure to refute an argument constitutes a concession).

[3] We, like the parties, use a pseudonym to refer to the victim in this case. *See* WIS. STAT. RULE 809.86(4).

were in different stages of healing with some having callous formations and others appearing to be more recent.

¶3 The State ultimately charged Graun with seven crimes: count one, child neglect causing bodily harm; count two, misdemeanor battery as an act of domestic abuse; count three, misdemeanor bail jumping; count four, physical abuse of a child by recklessly causing great bodily harm (rib fractures); count five, physical abuse of a child by recklessly causing great bodily harm (femur fracture); count six, physical abuse of a child by recklessly causing great bodily harm (right arm fracture); and count seven, physical abuse of a child by recklessly causing great bodily harm (foot fractures). The State alleged that the first six charges occurred between August 24, 2015 and October 7, 2015, and the foot fractures occurred between September 5, 2015 and October 7, 2015.

¶4 The matter proceeded to a jury trial where Graun was found guilty of all of the charges. The circuit court's cumulative sentence totaled fifteen years of initial confinement and ten years of extended supervision.

¶5 Graun then filed a postconviction motion alleging that his trial counsel was ineffective for failing to move to dismiss count six. Graun argued that count six was multiplicitous with count seven. He claimed the trial testimony revealed that the right arm buckle fracture occurred at the same time as the buckle fracture to Maureen's foot and that the evidence, therefore, failed to demonstrate that the buckle fracture in count six was factually different from the buckle fracture in count seven. Graun asserted there was no basis in the record to conclude that the injuries identified in counts six and seven were separated in time or that they required separate volitional acts by him. Graun additionally argued that count six was duplicitous because although it alleged a single fracture to

Maureen's right arm, the State actually presented evidence concerning two fractures to Maureen's right arm that occurred at different times.

¶6 Graun alleged that trial counsel's failure to move to dismiss count six was prejudicial because if counsel had done so, the circuit court would have been obliged to dismiss the charge.

¶7 The circuit court denied Graun's postconviction motion without a hearing. In its written decision, the circuit court explained that count six was not multiplicitous; and, even if it was duplicitous, trial counsel's failure to object was not prejudicial.

¶8 We provide additional background information as needed below.

II. DISCUSSION

¶9 To establish ineffective assistance, a defendant must demonstrate: (1) that counsel's performance was deficient; and (2) that the deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In order to establish deficient performance, Graun must identify trial counsel's specific acts or omissions that fell "outside the wide range of professionally competent assistance." *See* ***id.*** at 690. To demonstrate prejudice, Graun must show "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." *See* ***id.*** at 694. If he fails to satisfy one prong of the ***Strickland*** test, we need not consider the other. *See* ***id.*** at 697.

¶10 A circuit court may deny a postconviction motion alleging ineffective assistance of counsel without a hearing "if the motion fails to allege

sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111 (citations and emphasis omitted). We review *de novo* whether a motion entitles a defendant to an evidentiary hearing or whether a court has the discretion to deny the motion without a hearing. *See* ***State v. Jacobs***, 2012 WI App 104, ¶24, 344 Wis. 2d 142, 822 N.W.2d 885.

A. *Multiplicity*

¶11 Graun argues that trial counsel was ineffective for failing to challenge counts six and seven as multiplicitous.[4] "Multiplicity arises where the defendant is charged in more than one count for a single offense." ***State v. Rabe***, 96 Wis. 2d 48, 61, 291 N.W.2d 809 (1980).

¶12 We examine multiplicity claims using a two-part test. *See* ***State v. Eaglefeathers***, 2009 WI App 2, ¶7, 316 Wis. 2d 152, 762 N.W.2d 690. First, we consider whether the charged offenses are identical in law and in fact. *See* ***id.*** Then, we consider whether the legislature intended to authorize multiple punishments. *See* ***id.*** If the first part of the test reveals that the charged offenses are not identical in law and in fact, a presumption arises that the legislature did not intend to preclude cumulative punishments. ***Id.*** It then becomes the defendant's burden to make a showing to the contrary, that is, "to show that the legislature intended to preclude cumulative punishments." ***Id.***, ¶15.

[4] Because Graun limits his analysis to the buckle fracture in Maureen's right arm (as opposed to the transverse fracture) and the buckle fracture to her foot, we will do the same.

¶13 The parties do not dispute that the offenses charged against Graun are identical in law; he was charged with two violations of the same statute, WIS. STAT. § 948.03(3)(a) (2015-16). Rather, the dispute is over whether the offenses are identical or different in fact.

¶14 Offenses are different in fact if they "are either separated in time or are significantly different in nature." ***State v. Stevens***, 123 Wis. 2d 303, 322, 367 N.W.2d 788 (1985). Offenses are separated in time, if "there is a 'sufficient break' in the defendant's conduct to constitute more than one offense." ***State v. Warren***, 229 Wis. 2d 172, 180, 599 N.W.2d 431 (Ct. App. 1999) (citation omitted). Offenses are significantly different in nature when "a conviction for each offense requires proof of an additional fact that a conviction for the other offense does not. Offenses are also significantly different in nature if each requires a 'new volitional departure in the defendant's course of conduct.'" ***Id.*** (citations and one set of internal quotation marks omitted). If we conclude that the offenses are significantly different in nature, we need not address whether they are separated in time. *See* ***id.***

¶15 Hillary Petska, M.D., is a child advocacy pediatrician who testified during Graun's trial. Dr. Petska examined Maureen when she was brought to the hospital in October 2015 and determined that Maureen had multiple fractures "in various stages of healing." Dr. Petska testified that there were thirty-four fractures in total, which included twenty-seven healing rib fractures, a compression fracture in Maureen's lumbar spine, three fractures in her left foot, two right arm fractures (one a transverse fracture and one a buckle fracture, which occurred at different times), and a fractured femur.

¶16 Dr. Petska testified that Maureen had a buckle fracture in her right arm near the elbow and three buckle fractures in her foot. Buckle fractures are caused by "crushing or compression type forces" like "squeezing, twisting, [and] crushing" the bone. Dr. Petska opined that because the buckle fractures did not show any signs of callous formation, they were "less than seven to ten days old."

¶17 This testimony established that the buckle fracture in Maureen's arm required squeezing, twisting, or crushing her arm bone. It further established that the foot fractures required the same types of forces.

¶18 Like the circuit court, we conclude that twisting a child's arm and twisting a child's foot are two different volitional acts, i.e., the offenses are different in nature.[5] The circuit court aptly summarized this in its decision denying Graun's postconviction motion:

> Even if the buckle fracture to the right arm was caused during the same period of time that [Maureen]'s foot suffered a fracture, there is no showing that they could have been the result of one volitional act. The fractures and injuries are factually different, and the acts causing them were determined to be factually different according to the evidence presented…. The evidence supports a finding that each offense required a separate volitional act and that each offense caused harm that the other offense did not. For these reasons, the court would not have dismissed count six

[5] Graun disagrees and provides a hypothetical:

> [I]t takes no particular inventiveness to envision how an adult might cause both injuries with one volitional act. For example, with one hand, the adult grabs the child by the arm and squeezes and twists, *and then, with the other hand, grabs the child by the foot and squeezes and twists*, as one might do if violently snatching the child out of a crib.

(Emphasis added.) Even this hypothetical details two different volitional acts under the multiplicity analysis: two separate acts of squeezing and twisting different body parts.

> if trial counsel had moved to dismiss it on multiplicity grounds, and therefore, the court finds that counsel was not ineffective for failing to seek dismissal of that count.

See WIS. CT. APP. IOP VI.(5)(a) (Nov. 30, 2009) ("When the trial court's decision was based upon a written opinion ... the panel may ... make reference thereto, and affirm on the basis of that opinion."). Given that the offenses are significantly different in nature insofar as each required a new volitional departure in Graun's course of conduct, we need not address whether the offenses are separated in time. *See* ***Warren***, 229 Wis. 2d at 180.

¶19 It follows, then, that because the charges are not the same in fact, we presume the legislature did not intend to preclude cumulative punishments. *See* ***Eaglefeathers***, 316 Wis. 2d 152, ¶15. To overcome this presumption, Graun was required to show clear legislative intent to the contrary. *See* ***id.*** Graun has not done so, and we will not develop an argument for him. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. As a result, Graun's multiplicity claim fails and his trial counsel was not deficient for failing to move to dismiss count six on this basis. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 ("Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit."). We need not address the prejudice prong of the ***Strickland*** test. *See* ***id.***, 466 U.S. at 697.

¶20 The circuit court properly concluded Graun was not entitled to a ***Machner*** hearing on this claim.

B. *Duplicity*

¶21 Graun argues that in addition to being multiplicitous, count six is also duplicitous. The amended information alleged physical abuse of a child for a single "right arm fracture," and yet, at trial, the State presented evidence that Maureen actually had two fractures to her right arm and that the fractures were caused on different dates. As a result, Graun contends that allowing count six to go to the jury denied him his right to a unanimous verdict: "Some of the jurors may have voted guilty because of the transverse fracture to the right arm, the other[s] may have voted guilty because of the buckle fracture."

¶22 "A complaint is duplicitous when it joins two or more separate offenses in a single count. A duplicitous charge is defective because the jury may find the defendant guilty without the state proving each element of the offense beyond a reasonable doubt." ***State v. Copening***, 103 Wis. 2d 564, 572, 309 N.W.2d 850 (Ct. App. 1981) (citation omitted).

¶23 We prohibit duplicity:

> (1) to assure that the defendant is sufficiently notified of the charge; (2) to protect the defendant against double jeopardy; (3) to avoid prejudice and confusion arising from evidentiary rulings during trial; (4) to assure that the defendant is appropriately sentenced for the crime charged; and (5) to guarantee jury unanimity.

See ***State v. Lomagro***, 113 Wis. 2d 582, 586-87, 335 N.W.2d 583 (1983). If the State "joins several criminal acts which can properly be characterized as a continuing offense in one count and is challenged by the defendant on grounds of duplicity, the trial court must examine the allegations in light of the purposes of the prohibition against duplicity." *See* ***id.*** at 589.

¶24 Here, the State elected to charge Graun with four separate counts of physical abuse of a child causing great bodily harm. One charge for each body part Graun injured despite the number of injuries to that body part. Graun, focusing exclusively on the fifth reason for the prohibition against duplicity, argues that the duplicitous charges in count six denied him of his constitutional right to a unanimous verdict.

¶25 Had trial counsel successfully moved to dismiss count six on duplicity grounds, the State would have either elected which right arm fracture it would rely on or it would have charged Graun with two separate counts of abuse for the two different arm fractures, which would have subjected Graun to an additional sentence. *See* ***id.*** ("If the complaint is found to be duplicitous, the [S]tate must then either elect the act upon which it will rely or separate the acts into separate counts."). Once again, the postconviction court thoughtfully presented its reasoning for rejecting Graun's ineffective assistance of counsel claim:

> [Graun]'s argument suggests the State should have charged him with two separate offenses for two separate fractures to [Maureen]'s right arm. Under the circumstances of this case where [twenty-seven] different rib fractures existed alone, [Graun] received a benefit of having only one count of rib fractures charged and one count dealing with the right arm fractures. Whether the jury relied on the upper or lower arm bone fracture is irrelevant here…. Had the defense moved for the dismissal of count six as duplicitous, the court would not have granted the motion. Even if the court would have permitted a specific jury instruction advising the jurors that they had to agree on which right arm fracture [Graun] caused, there is not a reasonable probability that the defendant would have been acquitted. There is not a reasonable probability that the jury would have believed [Graun] had caused one arm fracture but not the other; indeed, there is every reason to believe that the jury would have convicted him of both counts had the State charged the two arm fractures in separate counts. Consequently, any failure on the part of counsel to object

> [to] the charge alleged in count six on duplicity grounds did not prejudice [Graun].

See WIS. CT. APP. IOP VI.(5)(a).

¶26 Trial counsel is not ineffective for failing to make a motion that would not have succeeded. *See* ***Wheat***, 256 Wis. 2d 270, ¶14. Moreover, even if the circuit court had granted a motion by trial counsel, the State would have then specified the arm fracture that was the basis for the charge. Graun's defense was not based on his causing one fracture but not the other. Given the evidence that was presented at trial, there is not a reasonable probability that the jury would have acquitted Graun of the charge, regardless of which fracture the State pursued. In other words, he has not shown prejudice. *See* ***Strickland***, 466 U.S. at 694.

¶27 The circuit court properly concluded Graun was not entitled to a ***Machner*** hearing on this claim.

By the Court.—Judgment and order affirmed.

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